Claim No: 424532

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Finatics Aquariums & More Inc. v. G. Hunter Contracting Services Inc., 2014 NSSM 59

BETWEEN:

FINATICS AQUARIUMS & MORE INC.

Claimant

- and -

G. HUNTER CONTRACTING SERVICES INC. and GLENN HUNTER

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearings held at Dartmouth, Nova Scotia on June 9, 2014 and July 2, 2014

Decision rendered on October 16, 2014.

APPEARANCES

For the Claimant Elizabeth Mills, co-owner
Phil Cochrane, co-owner

For the Defendants Matt Conrad, counsel

BY THE COURT:

[1] This is a claim by the Claimant for damages as a result of allegedly faulty construction work done by the Defendants (at least by the corporate Defendant), which work allegedly caused disruptive and costly corrective measures. There is also before me a counterclaim by the corporate Defendant for an unpaid invoice, for work associated with the attempted correction of the original problem.

[2] The Claimant company operated a pet store in the Bedford Place Mall, which store closed down in the spring of 2014 as a result of financial problems. The owners of the company FINatics Aquariums & More Inc. ("FINatics") are Elizabeth Mills and Phil Cochrane. At all relevant times they actively worked in the store, together with hired staff, as needed.

[3] The Defendant Glenn Hunter ("Mr. Hunter") is the principal of his limited company, G. Hunter Contracting Services Inc., which company does commercial construction.

[4] Ms. Mills and Mr. Cochrane have significant expertise in the business of selling tropical and other aquarium fish and the equipment necessary for keeping such fish as pets.

[5] In early 2012, Ms. Mills and Mr. Cochrane decided to lease some available space to open a new store in Bedford Place Mall in Bedford, Nova Scotia. They incorporated the Claimant company at about that time.

[6] Ms. Mills and Mr. Cochrane had specific ideas for how they wanted their store set up. The space being leased was essentially empty, except for its four walls, floor and ceiling.

[7] The Landlord had the responsibility to pay for some of the leasehold improvements, but the specific requirements for the pet store were the financial responsibility of Ms. Mills and Mr. Cochrane and/or the Claimant company.

[8] One of the things that can make a pet store different from other businesses, in a physical sense, is the weight of the fish tanks. The plan here was for tanks that, together with the water, would weigh approximately 20,000 lbs. The layout planned by Ms. Mills and Mr. Cochrane included a raised central "island" that would house the majority of the store's tanks, with a lesser number on the periphery. The issues in this case concern this island.

[9] The corporate Defendant was recommended to the Claimant for performing all of the leasehold improvements, including those specific to the pet store.

[10] There was discussion about the raised island and the fact that it would have to bear a great deal of weight. The raised floor, though only up about three steps, had to be strong enough not to buckle under the intense pressure. The Defendant arranged for a structural engineering company to be engaged for the relatively simple (from an engineering standpoint) task of designing the supports for the raised floor. Essentially the design involves short stud walls, spaced 16" apart, supporting the raised floor. The engineer's conclusion was that this was adequate to accept the anticipated additional weight.

[11] The eventual problem, as it later turned out, was that this type of support only works to its fullest extent when the weight of the water is evenly distributed over the surface. What the engineer had no way of knowing was that the design of the shelving to hold the tanks would cause most of the weight to be concentrated on the shelf "legs." Such a system could still have worked, had the weight-bearing legs been placed precisely over the joists.

[12] In the actual situation, the shelving and tanks were placed with no particular regard to whether or not the legs were on top of the joists, and in fact they were offset slightly, with the result that, over time, the floor between the joists began to buckle under the strain.

[13] The Claimant says that it was the responsibility of the Defendant to make sure that the shelving was properly placed. The Defendant contends that it had no such role to play, in that it did not design nor place the shelving in its eventual position. The Defendant says that the Claimant must take responsibility for failing to position the tanks accordingly.

[14] I will return to this question later.

[15] The situation might have been less problematic, had events in 2013 proceeded differently. In September 2013, when the sagging began to be noticed, the Claimant contacted the Defendant to come into the store and assess the situation. Mr. Hunter attended and was able to remove a side panel and look at the floor from the underside. He noticed that the shelving holding the tanks was beginning to sink under its weight, and that the pressure points

were between the joists. What happened next is critical, from the point of view of the Claimant.

[16] According to Ms. Mills and Mr. Cochrane, they were told that Mr. Hunter was going away for a week, but that in the interim the tanks would all have to be emptied in order that everything could be moved off the island so the island could be moved and/or worked on. This is precisely what they did, with considerable difficulty.

[17] Emptying tanks containing live fish, particularly the type of fish that were being sold, is a delicate matter. The fish have to be removed into tanks providing a suitable living environment, including temperature, salinity, pH etc. The tanks contained not only water and fish, but also gravel and ornaments, and probably plants, all of which had to be separately removed, cleaned and stored for re-use.

[18] In the process here the Claimant lost a considerable number of fish. Many hours of staff time were usurped, and a certain amount of business loss can be inferred, given all of the disruption.

[19] The evidence before me suggests that much of this work, moving fish and emptying tanks etc., was unnecessary. The engineer, Wesley Campbell, testified that the solution to the sagging problem would have been to jack up the floor and add some additional stud walls for support. He says that this could have been done without emptying the tanks or moving anything. He insisted that it could have been done safely. Mr. Hunter appears to have believed that there was a safety issue if someone had to crawl under the floor, but I accept the

engineer's opinion to the contrary, and believe that Mr. Hunter could have confirmed that before concluding that the island had to be cleared.

[20] In fact, after all of the work was done to empty tanks, transfer fish etc., the Defendant did precisely what the engineer recommended. Additional stud walls were built and installed. The Claimant contends that this work was also improperly done, in that in some places it was necessary to use shims, but this appears to be a red herring.

[21] After all of the work, the Claimant was unsatisfied with the floor which appeared still to be sagging in places. Also, the store began to experience some electrical problems which the Claimant blames on improperly placed electrical outlets for the tank lights and pumps, which were shorting out with increasing frequency.

[22] From the perspective of the Defendant, it was doing a job for which it would be charging. In October 2013, a bill was rendered in the amount of $2,250.00 plus HST. The Claimant was unwilling to pay this amount, at least not in full, in the belief that the Defendant was answerable for its mistake in the initial construction.

[23] In the meantime, the Claimant began to reestablish the island and refill and restock the tanks. According to Ms. Mills and Mr. Cochrane, this necessitated closing the store for a time. The cost of staff time and lost sales forms part of the claim.

[24] By late October or early November, the electrical problems had intensified and the Claimant brought in an electrician. The determination was that the

existing outlets (under and behind the tanks) were not the waterproof type, and were positioned in such a way that they were regularly being splashed with significant amounts of water. The company Reliable Electric did $1,921.69 worth of work that the Claimant contends was only required because of faulty electrical work in the initial construction.

[25] The Defendant denies that there was anything deficient about the initial construction, and that if replacing some of the GFI plugs was necessary, that would have been an inexpensive job.

[26] The claim as initially filed seeks damages of $12,825.04. The extensive material presented at the hearing appears to be seeking a little less, namely just over $9,000.00, plus the Claimant resists paying for any of the amounts sought by way of counterclaim.

[27] It is a sad footnote to this case that the store went out of business in about April of 2014, which appears to have been caused by many factors including the many business disruptions over the fall of 2013 when all of the work was being done.

Findings

[28] The Claimant has pleaded negligence and breach of contract in connection with the initial installation of the raised island in 2012, and in connection with the October 2013 repairs. As I understand the theory, the Claimant blames the Defendant for not having ensured that the tank assembly was positioned in such a way that the engineered floor could withstand the

weight. There is also a claim that the electrical system was inadequate, mostly because the Defendant (through its subcontractor) failed to allow for the inevitable splashing of water onto the outlets, as tanks are filled and emptied, and during the routine maintenance of those tanks and emptying and refilling the fish that inhabit them.

[29] The principal complaint about the 2013 work is that allegedly the Defendant ought not to have insisted that they empty all of the tanks and move everything off the island, since the remedial work could have been accomplished with everything in place.

[30] Dealing first with the 2012 claims, the Defendant resists responsibility on the basis that it did not position the shelving, but rather left that to the Claimant. The difficulty I have with this defence is that although the Defendant did not construct the shelving, it was involved in the painting and assembly, and thus had intimate knowledge of how it was intended to work. The Defendant arranged for the engineer's design of the floor, and must be taken to have understood the concept of the floor that it was building. It knew, or ought to have known, that the floor design only worked if the load was properly positioned on top of it. Ms. Mills and Mr. Cochrane had no special expertise in this area and were clearly relying on the Defendant for his construction expertise. They had no way of knowing that precise placement of the shelving units was critical to the success or failure of the raised floor. I find that the Defendant had a duty to ensure the proper placement of the shelving, or alternatively a duty to instruct the Claimant on the perils of improper placement.

[31] As such, I find that the Defendant breached his contract by failing to ensure that the tank assembly was positioned appropriately. The Defendant is thus responsible for whatever damages foreseeably flowed from that breach.

[32] The most direct item of damage would be repair cost a year later. Quite apart from the issues about emptying the tanks etc., the direct cost consequence of the breach of contract would be the repair costs. Since the Defendant performed this work itself, I find that this is a cost that it must absorb without recompense. This is sufficient in and of itself to dispose of the counterclaim. The Defendant cannot recover the cost to repair work that was only necessary because of its own breach. This includes both the invoiced amount of $2,589.11 plus the further amount of $517.50 which the Defendant says was never invoiced but is chargeable and owing.

[33] As for the events of 2013, Mr. Hunter testified that he did not instruct the Claimant to remove everything off the island. He said he told them that he was going away for a week and would return to make some decisions. Ms. Mills and Mr. Cochrane testified that they were clearly instructed to clear the island.

[34] I am more inclined to believe Ms. Mills and Mr. Cochrane. It seems quite doubtful that they would have undertaken such a disruptive course of action without having been instructed to do so. The task of draining the tanks, relocating the fish, and moving everything, was an onerous one that I find was only undertaken because Ms. Mills and Mr. Cochrane believed there was no alternative. It appears that Mr. Hunter did not take reasonable care to ensure that the corrective action would be done with a minimum of cost and disruption.

[35] Mr. Hunter's evidence at trial was that it was necessary to drain the tanks to reduce the weight on the island. This may or may not have been correct advice. The engineer, Mr. Campbell, suggested that the floor just needed to be jacked up and supports put in. He did not believe it was unsafe to go under the floor for this purpose. He was not directly asked whether reducing the weigh was a good idea. I am prepared to give Mr. Hunter the benefit of the doubt, in the sense that reducing the weight may have been good practice and reduced the risk of the floor collapsing from what was probably minuscule anyway, to something even less. But this does not explain why he would have directed the Claimant to remove everything and to suggest that the island might have to be moved.

[36] The project to take everything off the island set in motion something of a chain of mishaps, causing the store to be closed from time to time and chewing up staff time.

[37] Even after the repairs to shore up the floor, the Claimant contends that the floor still sagged and lacked integrity, causing them to make the decision to reconfigure the store.

The electrical repairs

[38] The Claimant spent $1,921.69 on a bill to Reliable Electric. This work was done to replace the outlets that were shorting out intermittently as a result of corrosion caused by excess water. The Claimant says that the original plugs installed by the Defendant were flush mounted on the floor, and were not the correct, water-resistant kind, with the result that water would pool and get into

the plugs. These were replaced with raised receptacles, connected by heavy-duty conduit. The Defendant suggested that this was excessive.

[39] About two thirds of the bill from Reliable Electric was for labour, with $533.36 representing materials. The description of the work in the invoice was simply “rewire outlets under fish tanks.” While the amount seems high, superficially, I believe Ms. Mills and Mr. Cochrane and their assertion that they were only doing what appeared to be necessary to be able to keep operating their business. They described the frequent and unpredictable power outages, which in the case of systems supporting the life and well-being of their fish livestock, was highly troubling and undesirable.

[40] I find as a fact that the original electrical work done by the Defendant, through its subcontractor, was not durable and failed to meet the test of reasonably workmanlike. I find the Defendant responsible for the cost of the electrical repairs, in full.

[41] The balance of the damages claimed are alleged are lost sales, extra staff time, and extra inventory costs, which are said to be supported by the Claimant’s financial records. I will list them and consider them in turn:

extra wage costs in week following September 25, 2013 - moving tanks off island	$1,174.80
Loss of sales and livestock losses (same week)	$875.00
Loss of sales during repairs October 2 - 4	$310.00
Cost of new floor tiles and extra labour cost	$285.54
Extra wage cost October 5 - 8	$488.40

Store closure after work completed October 16 - 18 - wage cost to reestablish store	$389.40
October 16 - 18 - Lost sales	$1,740.00
October 16 - 18 - Livestock ordered to replace and replenish	$1,217.25
Electrical work - Nov 4 - 5 - extra wage costs	$250.80
Nov 4 - 5 - Lost sales	$349.00
Reliable Electric bill (already allowed)	$1,921.69
	$9,001.88

[42] In my view, the Claimant has established that some damages were suffered, but these damages are difficult to assess with any accuracy. Unlike some cases, it is not pure mathematics. The financial records show staff being paid at times when, according to the other evidence, a portion of their work would have been helping with the emptying of tanks, rearrangement of the store etc., but this would not have been their only tasks. On some occasions, the store was open for business.

[43] On the question of lost sales, there is a reasonable inference to be made that sales were lost, given the store closure and disrupted interior, but the sales records themselves are equivocal given that some sales are recorded and there is no direct trend line that would allow a calculation to me made.

[44] The issue of livestock replacement is also difficult to quantify from the records, as there is no differentiation between orders to replace dead livestock and orders to replenish stock that had been sold. Even so, it is clear to me that there were livestock deaths that can be directly linked to the mistakes made by the Defendant.

[45] Under these circumstances, the Court must do the best it can to come up with a global assessment of damages that seems fit and proper, based on all of the evidence. I have assessed the damages for lost livestock, extra wage costs, new floor tiles and lost sales at $3,000.00. This is on top of the $1,921.69 bill for the electrical.

[46] In the result, the counterclaim is dismissed (excusing the Claimant from paying the amounts claimed) and the Defendant G. Hunter Contracting Services Inc. is ordered to pay to the Claimant the sum of $4,921.69. The Claimant is entitled to its costs of $193.55 to issue the claim and $115.00 to serve it.

[47] There is no personal liability on Glenn Hunter. The Claimant at all times appreciated that it was dealing with a limited company.

Eric K. Slone, Adjudicator