

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Lutz v. Arbor- Best Inc., 2013 NSSM 52

BETWEEN:

NATASHIA LUTZ and CATHERINE LUTZ

Claimants

- and -

ARBOR-BEST INC.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at

Dartmouth, Nova Scotia on September 3, 2013

Decision rendered on

October 5, 2013

APPEARANCES

For the Claimants self-represented

For the Defendant Brian Bailey, counsel

BY THE COURT:

[1] The Claimants own a house in the Beaver Bank area of Lower Sackville, Nova Scotia, which backs onto a wooded area. They decided to install a large, above ground swimming pool, which would be mostly in the wooded area but partly on their back lawn. This required someone to clear and excavate the area to make way for the pool.

[2] The Defendant company was hired at the quoted cost of \$2,025.00 plus HST to perform tree removal, stump removal and excavation. The written contract also specified that the Defendant would “cut up approx. 15 trees, chip brush into woods, 16" all logs for property owner.” This portion of the work was valued at \$850.00. The additional \$1,175.00 was to excavate and level a 27 foot diameter area, extending about 4 feet into the lawn.

[3] The work was done by Steven Legere, the son of the company’s owner, John Legere. It appears that this particular business was set up in some significant measure to provide employment for Steven.

[4] The work was started on November 5, 2012 and took several days. The Claimants did not get a good look at it in daylight until November 9. The Claimant, Natashia Lutz, testified that she was shocked at what she saw.

[5] As shown by the photos placed in evidence, the excavated area had been dug down several feet and the earth had been pushed up along the perimeter along with a tangle of roots and branches. The stumps of the removed trees

were shoved into the woods. The cut logs were not neatly stacked as the Claimants had expected.

[6] Ms. Lutz also complained that the excavation had buried a drainage pipe, although it is not clear to me that this was ever a significant problem. I also believe that it was fairly easily rectified, and as such nothing turns on it.

[7] Steven Legere explained that the 27 foot diameter area had to be excavated down to solid ground, as far as he was concerned. Once the trees and stumps were removed from the area, it left behind very soft dirt and scrubby material that would not support the pool. He thought it best to remove the material, expecting that the pool company would bring in gravel or other proper material to raise the level and support the pool.

[8] He also testified that he had not agreed to pile or stack the logs, but only to cut them.

[9] As for the dirt piled around the perimeter, he explained that he could not have pushed it further into the woods because it would have interfered with a waterway.

[10] John Legere became personally involved because he is, in fact, a family friend of Natashia Lutz's stepfather. When contacted and informed of Natashia's dissatisfaction, he came by to have a look and agreed with her that there were some problems with the work. My sense on all of the evidence is that he was hoping to satisfy Natashia Lutz despite not really being convinced that the work was truly deficient. He admitted that the appearance was unsightly, but

he believed that Steven had actually done what he had contracted to do. He said that he offered to have the debris, i.e. the stumps etc., trucked away, despite the fact that this was not part of the originally quoted work.

[11] In the end, John Legere offered in writing that the Defendant would refund the Claimants the sum of \$1,351.25 for “unsatisfactory” services. In this signed note dated April 24, 2013 he promised such payment by May 31, 2013. The Claimants were willing to accept that resolution, at that time.

[12] When June 1 rolled around, payment was not forthcoming. John Legere explained to Claimants that the company was short of money, and that they had to be patient. The Claimants considered that there was a real risk of nonpayment if they waited indefinitely and eventually, on August 15, 2013, they brought this claim seeking the much larger amount of \$6,985.05, which they claim as the cost to repair the damage the Defendant allegedly did to their property. By then, the Claimants had incurred significant cost to fully ready the site for their pool.

[13] The Claimants filed in evidence a letter from the president of Marlin Pools and Spas, purporting to verify that “due to the state of the site after the previous company had ceased operations, it was necessary to charge an additional... \$5,700 to repair the damages previously incurred. This action was necessary to ensure that the pool installation process could be executed properly.” (My emphasis)

[14] This statement carries little weight because the author was not in court to support it and to answer questions about what he really means when he speaks of the previously incurred damage.

[15] Many questions would need to be answered. For example, would it have been preferable for the Defendant to have left all of the loose dirt in the excavation, perhaps to be compacted? Was that kind of fill suitable to support a pool, or was it better to replace it with gravel? Was his company expecting to find the pool site already levelled with suitable material bringing it up to ground level? What knowledge, if any, did he have about the scope of work that the Defendant company had been contracted to provide?

[16] The Defendant is not to be held responsible for work it did not agree to perform. If one looks at the contract, the first part restricts itself to the cutting down of trees, removal of stumps and cutting of logs into usable lengths. This part of the work clearly was performed, although it would have been better from a customer relations standpoint to have left the site looking better.

[17] The balance of the contract was for excavation. The site was, in fact, excavated. Although there was some sloppiness in the way the dirt was pushed back around the perimeter, it is very hard to see how this could have done \$5,700.00 worth of damage to the land.

[18] It was unrealistic, in my view, for the Claimants to have expected the excavation process to have resulted in something much different than what the Defendant actually did. I believe the softness of the ground would have been a problem for the pool company, obliging them to fortify the area with gravel and

other stone material. I am not satisfied that this can all, or even mostly be blamed on the Defendant.

[19] I believe the Defendant did a sloppy job, which John Legere recognized when he offered a partial refund. If anything, that offer was likely overgenerous as the excavation work was not without some inherent value. I believe his generosity was a result of the familial connection as well as a sense of trying to forge good customer relations.

[20] Even so, having agreed in writing to refund \$1,351.25, the Defendant cannot escape this obligation or hope to come out of this proceeding owing anything less.

[21] The Claimants simply have not proved any damages beyond this amount, so a judgment will issue for \$1,351.25.

[22] It is unfortunate that the Defendant did not carry through on the promise to pay this amount in a timely manner. As such, it should also be obliged to pay Claimants' costs in the amount of \$193.55, for a total judgment of \$1,544.80.

Eric K. Slone, Adjudicator