Claim No: 278817

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Swain v. Tulloch, 2007 NSSM 34

BETWEEN:

LLOYD SCOTT SWAIN

Claimant

- and -

SHELLEY TULLOCH and INNIS TULLOCH

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 19, 2007
Written submissions received June 27, 2007, July 13, 2007 and July 17, 2007.

Decision rendered on July 24, 2007

APPEARANCES

For the Claimant - Cheryl Arnold, counsel

For the Defendants - self-represented

Introduction

[1] This case concerns a renovation project which did not meet the expectations of the Defendants, and for which the Claimant has only been partly paid. Like many disputes of its type, it results not from inadequate workmanship but from poor communication between the parties.

The Facts

[2] The Claimant is a contractor who was hired to renovate the Defendants' bathroom. There was no signed contract; only a handwritten quote which contained a scope of work and a price. By the time the project aborted, there had been a number of changes, none of them properly documented.

[3] Reduced to its essence, the project was originally projected to cost $13,460 and involved moving some walls, constructing a custom shower enclosure, replacing plumbing and electrical fixtures and sundry other details. One of the first changes was the decision to eliminate a very expensive custom glass shower door. As is common in home renovations, there were numerous other changes made along the way, some bigger and some smaller. The final price was $12,600 for labour and materials.

[4] The Claimant initially estimated that the project would take about a month to complete, assuming it started at the beginning of October 2006. It was understood by everyone that if the work went into November, the Claimant would come up against a conflict with another job to which he was committed. This is important because the project, in fact, was still ongoing in November and the delay became one of the bases upon which the Defendants purported to

terminate the contract. The Defendants argue vehemently that time was “of the essence,” and that the failure of the Claimant to meet his original completion target meant that he was in breach. For the reasons that follow, I do not accept that legal position.

[5] I find on all of the evidence that there was a lack of clarity at the outset concerning the time for completion, what factors might lead to delay, and what would be the consequences of delay. In the absence of a clear understanding, parties must be prepared to accept a reasonableness standard. In other words, was the time the Claimant took to advance the project reasonable, in light of the events that intervened?

[6] A number of events led to delays, or extra cost. They include, in no particular order:

a. The Defendants decided to have special, elaborate sprayers rather than just a shower head installed in the shower enclosure.

b. The skylight in the bathroom started to leak and required specialized repairs by another company before the Claimant could do his work in the immediate area.

c. The recessed lighting had to be removed and reinstalled after the Defendants themselves had marked them for placement incorrectly. This in turn necessitated movement of wiring and additional work to tear out and repair drywall.

d. The Defendants specified a non-standard sized vanity, which required special adaptations to the space. It turned out that the Defendants had made an arithmetic error in adding up the dimensions, but by the time it was discovered work had been done and time lost.

e. The Defendants purchased a cast iron tub rather than a standard acrylic one, which meant that the plumbing had to be exposed rather than concealed, which is a somewhat more elaborate job.

f. There were problems with the amount of tile ordered.

g. A window had been installed improperly by another contractor, requiring correction by the Claimant before he could proceed with some of his work.

[7] Given these changes, the Claimant was unable to make as much headway as he had hoped, and the project spilled over into November. By then the Claimant was forced to divide his time with another project, although he appears to have had his sub-trades on the job as required.

[8] With the project taking longer than expected, the issue of money came up.

[9] The Claimant testified that it is his usual practice to get a progress payment during the job, as he pays his subs and cannot afford to be seriously out of pocket. He admitted that he likely never mentioned this to the Defendants at the outset, who interpreted this to mean that they would not have to pay anything until the project was completed. Nevertheless, after about two weeks he asked

the Defendants for a $4,000 progress payment, which they made in good faith. In law, there was nothing that required them to do so as it was not an express, or even (as I find) an implied, term of the contract. It was rather the Defendants' expectation that this gratuitous payment was a one-time deal and that they would pay the balance on completion.

[10] When the job became bogged down, in early November the Claimant asked Mr. Tulloch for a further $4,000. The Defendants take exception to the fact that he approached Mr. Tulloch rather than both of them, Mr. Tulloch apparently being the easier touch. Mr. Tulloch was taken by surprise and wished to discuss it with his wife, but rather than just say so, in the heat of the moment he told the Claimant that it would take 7 to 10 days to arrange for the money.

[11] When the ten days expired, the Claimant spoke to Ms. Tulloch and asked for his money. She was not prepared to pay it. There is a significant factual dispute about what was next said.

[12] According to the Claimant, Ms. Tulloch offered to pay him $500 per day for a maximum of ten days, for every day that he showed up. He interpreted that to mean that the most they would pay for completion was $5,000. This was unacceptable to him.

[13] According to Ms. Tulloch, she was prepared to pay $500 per day for every day that he showed up, and that this money would be applied against the balance of the contract. She stated that the $500 per day was just an incentive for him to show up and do some work, as it was their experience that the Claimant was dragging his feet and rarely showing up at the job.

[14] One thing that is not in dispute is that the Claimant expressed the fact that this was unacceptable and the conversation ended without a resolution. However, on reflection, a short time later he decided to accept the offer, and called Ms. Tulloch back to tell her so, only to be told by her that they were terminating the contract, would have someone else complete it, and that he was not welcome back on the site.

Findings

[15] I am obliged to make findings about what occurred during and before this exchange, because it bears upon the question of who was in breach of the contract.

[16] In the absence of a specific payment schedule, the Claimant had no entitlement to be paid any moneys in advance. There is no basis to imply a term to that effect. There was no evidence before me as to standard practice in the home renovation business. Although it may be harder to believe that anyone could expect a lengthy project to be completed without some progress payments, this would not necessarily hold for a small project expected to be over in a few weeks. As such, the Defendants had no obligation to make any funds available. Had they stood their ground at that time and refused, the Claimant would have had no legal ground to stand on. However, by paying the initial $4,000 they effectively waived any breach of contract that might have been found arising out of the request for funds.

[17] When the Claimant came around looking for additional funds, the situation once again suffered from a lack of clarity in the contract. The initial payment by the Defendants obviously emboldened the Claimant to make the further request

that he did, although I find that it did not rewrite their contract to entitle him to such further payment. Had the Defendants stood on their rights, they could have simply insisted that the Claimant complete the contract and wait to be paid. However, by signalling that they were prepared to make a further payment, and making the Claimant wait ten days under that impression, the Defendants again waived any breach. This then led to the final showdown.

[18] Notwithstanding the poor track record of communications, I find as a fact that the Defendants made an offer only to pay $500 per day for ten days, and that it was their stated intention to pay no more. Had the offer communicated otherwise, the Claimant would not have had any reason to balk. The Defendants had no right to limit the Claimant in that way. And when the conversation ended, they had no right to terminate the contract.

[19] I am not unsympathetic to the Defendants, because they did have rights. They had a right to insist that the Claimant fulfill his side of the bargain within a reasonable time, payment or no payment. And had they clearly given proper notice to that effect, in the absence of compliance by the Claimant they could have terminated the contract.

[20] The Claimant's rights were to retain the benefit of the contract and be paid for his work, so long as he was willing to complete it within a reasonable period of time. He had no right to <u>demand</u> a further progress payment, although he did not breach the contract by asking for further money. He <u>would</u> have been in breach had he insisted on payment as a condition of doing any more work. Given the way things were going, he might well have taken that further step, to his own detriment, but he was preempted by the actions of the Defendants in terminating him.

[21] I find that the Defendants had unreasonable expectations, in light of the changes that they made to the scope of work and the difficulties that intervened without any fault of the Claimant.

[22] Time was not of the essence in this contract. While it was inconvenient for the Defendants to be ousted from their bedroom while the work progressed, this was not a contract into which one could read strict time requirements. For time to be of the essence, this has to be clearly understood by both parties. Even contracts for the sale of real estate expressly state that time is of the essence, and the failure to include such an express provision may signal otherwise.

[23] The Defendants have also argued that the Claimant should have understood that time was of the essence because of Mr. Tulloch's particular health situation. Mr. Tulloch is an insulin-dependent diabetic. It is well known that stress can adversely affect blood sugar levels for diabetics. It is also a fact that at some point the Claimant learned that Mr. Tulloch had diabetes, but there was simply no evidence to suggest that he was told or understood that he had to act differently in the performance of his contract, lest Mr. Tulloch's health suffer.

[24] The Defendants have also argued that they terminated the contract in part because December was approaching and they understood that the Claimant had no intention of working at all in December. The Claimant testified that it is his usual practice to work right up until the Holidays, and that he never stated to the Defendants that he was taking December off.

[25] It seems to me quite improbable that the Claimant would have said anything to that effect. What seems most likely is that he said something

innocent early on in the relationship - perhaps to the effect that he did not intend still to be working on their bathroom in December - that was misunderstood by the Defendants. Even had that been said, given the delays that followed it is hard to believe that he would not have amended his intentions and been prepared to work straight through, whether that took him into December, or not.

[26] That the Defendants could have made the assumption that the Claimant was not planning to work in December, speaks to the poor state of communication between the parties. Had that been their honest understanding, the responsible thing would have been to clarify with the Claimant what his intentions were, given the length of time it had already taken, and if necessary to insist that he work straight through.

Post-termination matters

[27] After the contract was terminated by the Defendants, the Claimant made known that he wished to retrieve his tools and some supplies that he had paid for. He testified that the Defendants would not allow him into their home, but rather left his tools at the foot of their driveway to be picked up. The Defendants testified that they lugged the stuff out to the driveway as a courtesy to him. While little turns on this point, I entirely believe the Claimant and disbelieve the Defendants. I find that they were angry at the Claimant and were likely concerned about what else he might take if allowed inside. As it was, they did retain certain supplies such as electrical outlets, which were later used in the project by whoever replaced the Claimant. The notion that they were doing the Claimant a favour or courtesy seems frankly disingenuous, and impacted negatively on their credibility overall.

[28] Another assertion by the Defendants also strikes me as false. Earlier on the day the contract was terminated, the Claimant had called the glass shop to find out whether the shower door was ready. He was informed that the store had been instructed to deal with the Tullochs directly and not with him. This prompted the Claimant to call the Defendants as he inferred from that instruction that he was probably being terminated. The Defendants testified that the reason they asked the glass supplier to deal with them was to relieve the Claimant from the financial responsibility of paying for the shower door, given the obvious financial problems that he was having. Frankly, I find that very hard to believe. I believe that the Defendants were simply positioning themselves to take the contract back, and the "spin" about relieving the Claimant of financial responsibility is just a rationalization.

Damages

[29] The balance owing on the original contract, after deducting the $4,000 payment, was $8,600.00. The amount that the Claimant is seeking is $7,475.00, comprised of $7,100.00 for the work completed by the Claimant (after deducting $1,500.00 for work left to be completed) and $375.00 for tools and materials not returned by the Defendants. (This appears to be a small error as the list adds up to $365.)

[30] There was evidence to the effect that the Claimant is actually out of pocket $7,851.70, including amounts he owes his subtrades and amounts paid for materials. Even if he succeeded entirely in this claim, this is not a job that is going to generate a profit for the Claimant. At best he avoids or mitigates a loss.

[31] Had the Claimant been in breach of contract, the Defendants would have been entitled to offset whatever amounts they paid to complete the contract. As it was, the evidence of cost to complete was extremely vague. Some of the work was done by the Defendants themselves, and other evidence tendered did not reliably reflect cost related to the original scope of work.

[32] Given my finding that it was the Defendants who breached the contract, the Claimant is entitled to fair value for the work that he did, which is not unrelated to the cost to complete (because that reflects to an extent how much work was never done) but does not allow a full credit for those costs.

[33] Essentially, what the Claimant is entitled to receive is a *quantum meruit*, which is simply Latin for an amount that reflects a fair value for the work.

[34] The original cost estimate was $12,600, and $4,000 was paid after two weeks. That $4,000 was acknowledged by the Defendants to be a fair estimate of the value of work performed to that point. Although the Claimant only seeks to give a credit of $1,500 for work that he was relieved from performing, I think that number is low. On all of the evidence, I am prepared to allow the Claimant a further $6,000 for work done to the point of termination. To allow any less would, in my opinion, provide the Defendants with an unjust enrichment at the expense of the Claimant.

[35] To the $6,000 I would add the $365 claimed for items retained by the Defendants, for a total of $6,365.00.

[36] I see no basis for an award of general damages.

[37] I will allow the Claimant prejudgment interest on $6,365.00 at the rate of 4% from December 1, 2006 to the date this decision is being released (236 days), which I calculate to be $164.62. I also allow costs of $160.00, for a grand total of $6,689.62.

Eric K. Slone, Adjudicator