Claim No: 419383

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: HCCC #116 Woodbridge Court Condominiums v. Carvery's Construction Ltd., 2014 NSSM 39

BETWEEN:

HCCC #116 WOODBRIDGE COURT CONDOMINIUMS

Claimant

- and -

CARVERY'S CONSTRUCTION LIMITED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearings held at Halifax and Dartmouth, Nova Scotia on December 12, 2013, April 28, 2014 and May 20, 2014.

Decision rendered on August 11, 2014

APPEARANCES

For the Claimant	Mark Knox, QC Counsel
For the Defendant	Andrew Gough Counsel

BY THE COURT:

[1] The Claimant sues the Defendant for allegedly faulty workmanship in a project to re-build a set of balconies at its Cole Harbour Road condominium building. The amount claimed is just shy of $16,000.00, which the Claimant contends was the cost to rectify the problem caused by the work that the Defendant did.

[2] The project began in the spring of 2011. The 4-storey buildings in question have three wooden “balcony deck stacks,” which means that the rear balconies on floors 2, 3 and 4 are part of one structure and are, in effect, stacked one on top of the other. (The ground floor units have ground level patios.)

[3] The Claimant had concluded that the stacks needed replacement, as they were warped and rotting. The Defendant was asked to quote on the replacement of the three stacks and on replacement of some of the patio doors. Its quote dated May 20, 2011 was accepted. The total price, including HST, was $36,777.00.

[4] The work began in about July 2011. Part of the process of removing the old stacks required removal of some of the brick facing. Almost immediately, it was noticed that there was significant rot in the wood structure behind the brick. This caused a complete rethink of the project. Obviously, the rotten wood needed to be torn out and replaced. The further question was whether to go with brick (again) or take the less expensive option of installing vinyl siding. In the end, it was agreed that, for slightly more than the original quote, the

Defendant could replace two of the stacks, repair the surrounding damage and re-side with vinyl. Because of budgetary limitations, the third stack was deferred for, as it turned out, a further year.

[5] The work proceeded during the summer months, concluding at some point in October 2011. The Claimant has contended that the work took longer than it ought to have done, but this is a red herring. Even if true, nothing turns on it.

[6] The decision to proceed in the fashion set out above involved a number of people, including professional engineer Mike Williams. He had done other work for the Claimant, and was called at the point where the brick had been removed, and was asked for a quick opinion. His observation was that the rotting of the wood had been caused by leaking around some of the patio doors and in the areas where the balcony structures attached to the building. His proposal was to remove the door units, replace the door framing, replace brick with vinyl, and replace as much of the timber framing and sheathing as seemed necessary. It also had to be considered whether any or all of the patio door units needed replacement, or whether some or all of them could be reused

[7] Mr. Williams did not supervise the work. He became involved later when the subsequent problems that are in issue in this lawsuit developed, which will be discussed later.

[8] There was no written contract between the Claimant and Defendant which identifies the scope of work or the work methods to be employed. There is the original quote, which was for a totally different scope of work, and two invoices - a progress invoice in September and a final invoice dated November

9, 2011. The total amount was $45,388.63, which included four patio doors purchased from an outside supplier at a cost of just under $4,000.00. This number of doors is one less than Mr. Williams believed were replaced. On this point, he appears to have been incorrect as I am satisfied that if more than four doors had been purchased, the cost would have been passed on to the Claimant.

[9] The ultimate question for the court is whether this remedial work was done properly. Within about sixteen months of the Defendant having completed this project, several of the residents reported water infiltrating their units near the patio doors. This led to the Claimant having further remedial work done, which is the subject of this lawsuit.

[10] The remedial work was done by a different contractor. As might be expected, the Claimant attempted to have the Defendant come and look at the problem when it first developed. I find as a fact that the Defendant, and in particular the owner, Glen Carvery, for reasons best known only to himself, was unresponsive and evaded any responsibility for the problems that the Claimant was experiencing. I do not accept his excuses that he did not get the emails or phone messages from property manager Karen MacLean. I found his evidence to be lacking in credibility and much prefer the evidence of Ms. MacLean, who testified to the attempts she made to contact him.

[11] The result of not showing any interest in identifying or rectifying the problem, was that the Defendant lost the opportunity to inspect the problem while it was manifesting, and lost the chance to be involved in the rectification.

[12] The contractor who did the remediation was Jason Bezanson (of J. Bezanson Renovations), a highly experienced carpenter with a background in restoration. He was contacted and bid on the job without knowing who had done the earlier work. He was the lowest of three bidders and thus received the job.

[13] He described how he went about the work. He had to go into each unit, remove the siding and inspect the areas around the patio doors, in order to determine how water was likely getting in. He testified that he identified numerous issues with the way the flashing, Tyvek and Blueskin had been installed. The water damage was mostly evident in the second and third floor units, which he traced to leakage coming in near the bottoms of the fourth floor door units. Problems he identified were:

a. Sealant inappropriately applied to j-trim
b. Absence in places of Tyvek over ledger board
c. Use in places of Blueskin where Tyvek should have been used
d. Inadequate or improper flashing
e. Inadequate caulking in places

[14] Mr. Bezanson testified that he removed all of the eight door units and, after removing and replacing wet material, re-installed them with all of the appropriate flashing and other weatherproofing materials. It was not necessary to remove the decks or the ledger boards, as they did not seem to be problematic. The job took about one and a half weeks with five men working, including himself. It was completed in April 2013 at a billed cost of $15,988.92.

[15] As of the conclusion of the hearing in this matter, more than a year later, there were no further reports of water infiltration.

The Defendant's defences

[16] The Defendant resists this claim on a number of bases. For one, it simply denies that its work was deficient to any extent. Secondly, it says that any warranty it might have given would only have extended for a year.

[17] Dealing first with the question of warranty, there is nothing in writing or in the verbal communications that spoke to any particular warranty or term thereof. Mr. Carvery floated the theory that one-year warranties are standard in construction. I am not aware of any such convention, and no such limitation was proved. I find instead that, in the absence of any express limitation, there was an implied warranty that the work would be done in a workmanlike manner. If any authority is necessary to support that, one could look to s.26 (5) of the *Consumer Protection Act* which provides that:

> There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

[18] I further find that skilled and workmanlike services would be those that perform the job and last for a reasonable length of time, which in the case here would be for multiple years.

[19] The Defendant also argues that the Claimant has not definitively established where the water was infiltrating.

[20] The question of whether or not the initial work was done properly is somewhat bound up with the question of what the Defendant was directed to do. The Defendant called evidence of some of its workers, to the effect that they took their direction from the building superintendent, Doug Snyder, and in particular on the question of which of the eight door units could be reused and which needed to be replaced. If, arguably, the Claimant or its agent specifically directed the Defendant not to replace door units that were defective, then the Defendant could perhaps avoid responsibility when those units later leaked. As argued by Defendant's counsel, the Claimant would have been taking a "calculated risk" that the old units might not be watertight.

[21] I do not accept this view. The Defendant was chosen because of its expertise. It assigned a supervisor to the project, Ken Ryder, who would have been the one making decisions (or, at least, recommendations) about which door units were salvageable. Unfortunately, no effort was made to call Mr. Ryder as a witness. There is not a shred of credible evidence that the Claimant itself, through Mr. Snyder or anyone else, specifically instructed the Defendant to reuse a door that ought to have been replaced. Had that occurred, I would have expected Mr. Ryder or someone in authority in the Defendant company to lodge an objection with the Claimant, disclaiming any responsibility for the consequences of such a decision.

[22] I accept that both Mr. Snyder and his boss, property manager Derrick Tucker, were involved in these decisions and had concerns about cost, but it is not credible to suggest that they would have overridden the opinion of Mr. Ryder, had he dissented from their view. They would have been relying on the opinion of the Defendant's employees as to which units might be safely reused.

[23] I therefore find that the Defendant was responsible to ensure that door units were fit to be reused, or whether they needed to be replaced. In the end, as we know, four were replaced. The evidence leaves me in doubt as to which precise units were replaced, but I do not find that it is important to establish that.

[24] Nor is it necessary to establish precisely why the job failed and new leaks occurred. I find that it was within the scope of the Defendant's original job to remove and replace or reuse patio door units, in a workmanlike manner and to leave the building envelope in a watertight condition. That means that they should not have leaked.

[25] The Defendant called an expert witness, engineer Gordon Tynes Peng, who - despite not having inspected any of the work at the relevant time - offered some opinions as to possible reasons why leaking might have occurred. He suggested that it might have been because old door units were reused, and that they could have leaked, through no fault of the Defendant. Much of his report takes issues with the conclusions of Mr. Williams, who had prepared a report on behalf for the Claimant in January 2013 when the problem was first identified. Mr. Williams attributed the problems primarily to failures of the flashing and other door installation features, i.e. basically the problems that were identified by Mr. Bezanson.

[26] Mr. Peng did not have the advantage of having seen the Defendant's work, nor did he observe the water problem at the time it was occurring. As such his report carries very limited weight with me. Might he be correct that some of the door units were not water tight? I do not dismiss that possibility

entirely, but if that were the case it is difficult to understand why Mr. Bezanson's work seems to have rectified the problem, as Mr. Bezanson did not replace any of the door units.

[27] In the end, I am satisfied that the Defendant's workers did not do a proper job, with the result that water began to leak. Precisely when the leaking started would be hard to establish. It might have been some time before it was noticeable to the residents. While not exactly "res ipsa loquitur" - if the failure was within the scope of the Defendant's initial work, and where the damage would not have occurred (or at least not so soon) had the work been done properly, the inference can fairly be drawn that there was a deficiency, whether or not the precise deficiency has been identified. The Defendant had control of all of the elements during its work, and ought to have ensured that the doors were installed, or re-installed, in such a way that water did not infiltrate. This they failed to do, and must answer in damages.

[28] There is no real exception taken with the cost of repair. The Claimant obtained two other quotes, one of which was considerably higher and the other of which was slightly higher than that of Mr. Bezanson. It was reasonable to seek three bids and take the lowest. As such I allow the Claimant the full cost of Mr. Bezanson's work, namely $15,988.92.

[29] The Claimant also seeks its expert costs. Mr. Williams was obliged to be in court on three occasions, and charged a total of $942.50 for his time. It also claims its cost of filing in the amount of $193.55. I am prepared to allow these amounts. Mr. Williams was most helpful in assisting the court to understand the technical aspects of the building and the issues surrounding the work.

[30] The Claimant shall accordingly be entitled to recover damages in the amount of $15,988.92 plus costs of $1,136.05 for a total of $17,124.97.

Eric K. Slone, Adjudicator