Claim No: 269810

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Ray Cox Construction v. Kasperson, 2007 NSSM 63

BETWEEN:

RAY COX Jr. c.o.b. as RAY COX CONSTRUCTION

Claimant
Defendant by Counterclaim

- and -

DEBORAH KASPERSON and PAUL E. KASPERSON

Defendant
Claimant by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on September 11, 2007 and October 17, 2007

Decision rendered on October 29, 2007

APPEARANCES

For the Claimant - self-represented

For the Defendant - Lisanne M. Jacklin, counsel

BY THE COURT:

[1] This is a reassessment of damages arising from the Counterclaim of the Defendants.

[2] The matter was heard by another Adjudicator in December 2006, and his reasons dated the 22nd of January 2007 are on record. On appeal to the Supreme Court of Nova Scotia it was later found that he had not properly considered all of the evidence supporting the damage claim of the Defendants, and the matter was sent back for a reassessment to be performed by a different Adjudicator. Most of the factual findings from the original trial stand.

[3] I will not repeat what can be found in the original reasons other than to state that the claim was for the Claimant's work done in constructing a home for the Defendants. It has already been determined that the Defendants owe the Claimant $14,438.25.

[4] It has also already been determined that the Claimant is legally responsible for deficiencies in the in-floor heating system, which resulted in the system being unable to achieve reasonably balanced temperatures in the house. At the time of the original trial, it had been unclear what would be done to rectify the problem. The original Adjudicator made an assessment of damages that was found to have ignored evidence and been too low.

[5] With the benefit of hindsight, the passage of time and further evidence before me, the conclusion is now inescapable that the Defendants have

incurred significant expense. The assessment can be made in more than one way although the result is the same.

[6] The Defendants received and ultimately accepted advice that the original system could not be salvaged. They tried to their great frustration for about two years and cannot be expected to have lived with it through yet another heating season.

[7] It is not open to the Claimant to challenge the finding that the system was deficient. It is also too late for the Claimant to attempt to establish that the system could have been repaired at a lesser cost, as he attempted to do at the hearing before me, since it has been taken out of service and replaced with a forced-air system. The Claimant called a witness who appeared to be quite knowledgeable about in-floor systems, who offered some theories as to why the system was problematic and how it might have been salvaged, but his evidence was purely hypothetical since he had not even been in the home. The Claimant never expressed any desire to have the system inspected by his own expert from the time he first understood the extent of the problem (the time of the original trial) until this past summer when it was replaced, and unfortunately there is no way to test any of his or his witness's theories.

[8] The Defendants explored several options. The cost to rip up the wood floors, remove all of the concrete and re-install another similar system would have been prohibitive - perhaps in the range of $100,000 and up. It would also have been massively disruptive to their lives. Instead, they opted to purchase a heat pump and have the home retrofitted for a forced

air delivery system. This was a much less disruptive alternative. The cost to them for the retrofit was about $30,400.

[9] I did not receive detailed evidence of the original cost of the labour and materials for the in-floor heating system, but there is evidence upon which I find that the cost of that system would have been at least the amount spent on the new system, if not more. That money was spent to no benefit. The system is useless and has no salvage value. The Defendants have essentially paid for two complete heating systems when they ought to have paid for only one.

[10] By any measure the damages traceable to the deficient heating system exceed $25,000, which is the jurisdictional limit of this court. I could base it on the cost of the original system which is useless, or on the cost of the replacement system. It makes no practical difference. Despite my incomplete understanding of what the Claimant did to create such a disastrous problem for the Defendants, I must accept the original finding that the Claimant is legally responsible for those deficiencies.

[11] The damages arising from the Counterclaim are accordingly assessed at $25,000.00.

[12] The original decision appears not to have awarded the Claimant his filing fee for the claim, nor the cost to the Defendants of the Counterclaim. I do not intend to take any different course. Nor in my discretion do I allow either party any prejudgment interest.

[13] In the result the Defendants will have a judgment for $25,000.00 less $14,438.25, for a net of $10,561.75.

Eric K. Slone, Adjudicator