

Claim No: 290681

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Swinehammer v. Hayseed Acres Inc., 2008 NSSM 13

BETWEEN:

JAMES SWINEHAMMER of JC Excavating

Claimant

- and -

HAYSEED ACRES INCORPORATED.
and JACK H. WHEBBY

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on February 26, 2008

Decision rendered on March 4, 2008

APPEARANCES

For the Claimant: Myra L. Jerome
Counsel

For the Defendants: James D. MacNeil
Counsel

BY THE COURT:

- [1] This is a claim for the balance owing on a contract to build a logging road. The issue in the case is whether or not the Defendants, or either of them, was actually a party to that contract and responsible for payment. The sum unpaid is \$10,000.00.
- [2] Many of the facts are not disputed. The Claimant operates an excavating business in East Chezzetcook. One of the services he provides is road building.
- [3] The Defendant Jack H. Whebby (“Whebby”) is the sole officer and director of the Defendant Hayseed Acres Incorporated (“Hayseed”). Hayseed is the owner of a number of wood lots in the Musquodoboit area.
- [4] Whebby had an understanding with a gentleman named Peter Silby (“Silby”) who is a woodsman, that when available he (Silby) would log some of Hayseed’s land. In the late summer or fall of 2007, Silby showed up and announced that he was ready to begin logging.
- [5] The Hayseed land is not near any road that would allow heavy equipment to be moved in and logs to be removed. One possibility was to use an abandoned CN rail bed as a logging road, but that was not allowed. It was determined that a road would have to be constructed to allow access, and that this road would have to be built mostly on land belonging to a neighbouring property owner, Nina Paper.

- [6] Whebby negotiated an agreement with Nina Paper that allowed him a licence to cut trees and clear a temporary logging road over its property. The road actually begins at Highway 357, crosses a small parcel of Hayseed land, crosses the CN rail bed and then proceeds over the Nina Paper land to connect up with Hayseed's larger parcels that were to be logged.
- [7] Whebby testified that he first believed that Silby would build the road himself, as he was equipped to do so. It turned out that Silby's equipment was not available. Silby said he would arrange for someone else to do the road.
- [8] It is undisputed that Silby contacted the Claimant and directly engaged him to build the road. The Claimant sought to characterize Silby's role as that of an "agent" for Whebby or Hayseed, but there was no evidence that any agency language was used that would have identified such a relationship. In fact, subsequent events make fairly clear that it was vague at the outset for whom the Claimant would be working.
- [9] The road was cleared and excavated over a period of thirteen days ending in early October 2007. There is no dispute about the quality of the work. Whebby himself did not meet the Claimant until work had already started, but was a frequent presence on the project, even using his own dumptruck to haul material. Silby was also around to an extent that was not really specified at trial.

- [10] At the conclusion of the project, the Claimant turned to Whebby and Silby and asked to whom the bill should be made out. It is here that the evidence diverges, though not dramatically.
- [11] According to the Claimant, Whebby simply said that it should be made out to Hayseed. The Claimant later went back to his office and hand wrote out the invoice for a total of \$20,571.00 (including HST). Because he did not know where Whebby or Hayseed was located, he had to look it up in the phone book. He then drove out to hand deliver the bill to Whebby. It is not contested that Whebby looked at the bill and remarked that it seemed a little higher than he and Silby had anticipated. The Claimant explained that there was perhaps more expense for culverts than Whebby had realized, and the Claimant also pointed out that the HST was a significant portion of the cost.
- [12] According to the Claimant, Whebby said that he would pay half right away and that he would talk to Silby about the remainder. It is also uncontested that Whebby shortly thereafter arranged for a certified cheque for \$10,571.00 to be delivered to the Claimant, leaving precisely \$10,000.00 unpaid. The Claimant states that he still regarded the Defendants, Hayseed and Whebby, and not Silby, as responsible for this balance.
- [13] Whebby's evidence was subtly different on a couple of points. He testified that he had an arrangement with Silby to split the cost of the road, although he considered that it was Silby who had hired the Claimant. When asked by the Claimant to whom the bill should be made out, knowing that he would be paying half, Whebby says that he wanted to make sure that he had a bill to substantiate the expenditure that he was

making. He noted that at that time he really had no idea how much the bill would be.

- [14] When presented with the bill, Whebby says that he explained to the Claimant that he would pay "his half" immediately, and he went out of his way to obtain certified funds for the Claimant's benefit.
- [15] It is also undisputed that Silby never paid anything. There was no evidence that the Claimant ever sought payment from Silby directly. His expectation appeared to be that Whebby would be obtaining money from Silby to pay him. He called Whebby a few times, to no avail. On one of those calls Whebby remarked (or complained) that he had only ever received \$4,000 from Silby.
- [16] The peculiarities of financial arrangements in the logging business were touched upon. Whebby explained that with private wood lot owners, the arrangement is that the logger does the work at his own expense and the land owner is simply paid a fixed amount (I believe it was \$65.00 in this case) per cord of wood taken. He testified that in this case Silby had removed \$90,000 worth of logs from his property and had only paid a small fraction of what he owed Whebby, namely the \$4,000 referred to above.
- [17] On this financial model the responsibility for building the road would appear to fall upon the logger, although where the logs would otherwise be inaccessible it is also conceivable that the owner might have to pay some or all of that cost, in order to be in a position to sell his logs. Another case where the owner might be financially responsible for the road would be

where the road has some enduring value and is an improvement to the land.

- [18] Suffice it to say that in this instance, apart from Whebby's evidence which could be criticized as self-serving, it is far from clear what arrangements applied as between Silby and Whebby, although the notion that they were to split the cost appears quite plausible. It does appear that the expectation was that there would be a significant amount of money generated by the logging that would have been more than enough to justify the expense.
- [19] There is no evidence upon which I could make a finding that this road is of any enduring benefit to the Defendants. Most of the road is over someone else's property, and there is no evidence as to how much longer it could be used, or even if there are any more logs to be taken in the foreseeable future.
- [20] In the final analysis, the Claimant was hired by Silby to build a road. There was nothing explicit that clothed Silby as an agent of the Defendants, as it was equally consistent that he was fulfilling his own responsibility to build the road. The fact that the Claimant had to ask what name to put on the bill illustrates his uncertainty. If it had been clear in his mind that his contract was with Hayseed or Whebby, he would not have needed to ask.
- [21] The question then arises: by asking that it be made out to Hayseed, did Whebby confirm for all purposes that Hayseed was and always had been the contracting party? I do not think so. It was an equivocal act on Whebby's part. His explanation that he needed an invoice to substantiate

his payment is plausible. I accept that there are inconsistencies with his stated intention, such as the fact that Whebby or Hayseed did not pay precisely half (which would have been \$10,285.50 rather than \$10,571.00) and the fact that Whebby did not simply ask for the bill to be split into two bills. However, given the very lackadaisical manner that prevailed throughout this process, inconsistencies are not surprising.

- [22] Normally it is discernible at the outset who is a contracting party. Absent the evidence of the after the fact conversation about the bill, all of the other evidence points more to Silby than to Whebby or Hayseed. It was Silby who had dealt with the Claimant before and who had all of the direct contact with him prior to the work being started. It does appear that much was left unsaid in the dealings, including but not limited to cost. No estimate was asked for and none given - not as to the total cost nor even as to hourly or daily rates.
- [23] It appears to me that the Claimant acted on faith and little else in putting in a great deal of work without knowing who would pay for it. Perhaps he has not been hurt in previous similar dealings, but he took a large risk that his faith would prove misplaced.
- [24] In my view, a party performing work and intending to sue for the cost, has the primary onus to establish the basic terms of the contract, including most significantly who would be financially responsible. Failure to establish these terms is his own risk. In cases where there is uncertainty, the law can sometimes step in and fill in the gaps, such as by allowing a *quantum meruit* where there has been no agreement as to price. Where the identity of a contracting party is uncertain, the law of unjust enrichment

can sometimes step in to ensure that the party who benefits from the work bears the burden of it.

[25] In the case here, I am unable to find that either of the Defendants was the contracting party, or that either of them benefited unjustly from the Claimant's work. Given the convoluted arrangements applicable to logging, as well as the fact that the road is on an unrelated party's land, it is not clear that either of the Defendants has been enriched, let alone unjustly so.

[26] Both counsel were critical of the other for not having brought Mr. Silby to court to testify, although I got the distinct impression that he might have been hard if not impossible to locate. It is indeed possible that he might have shed some light on the arrangements. He might also have answered for why it appears that he has created a situation where two seemingly honourable men are out a great deal of money and forced to fight with each other, while he (Silby) appears to have walked away with a great deal of money that is not entirely his to keep. I cannot of course make any ultimate findings against Silby because he was not a party to the action nor a witness in court, but it does appear that for purposes of this case only it is Silby who has left both of these parties to suffer financial losses.

[27] In the end, the Claimant has the burden of proving his case on a balance of probabilities. I am unable to find that he has proved that either of the Defendants owes him money. The evidence was equivocal and the equities are roughly equally balanced. As such, the claim must be dismissed.

Eric K. Slone, Adjudicator