SUPREME COURT OF NOVA SCOTIA

Citation: *Greenaway v. MGWM Remodeling Inc.*, 2024 NSSC 72

Date: 20240313
Docket: 525651
Registry: Amherst

Between:

Greg Greenaway and Kathy Hibberts

v.

MWGM Remodeling Inc. dba Case Design Remodeling

Judge: The Honourable Justice D. Timothy Gabriel

Heard: February 8, 2024, via telephone conference

Counsel: Greg Greenaway and Kathy Hibberts, self-represented Appellants
Jordan Duinker, appearing for self-represented Respondent

By the Court:

[1] This is an appeal of a Small Claims Court decision made by adjudicator Karen Hollett ("the adjudicator"). It arose from a contractual dispute between the Appellants and the Respondent involving renovations to the Appellants' home. The work included renovations in the bathroom (widening a door, supply, and installation of two new windows) and the reconfiguration of a laundry area. The male Appellant is an armed forces veteran and received partial funding from Veterans Affairs for these renovations.

[2] The parties had agreed upon a contract price of $63,778.42, plus HST ("the cost"). The Appellants were responsible for $18,746.42 of it, plus the HST applicable to that portion of the cost. Veterans Affairs was to pay the rest. The contract called for the payment of the cost in four instalments. These instalments were to coincide with the signing of the contract, the start of work, and the start of the drywall. The final payment was due upon substantial completion.

[3] The Appellants made the first three payments, and approved payment by Veterans Affairs to the Respondents for its share of the cost (upon substantial completion of the project) but refused to pay the remaining $2,155.85. They cited numerous issues they had with the work that was performed, including the cost of the renovations, which had been fixed in the contract.

[4] The Respondent duly initiated a proceeding in Small Claims Court to recover the remaining amount noted above, as well as an additional $1,460.50, which it claimed arose out of a "change order" for the thawing and insulating of a basement pipe, as well as interest and costs.

[5] When the matter was heard on June 12, 2023 the Appellants had identified three specific concerns with respect to the quality of the work which the Respondent had performed. First, a doorway transition strip had not been properly affixed and was popping up. Next, vanity caulking had cracked allowing swelling caused by moisture. Finally, there were issues identified with the washer and dryer stacking kit.

[6] The adjudicator was satisfied that the evidence established the following timeline:

- March 31, 2021 – contract signed

- August 13, 2023 – materials delivered to site
- August 16, 2021 – project demolition commenced
- September 15, 2021 – substantial completion date and identification of deficiencies by Appellants (“Job Completion Form” / punch list #1)
- October 6 – 13, 2021 – work on site pursuant to punch list #1 completed and clear up of debris
- October 27, 2021 – date of final invoice
- November 10, 2021 – return visit by Barry North to identify further deficiencies (“Job Completion Form” – punch list #2)
- December 6, 2021 – last day completing punch list #2 working on site at Appellants’ residence

[7] Among other things, the Appellants argue that the contract stipulated that the renovation work was to be performed to a standard of "workmanlike quality", and that they were to be provided with a written warranty to that effect. Paragraph 18 of the contract sets out this warranty, the relevant portion of which reads as follows:

> 18 WARRANTY – THE CONTRACTOR warrants that all home improvement work done pursuant to this Contract shall be of workman like equality, and shall be in accordance with applicable building codes and accepted by NAHB Residential Construction Performance Guidelines. Provided the Owner is in full compliance with this Contract and its payment provisions, THE CONTRACTOR shall remedy any defects, excluding normal wear and tear, due to faulty CONTRACTOR supplied materials or workmanship which appear within a period of two (2) years from the date of substantial completion. With respect to CONTRACTOR supplied materials and equipment, any warranty furnished by manufacturers will be forwarded to the Owner…

[8] The Appellants have further alleged that the adjudicator, in ordering them to pay $1,884.15 to the Respondent, committed an error of law, and also failed to follow the requirements of natural justice. They particularize their concerns in their Notice of Appeal as follows:

> Not properly served. The order from Small Claims Court was dated June 22, 2023 and mailed via Canada Post to both parties. On July 17, 2023 we called the Halifax SCC [Small Claims Court] to see if there was a decision as we never received a copy of the order. After calling we were then emailed a copy of the order.

> We feel that the adjudicator failed to realize that case design did not meet their [the Respondent's] end of the contract. Certain aspects of the job are poorly done, vanity now is damaged because of poor workmanship, and no warranties have been provided to us and we still have an enormous bill to pay after being unhappy with their work.

[9] At the request of the Appellants, and with the agreement of the Respondent, the submissions on appeal were heard via telephone conference on February 8, 2024.

[10] During oral argument, the Appellants agreed that the first paragraph referenced in their Notice, which dealt with service of the decision upon them, was immaterial to their appeal.

Standard of Review

[11] In *John Ross and Sons Limited v. Federal Express Canada*, 2022 NSSC 336, Hoskins, J. canvassed the authorities and summarized them to the following effect:

> [28] It is generally recognized in the authorities relating to appeals on the record that a high level of deference must be accorded to the trier of fact, and that any material finding of fact that is based on "palpable and overriding error" constitutes an error of law: *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, at paras. 31-33. Moir J. in *Hoyeck*, articulated a somewhat different approach in the Small Claims context, which does not involve a review Small Claims Court findings of fact for palpable and overriding error, but rather involves a review for error of law that extends to situations where there is no evidence to support the conclusions reached by the Adjudicator. It seems that Moir J's approach recognizes the distinctive aspects of the Small Court of appeal regime. He wrote:
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> > 23. We do not review Small Claims Court findings of fact for palpable and overriding error. Our jurisdiction to review for error of law may extend to the situation "where there is no evidence to support the conclusions reached": *Brett* at para. 14. That would have to be apparent from the summary.
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> > 24. In conclusion on this point, fact-finding in Small Claims Court is only reviewed when it appears from the summary report and the documentary evidence that there was no evidence to support a conclusion. An insufficient summary may attract review on the third ground, fairness, but it is not insufficient just because it is less satisfying than a transcript.
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> [29] In several decisions of this Court, Justice Moir's approach to the standard for review for Small Claims Court appeals has been endorsed and applied, such as in *The Rendezvous Sports Bar and Lounge v. On Shore Construction Ltd.*, 2020 NSSC 319, where Keith J's observations are apposite. He said, at footnote 1:

> There is some question as to whether "palpable and overriding error" also constitutes an error of law in the context of a Small Claims Court appeal. LeBlanc, J. summarizes the debate at paras 34 -36 of *C.M. MacNeill and Associates v Toulon Developments* 2016 NSSC 16. I prefer the analysis in *Hoyeck v. Maloney*, 2013 NSSC 266. In my view, it better accords with the statutory goals of the Small Claims Court as an efficient and economical forum to resolve disputes within a defined monetary limit. Moreover, importing the concept of a "palpable and overriding error" into a Small Claims Court appeal risks confusing or conflating the jurisprudence from other appeal proceedings which occur under very different circumstances. For example, appeals which are not brought under the *Small Claims Court Act* are obviously not subject to the statutory principles and procedures uniquely created for Small Claims Court proceedings – including the express legislative goal of inexpensive and informal adjudication (section 2 of the Act). The appeal record in a Small Claims Court appeal is also very different and does not include an actual recording of the original hearing. The judge hearing a Small Claims Court appeal is much more dependent on the written reasons and report prepared by the Adjudicator.
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> [30] While there may be a divergence of opinion as to whether this Court should review Small Claims Court findings of fact for palpable and overriding error, it is clear, as Justice LeBlanc stated in *C.M. MacNeil & Associates v. Toulon Development Corporation*, 2016 NSSC 16, at para. 37, that this Court may find an error of law where there was no evidence to support the conclusions reached. As Moir J. pointed out in *Hoyeck*, at para. 23, this would have to be apparent from the summary.
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> [emphasis added]

[12] Although a Small Claims Court appeal is a somewhat unique process (as noted above) it does not constitute a hearing *de novo* by any means. The adjudicator's findings of fact are to be afforded deference. It is still open to me to find, if I should be so satisfied, that there was no evidence capable of supporting a particular finding, or if some other error of law was committed by her.

[13] The Appellants contended, both before the adjudicator and before this court, that the defects to which they have referred should be remedied, at the Respondent's cost, because a warranty was to be provided to them. The Respondent argues that its work was not deficient, and, even if it were, the Appellants have not satisfied the contractual precondition triggering its obligation to either provide the warranty referenced in paragraph 18 of the contract, or remedy any deficiencies pursuant to it. This is because (they argue) they have not paid either the remainder of contractually stipulated price, or in any event the amount which the adjudicator had

concluded was still owing ($2,000 minus $155.85, for the washer and dryer stacking kit which was not suitable, for a total of $1,844.15).

[14] The following excerpt from the adjudicator's summary report of findings outlines the rationale for her decision:

> 21. Although this [*sic*] not specifically raised in the Notice of Appeal, a focus of the Appellants' testimony involved the placement of the grab bars serving the tub. The evidence was that the funding from Veterans' Affairs was initially approved based on a bathroom design which included an accessible walk-in shower; however, the Appellants' preferred option which [*sic*] was to install a tub and mechanical lift was later approved with the proviso that this additional equipment would be purchased by the Appellants because this arrangement may not accommodate the Appellant Greenaway's future needs. Although this was the situation, the Appellants ultimately contracted for and the Respondent installed a free-standing tub with grab bars.
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> 22. The evidence stablished that these grab bars were installed per building code (into blocking) and were located in accordance with the Appellants' approved design. There was an error during the tub installation because the shower head and tub drain did not at first line up perfectly; however, the placement was corrected by the plumber and this was addressed during the installation.
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> 23. I did not find any liability on the part of the Respondent for the design which ultimately did not accommodate the Appellant Greenaway's needs. The evidence established that the Appellants' were provided with professional Occupational Therapist assistance and advice through Veterans Affairs during the planning for an approval of the renovation and design of their bathroom. The Appellant Hibberts' testimony was the Occupational Therapist had laid out everything when the plan was done for the bathroom renovation, but it was not until everything was in place and one was standing in the tub that it became obvious grab bars did not serve their intended purpose. Therefore, the Appellants later installed (through Blue Cross) a ceiling to floor mounted pole to provide the additional support needed. I took from the Appellant Hibberts' testimony as well that the placement of the tub, which was free-standing and under a window in accordance with the plan approved by the Appellants, made this the only option in the opinion of the Occupational Therapist.
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> 24. The Appellants also gave evidence about the inconvenience and distress caused them by the renovation, including illness, caused by the renovation and in particular sharing the portable toilet provided on site. While there was no requirement under the contract for the Respondent to supply a portable toilet for the Appellants' use, I took note that the Respondent would be required to provide a toilet for the use of its employees working on site pursuant to Occupational Health requirements. In my view, while living in the home during these renovations would not doubt would be difficult for the Appellants, particularly as there was only one

bathroom in the dwelling, the evidence did not support a finding that this was an appropriate case for general damages within the Small Claims Court's jurisdiction which is limited.

25. The many other issues identified by the Appellants in justification of their refusal to pay, which they had had [*sic*] outlined in various correspondences to the Respondent, and which still aggrieved them at trial, such as providing lunches to the Respondents' workers; allowing the Respondent the use of their garage for storage, and the demeanor of the Respondent's Director of Construction also would not relieve them of their obligation to make the final payment agreed in by the contract.

26. This was not a situation where due to issues a project is legitimately terminated by the homeowner or, as sometimes happens, a contractor walks away from a project leaving the homeowners' in limbo. I accepted Mr. Meagher's evidence that he tried to address the various concerns raised by the Appellants. His testimony and documents established that, following receipt of a letter from the Appellant Greenaway dated January 27, 2021 [*sic*] listing their ongoing issues, that he had met with them via ZOOM on February 11, 2022, to try to resolve these and that he had planned to do a site visit. He scheduled a meeting with them at their home for February 18, 2022 but this was cancelled by the Appellants. The Appellants' evidence was that they were dealing with a house emergency caused by a heavy rainstorm and this is why they cancelled the appointment. Mr. Meagher had again personally tried to follow up with the Appellant Greenaway by email on October 4, 2022 to discuss their concerns and resolve the matter, but did not receive a response. The Appellant Hibberts' evidence in response was that the Appellant Greenaway does not check his email. The Notice of Claim was first issued on November 8, 2022.

27. In sum, the evidence did not establish to a civil standard, despite the Appellants' various complaints, that the standard of work of the Respondent overall fell below what the contract required which was a workman like manner and compliant with codes. Deficiencies are expected and the number and nature of the deficiencies would not be unusual for a project of such a scope and there was a means to have these addressed under the contract. <u>The warranty provisions, assuming the Appellants complied with the payment provisions which they were obligated to do, would also be available to them</u>.

28. I therefore allowed $2,000.00 representing the balance owed under the contract minus $155.85 as a reasonable estimate (in the absence of any evidence by either party as to the actual cost) for the washer and dryer stacking kit which was not suitable.

29. The Respondent also claimed $1460.50 pursuant to a change order for basement pipe thawing/insulation; but as the Respondent did not put forth sufficient evidence to establish, to a civil standard, the Appellants' liability for this aspect of the claim is not allowed.

> 30. In my discretion, and in the circumstances, I declined to award interests or costs.
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> [emphasis added]

[15] Although this was not argued before me, I do not take the adjudicator to have suggested that any remedy available to the Appellants was subsumed by the warranty. It is certainly the case that delivery of the warranty and/or its availability to the Appellants was contingent upon the payment by the Appellants of all of the cost installments called for by the contract. That is what the contract said (in paragraph 18).

[16] However, a term is implied with respect to any consumer sale of service, which specifies that the services will be performed in a skillful, efficient, and competent manner. Any term in a contract that purports to say the contrary is null and void. (*Consumer Protection Act*, ("CPA") ss. 26(5) and 28).

[17] I note that the adjudicator indicated that the Appellants had failed to satisfy her "that the standard of work of the Respondent overall fell below what the contract required which was a workman like manner and complicit with codes." (See paragraph 27). This appears to be a finding that the work performed by the Respondent had not been shown by the Appellants to have failed to satisfy the requirements of CPA s. 26(5).

[18] Adjudicator Hollett went on to say that, if the Appellants were to pay the balance of the price legitimately owed (which she found to be $1,844.15) it would entitle them to rely upon the warranty promised. This would require the Respondent to remedy any future defects "due to faulty contractor supplied materials or workmanship" should they surface within two years.

[19] I have been provided with no basis upon which to disturb the adjudicator's decision. Moreover, I see no error of law committed on her part, nor have the Appellants established that their treatment at the hearing failed to accord with the tenets of natural justice.

[20] The Respondent, for its part, did not contend that the adjudicator erred in failing to award interest on the amount owing, or costs to the Respondent.

Conclusion

[21] The appeal is dismissed without costs.

Gabriel, J.