2006 Claim No. 265573
Date:20060821

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Silburt v. MacDonald, 2006 NSSM 24

BETWEEN:

Name: **Barbara and Bruce Silburt** **Claimant**

- and -

Name: **Mr. David MacDonald and Peak Renovations Ltd.**
Defendants

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on October 20, 2006. This decision replaces the previously distributed decision.

Appearances:

Claimant: Barbara Silburt
Defendant: David MacDonald

D E C I S I O N

[1] This proceeding was heard on June 22nd, 2006.

[2] The case involves a roofing job and the termination by the Claimant of the contract for roofing which was between her and the Defendant company. The contract was terminated on August 8, 2005. On August 10, 2005 the Claimant made a partial payment to the Defendant I will have more to say about this payment and the letter of August 10th below.

[3] On August 12th there was a very heavy rainfall and resulting water incursion into the Claimant's home. The Claimant's claim is based on damages resulting from that leak and, the return of what is described as a "goodwill payment" of $1,025.00. The total amount of the claim is $3,700.00 plus costs and in addition to the $1,025.00 is also for damages of $2,110.50 for replacing the insulation and ceiling ruined by the leak, $364.50 for re-wallpapering, and $200.00 for replacing damaged eaves troughs for a total of $2,675.00, not including the "goodwill" payment.

[4] The Claimant has presented a very well organized case with extensive written materials. It is obvious that she has spent a great deal of time putting the materials together. Based on the evidence presented there would appear to be no question whatsoever that the roofing job was being done in a sub-standard manner.

[5] Mr. MacDonald acknowledged that there were problems on this job. However, at this point I would question the relevance of that material in light of what would appear to be issues arising from the claim that has been brought forward. That is to say, the claim here is for damages arising from the water leaking into the home which was due to the Defendant's failure to make the house roof watertight, at least temporarily, upon being ordered off the job or, alternatively, in failing to advise the Claimant that the roof was not watertight. The other issue relates to the "gratuitous" payment of $1,025.00 and the claim for its return.

[6] Neither of these issues directly relates to the level of quality of work performed by the Defendant company. If the Defendant contested his removal from the job, then that evidence would be highly relevant. At this stage however, it would appear that the Defendant accepted the termination by the Claimant of the contract or, to put that another way, being ordered off the roof by the homeowner.

[7] I will deal with the two claimed items.

Payment of $1,025.00 on August 10, 2005

[8] This payment was made by the Claimant within two days of terminating the roofing contract. It was made at least partly in response to the requests or demand of the Defendant for some payment on the contract. The Defendant gave evidence that there were losses on the contract and that this amount was insufficient to cover his materials, labour, and tipping fees. I accept that evidence.

[9] The Claimants assert that the payment was made "under duress". I heard no evidence to support a finding of duress. The Claimants also assert that this payment was made before they were aware of the Defendant's breach of contract. The evidence is quite against this assertion.

[10] It seems to me that there are two ways in which this payment may be characterized. First, as a negotiated settlement to sever the relationship between the customer and the contractor. Secondly, as a purely gratuitous payment which, from a legal point of view, constitutes a gift.

[11] While the letter enclosing the cheque refers to it as a "gratuitous payment" made without admission of liability, it seems to me that in light of the surrounding circumstance, and in particular that Mr. MacDonald had been pressing for some payment, and that work had been done, materials ordered, and a labourer in addition to Mr. MacDonald had been on site, a more accurate characterization is the former. If that is right, there is no legal basis for the return of the money.

[12] On the alternate view, it seems to me that there is also no legal basis for the return of the money. That is, if it purely was a gift, than I am not aware of any legal basis to reverse the intention to make a gift and order the gift returned.

[13] As already stated, it seems to me that the circumstances that this was a negotiated settlement amount to conclude a contractual arrangement which had been terminated, by the customer.

[14] At arriving at this conclusion, I have considered what would have been the case had there not been the heavy rainfall on August 12th and had Mr. MacDonald gone back to Ms. Silburt seeking a further payment in addition to the payment of $1,025.00. I have no doubt that had

he done so that she would have held up that payment as a shield to any further claim that he might have had.

[15] In light of the above, the claim for the return of the payment is dismissed.

Damages - Leak

[16] The evidence of the principal witnesses is at significant variance in a material regard. That is, Ms. Silburt states that she was not told by Mr. MacDonald that her house would leak and she asserts that he should have told her this. Mr. MacDonald states on the other hand that he did indeed give this advice to Ms. Silburt on August 8th when he was taken off the job site.

[17] If Mr. MacDonald's evidence is accepted on this point, then it would surely follow that there would be no claim by Ms. Silburt as she would be seen to have been clearly put on notice of the potential risk and would be seen as having accepted that risk by ordering the contractor off the job.

[18] I note that Ms. Silburt did not in any way suggest that Mr. MacDonald told her the roof was watertight. Her evidence would indicate that there simply was no discussion on this point and her position that would seem to flow from that is that in the circumstances if the roof was not watertight, Mr. MacDonald had a duty to advise the customer of that. Or to put this another way, was Ms. Silburt entitled to assume, in the absence of advice to the contrary, that the roof was watertight at the point at which she ordered Mr. MacDonald off the job site.

[19] It seems to me that the responsibility here must fall on the "expert", i.e. the contractor as it is that party, as between the two, that has the knowledge of whether or not the roof was watertight. I am not prepared to find that in the circumstances here the contractor had a duty to leave the home in a watertight condition given that the homeowner in effect ordered the company off the site. Such a demand by a homeowner cannot be ignored; at that point, the licence to be on the property is rescinded and the contractor in effect becomes a trespasser.

The contract was terminated and I cannot see any basis in law to require, in such circumstances, that the contractor must leave the building in a watertight condition.

[20] However, the contractor having the knowledge that the building was not watertight, which it seems must be imputed to the contractor here, it seems to me that there is a positive duty to convey this information to the homeowner in these circumstances.

[21] On the evidence I heard and having observed the respective demeanors of the two principal witnesses, I accept Ms. Silburt's evidence that she was not advised by Mr. MacDonald that the roof was not watertight. I am aided in this conclusion by considering that the opposite conclusion would require me to conclude that Ms. Silburt would have taken the risk of having her home leak for some five days. I believe this to be extremely unlikely that any homeowner would adopt such a risk. I find that this information was not conveyed to Ms. Silburt.

[22] In light of the above, I find that the contractor is responsible for the damages resulting from the failure to advise that the home was not watertight. I fix these damages at the amount claimed and which, appear to be reasonable and causally related to the breach. That is, the amount of $2,675.00 referred to above.

[23] The Claimants have sued both Mr. David MacDonald and Peak Renovations Ltd. The evidence established that the contract was with Peak Renovations Ltd. Accordingly, a breach of contract would resound only against Peak Renovations Ltd. and not against Mr. MacDonald. As to an alternate finding in tort against Mr. MacDonald, I did not have the benefit of legal submissions on this issue but while the corporate Defendant may be liable on a tort basis I am not satisfied that the director of the company would in law share the responsibility. Accordingly, the claim against Mr. MacDonald in his personal capacity is dismissed.

Costs

[24] I will allow the following costs:

Filing Fee	$ 80.00
Bailiff Fees	$127.00
Allowance for copying/photographs	$ 50.00
Witness fees	$300.00
Total Costs	**$557.00**

[25] Part of the costs amount is for two separate nights of witness fees. This proceeding was originally scheduled to be head a week previous but Mr. MacDonald was not prepared to proceed. At that time he agreed, and I took it to be inclusive of his personal capacity that he would pay for the additional costs in either event of the cause. Accordingly, while the main claim is dismissed against Mr. MacDonald personally I will order that he be responsible jointly and severely with the company for the first night of witness fees, i.e. $150.00.

Disposition

[26] It is hereby ordered that the Defendant, Peak Renovation Ltd. pay to the Claimants the following:

Debt:	$2,675.00
Costs	$ 557.00
Total	**$3,232.00**

[27] It is further ordered that the Defendant, David MacDonald, pay to the Claimants the sum of $200.00.

DATED at Halifax, Nova Scotia, this 21st day of August, 2006.

Michael J. O'Hara
Adjudicator

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Copy Defendant(s)