SUPREME COURT OF NOVA SCOTIA

Citation: *Harriss v. Keating Construction Company*, 2014 NSSC 106

Date: 2014-03-21
Docket: Syd No. 337036
Registry: Sydney

Between:

Patricia Harriss and Kevin Sutherland

Plaintiffs

v.

Keating Construction Company Limited and Allan R. Keating

Defendants

SUPPLEMENTARY DECISION

Judge:	The Honourable Justice Frank Edwards
Heard:	February 17, 18, 19, 20, 21, 2014, in Sydney, Nova Scotia
Written Decision	March 21, 2014
Counsel:	Robert H. Pineo, Jeremy P. Smith and Alison Morgan, for the Plaintiffs Hugh R. McLeod, for the Defendants

By the Court:

[1] **Introduction:** On March 6, 2014, I rendered a written decision in this matter. (***Harriss v. Keating Construction Company Ltd***., 2014 N.S.S.C 84) I invited Counsel to make written submissions on costs. On March 13, 2014, Defendants' Counsel wrote to me requesting that I issue a supplementary decision dealing with the Plaintiffs' claim of fraud. On March 18, 2014, Plaintiffs' Counsel wrote to me with a list of parts of the Plaintiffs' claim that they felt my decision "may not have addressed." They too wanted supplementary reasons. On March 19, 2014, I advised all counsel that I would accede to their wishes. What follows is a point by point reference to the queried items starting first with the Plaintiff.

[2] **Specs Report (Holloway) lines 15 & 16**: refer to the cost of sealing and painting walls **after** the removal and repair of gyproc. The latter would have been required, for the most part, if I had required Keating to remove the fibreglass batt insulation and replace it with foam insulation. In my March 6, 2014 decision, paragraphs 78 – 81, I dealt with the insulation issue and found at paragraph 80 that there was no compensable deficiency. Therefore, most of the painting contemplated in **Specs** lines 15 and 16 will not be necessary, unless the Plaintiffs, on their own, decide to re-insulate.

[3] Obviously, removal and replacement of the beam will cause disruption of the ceiling gyproc and, to a lesser extent, the wall gyproc near each end of the beam. The disruption, however, will not be nearly as extensive as it would have been had I required all the gyproc to be removed to access the insulation. For reasons that will become clear later in this supplementary decision, I will leave the repair and painting of the gyproc with the Plaintiffs.

[4] Similarly, (Specs line 31), the ceramic backsplash, would only have to have been removed if the insulation was being replaced. I also disallow the estimate of floor protection – a drop cloth for $389.10. (Specs line 19).

[5] **Costs incidental to removing and replacing the beam:** Some context is required. When the Plaintiffs closed their case at trial, the problem with the beam had not been specifically identified. Holloway, the Plaintiffs' expert, allowed only the cost of ($1500.00) having an engineer inspect the beam to determine whether it passed the National Building Code. In fairness, he also allowed that there would be "some associated costs and considerations" if the beam had to be replaced. That is the most I would have been in a position to grant regarding the beam.

[6] It was therefore somewhat of a windfall for the Plaintiffs when the Defendants' expert, Leonard, put the cost of $16,571.50 plus tax on the beam replacement. (See Decision paragraph 71). I allowed that amount.

[7] It is true that I found that Keating should bear full responsibility for the beam deficiency (paragraph 59) and that the Plaintiffs were entitled to rely upon Keating's expertise (paragraph 68). On the other hand, I also found that Sutherland did not want permits (para. 45), was deemed to have waived building code compliance, (para. 49), that he knew permits were required (para. 52), and that he had been advised by his own inspector that "permits must be acquired." (para. 53).

[8] In that context, I would have thought that the Plaintiffs would have been content to be awarded the replacement cost of the beam. With respect, they reach further than I am prepared to go when they also seek incidental costs associated with the beam replacement. To be candid, I seriously considered making the Plaintiffs share the cost of the beam replacement with Keating. In the end, after weighing all the evidence, I decided Keating should bear the cost.

[9] Accordingly, I disallow line 68 – move out and then reset ($97.39); line 69 – job site storage container ($450.00).

[10] I also disallow some of the other cost items queried by Plaintiffs' Counsel. Some, if not most, of those estimates were made by Holloway in contemplation of the entire interior of the house being stripped to access the insulation. As noted, I have rejected an award for the insulation deficiency. That is the claim which, if granted, would have seen the inside of the house stripped. I have made a temporary accommodation allowance regarding the beam replacement. (Decision para. 102). I therefore reject the estimates referenced in paragraphs 171 – 183 of the Specs Report.

[11] **Items Not Addressed in March 6, 2014 Decision:**

Pocket Doors: The Plaintiffs' claimed $288.86 each for the replacement of two pocket doors. (Specs Report lines 86 and 134). My recollection is that Leonard thought only one door needed replacing. I would therefore allow **$288.86** for this deficiency. The Plaintiffs can paint the door themselves so I disallow Specs. Lines 87 and 135.

Suspended Ceiling System: The contract allowed for same in the laundry/utility area. I allow **$461.54** (Specs lines 114, 129, 130, 146). I disallow the estimate for moving the washer and dryer. (Specs lines 88 and 89).

[12] **General Damages:** In the circumstances of this case, and in light of what I have said above, I am not inclined to make a general damage award. I note that the Plaintiffs do not reference the General Damage Claim in their pre-trial brief. Nor

did Counsel mention general damages during his oral submission post-trial. The Statement of Claim claims general damages but the March 18 letter is the first reference to general damages for permanent damage to the house.

[13] I have no doubt but that this has been a very stressful experience for the Plaintiffs. As well, they will have to live with an unlevel floor on the top level of their home. Unfortunately, they brought much of this upon themselves. I am therefore going to limit their entitlement to what they are due under the contract.

[14] **Pre-judgment Interest:** Although this aspect of their claim is not referenced in their March 18 letter, I realized that I had overlooked this award. I had intended to add it in when I rendered my decision on costs. I will allow 2.5% for 3 years on the net award:

Pocket door	$ 288.86
Suspended Ceiling	$ 461.54
Original Award	$15,569.53
Total Net	$16,319.93
PJI $408.00 X 3	1,224.00
Revised Total	$17,543.93

[15] **Defendants' Request:** In his letter of March 13, 2014, Defendants' Counsel requested that I address the Plaintiffs' allegation that Keating made a fraudulent claim against them. (Statement of Claim, paras. 16 and 17).

[16] Keating did make an unjustified claim by sending an invoice for $71, 848.97 to a collection agency. He had cost cards to back up that figure. His own expert however, testified that Keating had charged more hours, and claimed to have used more material than he should have.

[17] I am satisfied that the inflated figure ($71,848.97) had more to do with managerial incompetence than fraudulent intent. I have already commented on his conduct being deplorable, high-handed and arbitrary. (Decision para. 111). I am not convinced that Keating made a fraudulent claim.

[18] **Costs:** Plaintiffs have seven days from receipt of this Supplementary Decision to make a written submission on Costs. Defendants' Counsel will have seven days **after** receipt of the Plaintiffs' submission to make a written reply.

Edwards, J.

Sydney, Nova Scotia