IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Prestige Paving Inc. v. JRT Developments, 2007 NSSM 6

2006 Claim No. 272021
Date: 20070108

BETWEEN:

Name: **Prestige Paving Inc.** **Claimant**

- and -

Name: **JRT Developments** **Defendant**

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 9, 2007. This decision replaces the previously distributed decision.

Appearances:
Claimant: Paul Presti and Matthew Presti
Defendant: Peter E. Crofts

D E C I S I O N

[1] This matter came before the court on December 11, 2006.

[2] It is a claim in respect of a paving job for monies allegedly still outstanding. There are essentially two issues in the case - what the contract price was and, secondly, whether there is a defence and/or counterclaim in respect of the quality of the paving job.

[3] As to the first issue, I accept the Defendant's version that the original contract was the amount of $12,000.00 and then, with some extras which were discussed, the amount was increased to $13,000.00. In making this finding I refer to a few factors.

[4] First, there is the invoice of May 26, 2006, which, was sent out almost immediately. The second invoice which the Claimant seeks to rely on is dated June 12, 2006. It was not sent out immediately and indicates that it is a "second notice". It contains a total amount of $4,200.00, plus HST, and purports to be for the line painting and numbering, top soil, sods trucking, landscaping and extra from original paving contract. There is no evidence to support the amounts claimed on the June 12, 2006, invoice. The question was asked and there was no satisfactory answer for why this was marked as a "second notice".

[5] I note as well and I accept this evidence, that the June 12, 2006, invoice was never received by the Defendant until the commencement of this claim. I also note that the amounts contained are inconsistent with the "chronological facts" referred to in the email of August 15, 2006, from Mark McGrath to Elias A. Metledge.

[6] Moreover, I found Mr. Alphonse's evidence for the Defendant, to be credible. He testified that the original agreement was $12,000.00 (plus HST). Mr. Alphonse testified that there was a discussion regarding some extra work, primarily the landscaping, and when he received the invoice of $13,000.00 he did not question it because of the extras. His evidence was also to the effect that the line painting was included in the original price.

[7] In contrast to Mr. Alphonse's evidence, which I found to be believable and specific, the Claimant's evidence on the extras seemed to me to be inconsistent, vague on some aspects, and not nearly as credible.

[8] For these reasons I preferred the Defendant's evidence and find that the contract amount was for $13,000.00 plus HST.

[9] There is then the issue of the quality of the paving job. In that regard, there was evidence from Mark Downey, EIT, from Maritime Testing. He gave expert opinion evidence about paving "compaction". His reports dated August 3, 2006, and August 23, 2006, were introduced. His report of August 23, 2006, contains the results of testing for six asphalt cores

and shows an average compaction level of 82.8% maximum theoretical density ("MTD"). In his report he states:

> *"Currently, the specification used by the Nova Scotia Department of Transportation and Public Works (NSTPW) is Asphalt Concrete End Product Specification (EPS). Within these specifications, the acceptable standard for compaction is 92.5% MTD, and any compaction less than 89.0% MTD is subject to rejection and subsequent removal/replacement. Low compaction adversely affects both pavement strength and durability."*

[10] In his evidence at the hearing, Mr. Downey indicated that the primary concern related to low compaction is longevity of the paving. He further indicated that a typical reason for low compaction is that the asphalt is allowed to cool too much before the "compacted effort" is applied.

[11] On cross-examination he clearly acknowledged that it was a difficult job because the parking garage was inside and, therefore, the asphalt had to be transported in by a bobcat and the regular equipment could not be employed. He also acknowledged that there are no published standards for parking lots. He offered his opinion that he considered an acceptable standard would be the same as for the NSTPW. He also offered his opinion that he expected a 90% compaction level is the reality for actual parking lots.

[12] Mr. Downey was unable to provide any specific information with respect to the relationship between lower compaction and reduced longevity.

[13] In my view, there clearly is an issue with respect to the compaction level. In such a contract the law would imply a term that the level of quality be comparable to industry standards. There are no published standards for compaction level for parking lots but based on the evidence, particularly that of Mr. Downey, it does appear inescapable that the compaction of this parking lot was lower than what would normally be an acceptable level. I note as well that this was manifested in the actual observations shortly after the job was completed of

"scuffing" and "power steering" marks. While it does appear that there is some amount of this in many paving jobs, the overall thrust of the evidence indicated to me that it was to an exceptional degree in this case.

[14] At the same time, it cannot be doubted that this was a difficult job and the question that remains outstanding is whether any other paving company would have been able to provide a higher level compaction given the circumstances, and in particular, the fact that it was an inside parking lot. Based on Mr. Downey's evidence and his suggestion of other methodologies, I am led to the inference that it could have been done to a higher degree of compaction.

[15] Based on this I believe that it is appropriate that there be some offset for the quality of the paving job which will likely affect the longevity of the job.

[16] I believe the appropriate reduction is an amount of $3,000.00. Accordingly, the contract amount of $13,000.00 would be reduced to $10,000.00, plus HST, which would be $11,400.00 less $6,000.00 already paid, would leave a net outstanding amount of $5,400.00.

[17] There is then the question of costs. The Defendant was required and did quite properly obtain the services of Maritime Testing for which there was an account of $863.55. While I am not allowing any counterclaim beyond the reduction of $3,000.00, I believe it is appropriate that since the Defendant has had some success, to be awarded its costs. As well, the evidence of Mr. Downey was very significant and important to the conclusion arrived at in the case. Accordingly, I think the Defendant should be awarded its cost for this report. At the same time the Claimant has had a degree of success and also ought to receive its costs. Based on the materials on the file, the cost of filing the action and the bailiff service total $205.60. Accordingly, the net difference is $657.95 to the credit of the Defendant. This would reduce from the claim amount of $5,400.00, which leaves a difference of $4,742.05, and this last figure would be the amount of the order.

[18] There will be no prejudgment interest allowed.

[19] It is hereby ordered that the Defendant pay to the Claimant the net sum of $4,742.05.

DATED at Halifax, Nova Scotia, this 8th day of January, 2007.

Michael J. O'Hara
Adjudicator

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