

SUPREME COURT OF NOVA SCOTIA

Citation: *Harriss v. Keating Construction Company, 2014 NSSC 84*

Date: 2014-03-06

Docket: Syd. No. 337036

Registry: Sydney

Between:

Patricia Harriss and Kevin Sutherland

Plaintiffs

v.

Keating Construction Company Limited and Allan R. Keating

Defendants

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Judge: The Honourable Justice Frank Edwards

Heard: February 17, 18, 19, 20, 21, 2014 in Sydney, Nova Scotia

Written March 6th, 2014

Decision:

Subject: Building contracts; home renovation; fixed price or cost plus contract.
Personal liability of owner/operator of the corporate Defendant.

Facts: The Plaintiff homeowners contacted the Defendant Company regarding an intended renovation of their one hundred year-old home. The Defendant, Allan Keating, and his office manager/estimator visited the site early in October 2009. They did an extensive inspection of the home with the Plaintiff Sutherland present. On October 12, 2009, the Defendant Company submitted a proposal to do the requested work for \$150,000.00 plus tax. The proposal stated that it was a “budgetary quote” and stipulated that certain specified items were yet to be priced.

On October 20, 2009, the Plaintiffs paid a \$50,000.00 deposit to the Defendant. The Defendant began work a few days later. The Defendant claims that, shortly after work began, it became apparent that the home was in much worse condition than had been apparent on his initial site visit. Mr. Keating says that he went to see the Plaintiffs. He claims that the Plaintiff s agreed that the work would proceed on a cost-plus basis instead of for the fixed price of \$150,000.00. The Plaintiffs deny that any such change occurred.

On November 13, 2009, the Defendant sent a second proposal to the Plaintiffs again offering to do the requested work for \$150,000.00 plus tax. This document made no reference to the alleged verbal agreement to proceed on a cost-plus basis. Nor did it contain the “budgetary quote” reference of the October 12, 2009 document. It did contain details re the spiral stairs, the deck, and the cabinets, all to be included in the \$150,000.00 price. It made no reference to any items to be priced in the future.

Mr. Keating dismissed the November 13, 2009 document as “an unsigned piece of paper with words on it.” He insisted that he had his verbal cost-plus agreement with the Plaintiffs and that is what he went by. He says he therefore told his office manager to put whatever the Plaintiffs wanted in the November 13 document.

By April 2010, the Plaintiffs had paid \$150,000.00 to the Defendant. By June 2010, the renovation was still not complete. At that time, Mr. Keating told the Plaintiffs that he was stopping work until they paid more money. The Plaintiffs refused. Shortly thereafter, Mr. Keating turned over to a collection agency an invoice addressed to both Plaintiffs for \$71,848.97. He did not provide the invoice to the Plaintiffs until more than two months later.

The Plaintiff s brought action on their alleged fixed-price contract. The Defendants counterclaimed on the alleged cost-plus agreement. The Plaintiffs have also made a claim against

Mr. Keating personally in relation to the collection agency issue.

- Issues:**
1. Fixed price or cost plus contract.
 2. Calculation of deficiencies.
 3. Collection agency issue;
 - (a) personal liability of Alan Keating,
 - (b) whether any liability,
 - (c) punitive damages.

Result: Clearly a fixed price contract situation. Plaintiffs entitled to deficiency allowance of \$36,569.53 less unpaid tax \$22,500.00 plus temporary accommodation allowance of \$1,500.00. Balance to the Plaintiffs: \$15,569.53. A large portion of the Plaintiffs' case was disallowed because the Plaintiffs were deemed to have waived Building Code compliance especially regarding the spiral stairs and the inadequate insulation. Defendants' counterclaim was dismissed.

Collection Agency issue:

(a) Court declined to find either Defendant liable. Defendant not personally responsible because the act was not a distinct personal act rather than an act of the operation. That portion of the Plaintiff's claim dismissed without costs.

(c) Punitive Damages: declined. Available only in rare cases though this was a close call. Defendant's personal behaviour high-handed and deplorable but not sufficiently reprehensible to warrant punitive damage award. Court ordered Defendant to have claim removed from the collection agency.

Cases Noted: **Halifax Growing Dock v. R.** (1921) 62 SCR 338; **Clark v. Scotiabank and Equifax**, (2004) 25 CCLT (3d) (Ont. SC); **Miller v. General Motors**, (2002) 27 BLR (3) 300 (Ont SC); **Newplan Group Ltd. v. Altius Minerals Corp.**, (2010) 301 NFLD & PEIR 2014; **Craik v. Aetna Life Insurance Co. of Canada**, (1995) O.J. No. 3286 (Ont. Gen. Div.), affirmed at (1996) O.J. No. 2377 (Ont. C.A.);

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