

Claim No: 07-289614
and Claim No: 07-289615

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Royale Flooring v. Hotel Nova Scotia Ltd., 2008 NSSM 21

BETWEEN:

3107313 NOVA SCOTIA LIMITED,
carrying on business as ROYALE FLOORING

Claimant,
Defendant by Counterclaim

- and -

HOTEL NOVA SCOTIA LIMITED

Defendant,
Claimant by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on February 12, 2008

Decision rendered on April 1, 2008

APPEARANCES

For the Claimant: J. Patrick Atherton
Counsel

For the Defendants: Robert Cragg, Counsel
Owen Bland, Articled Clerk

BY THE COURT:

Introduction and preliminary issue

- [1] There are two actions before the Court involving the same parties. The amount claimed in the first action (No. 07-289614) is \$23,427.00. The second action (No. 07-289615) claims \$4,446.00. The total amount at stake is therefore potentially \$27,873.00.

- [2] It was agreed by counsel that the two actions could be heard together, as they both arise from the same series of transactions, although this was without prejudice to the Defendant's argument that the commencement of two claims was an improper attempt to split the cause of action in order to circumvent the court's \$25,000.00 monetary jurisdiction.

- [3] The Claimant is in the business of supplying and installing flooring products including, in this case, ceramic tiling. The principal of the Claimant and its directing mind is Todd Royale.

- [4] The Defendant is the owner and operator of the Westin Hotel in downtown Halifax. For the sake of the narrative I sometimes refer to the Defendant as "the Hotel."

The Facts

- [5] The claim and counterclaim arise from a significant renovation of the hotel swimming pool area. The Claimant sues for the cost of the supply and installation work in an area of approximately 1,800 square feet. The

Defendant claims that the work was substandard and of no value. It counterclaims for the cost of completely redoing the work, which it has not yet done but proposes to do.

[6] The deficiencies that are asserted are:

- A. Incorrect tile grout throughout
- B. Uneven colouring caused by the use of several different dye lots
- C. Excess grouting in certain areas, giving a poor appearance
- D. Some tiles were set upside down
- E. Some improper spacing of tiles
- F. Sharp and jagged edges around some drains and access panels
- G. Inconsistent and uneven tile joints
- H. No non-slip surfaces on steps, and
- I. Pool nosing tiles damaged by the Claimant's subcontractor.

[7] I believe it is fair to say that the first two alleged deficiencies are the most serious, by far, because it would be virtually impossible to correct them without almost or completely redoing the job.

[8] The Claimant's basic position is that it supplied the precise tiles that were specified, and had no control over the dye lots. As for the grout, it says that there was no grout colour specified, and Mr. Royale simply chose a neutral "straw" colour similar to the tile colour which he believed was appropriate. Its position on other deficiencies is basically that these are minor and for the most part fixable.

The Project's History

- [9] A complete facelift of the pool area was something that was in contemplation for some years, dating back to when the current owners took over this hotel. Eventually in 2005 the Hotel hired a designer, Linda O'Hara, whose job encompassed all facets of the pool area, and which included choosing the type and colour of ceramic tile and the hiring of a supplier and installer. Ms. O'Hara was an experienced project manager with some 30 years of experience. She described the process that she went through to select the tile and grout colour. It was her evidence, consistent with all of the Defendant's witnesses, that it was clear from the outset of the project that the grout had to be a dark colour. This is a critical point in this case.
- [10] As described by Ms. O'Hara and others, the problem with a light coloured grout is that it appears darker when it gets wet. The effect in a swimming pool area is that the areas nearest the water get and stay wet while other areas of the pool deck do not, with the result that the area appears blotchy and the impression can be created that some of the grout is dirty or mildewed. Having a black or dark grey grout throughout creates a consistent look unaffected by whether or not it is wet.
- [11] Ms. O'Hara testified that she hired Mr. Royale and his company and had several meetings with him where the subject of grout colour was discussed. She was very clear in her evidence that the colour "graphite" was discussed with Mr. Royale, and that he never questioned the choice of colour or the rationale.

[12] The fairly thin paper trail does not resolve this question. There is a Quotation Sheet dated May 13, 2005 which contains the following information relevant to this case:

<i>To supply and install all floor tile as per spec. in pool area</i>	<i>\$19,400.00</i>
<i>Include Removal and Floor Prep.</i>	
<i>HST</i>	<i>2,910.00</i>
<i>TOTAL QUOTATION</i>	<i>\$22,310.00</i>
<i>Columns and walls \$2,400.00</i>	
<i>Ditra Matt</i>	<i>\$1,000.00</i>

[13] The specifications are several hand-drawn sketches with notes, which are quite detailed but say nothing about grout colour.

[14] Although this quote was given and the specs created in 2005, the decision to proceed was not made until about a year later. Work was to begin May 7, 2006.

[15] The supplier of the tile was Olympia tile. Mr. Royale testified that he measured up the job and ordered the tile. One of the issues that came up early on was whether or not to remove all of the existing tile or tile over it. Mr. Royale testified that both are accepted practices and that it would have been cheaper not to have to remove the tile. He said that someone associated with the Hotel insisted that all of the tile had to be removed, so he subcontracted with Atlantic Demolition to do that work at a total cost of \$4,446.00, which he seeks to recover in the second claim.

- [16] Mr. Royale stated that he was indifferent to what type of grout would be used since the cost is the same. Not having a clear choice from the Hotel he chose the light coloured grout that has become an issue.
- [17] Mr. Royale further testified that he was present on most days during the work, and that he did not notice the differences in colouring arising from differences in dye lots. He testified that this would not have been obvious until all of the tile was down, grouted and cleaned.
- [18] It was further Mr. Royale's evidence that he felt rushed to complete the job because the Hotel had a convention coming in for the long weekend in May and had to have a functioning swimming pool.
- [19] It is not disputed that Ms. O'Hara was not in town during the job because she was away on a long-planned trip. Others from the Hotel were there frequently to observe, though it is not clear whether they had the same eye to detail as she would have had.
- [20] The complaint about the grout colour only came up after all of the grouting was done. As explained by the Hotel's witnesses, grout lightens as it dries and it was not until a few days after it was installed that it became obvious that the grout was as light-coloured as it was.
- [21] The pool was up and functioning for the Victoria Day weekend, but clearly the Hotel was not happy. Complaints about the dye lots were also being made, and many efforts were made to see if the appearance could be helped by various means, including adding dark dividing strips strategically

to disguise the shift in colour between one section and another. An effort was made to stain the grout with linseed oil, but this did not work. Various other claimed deficiencies were worked on.

- [22] Suffice it to say for purposes of this decision that the end result was still not to the satisfaction of the Hotel. The position of the Claimant is that the Hotel has a functioning pool area which is, admittedly, not quite as nice as they had hoped, but which is not entirely without value.
- [23] The position of the Hotel is that it is a high class hotel that contracted for a job of a high calibre, and it should not be obliged to accept anything less.
- [24] A number of factual findings can be made based upon the evidence before me, which findings drive the result.

Was demolition included in the price?

- [25] Notwithstanding the evidence of Mr. Royale, it seems to me that the quotation could not be clearer about what was included in the price. The words used are "Include Removal and Floor Prep." While it is possible that such language could refer to something else or something less, I do not find there to be any compelling evidence to qualify the inviting inference that demolition was included in the quote. Mr. Royale testified that this removal only referred to certain areas where the existing tile was buckling. This is a specialized meaning that could have been intended, but would not be the ordinary meaning of the words used. Had Mr. Royale honestly believed that he was being instructed to do something more than the contract called for, it would have behooved him to obtain a further written

document to back up such a claim as an extra. Otherwise I believe he is bound by the ordinary meaning of the words used. I am not saying that compelling evidence of a specialized meaning might not prevail. I am saying that I did not find Mr. Royale's evidence on this point to be convincing.

- [26] As such the claim for this extra should be dismissed outright, and it is not necessary to address the claim-splitting argument.

Was graphite grout specified

- [27] I am slightly troubled by the fact that nowhere in the specifications is there any reference to grout colour. However, assuming that there was any real uncertainty it is at least equally if not more troubling to consider why Mr. Royale would not have insisted that Ms. O'Hara or hotel management make the decision about what grout to use. Surely Mr. Royale knows, as would any layperson, that a different coloured grout can fundamentally change the overall effect of a tiled area. Knowing how meticulous Ms. O'Hara had been in the specifications concerning other details of the project, Mr. Royale surely had to have known that she would not have left grout colour simply to chance, hoping that he would choose an appropriate or neutral colour.

- [28] I am inclined to accept that the graphite colour was mentioned in at least one of the meetings where Mr. Royale was present, and that it was reasonable for the Hotel to believe that he knew what they wanted. Most likely it slipped his mind later. However, his fundamental error was not to have asked and to have assumed that he could make a unilateral choice.

Even if the subject had never been raised, I find that he had a positive duty to raise the subject with his client. Had he believed or even suspected that the Hotel had no particular choice in mind, he would have known that there were options and that the entire look of the project would be affected, and that this was a decision which the Hotel and not he should be making.

[29] It also makes perfect sense to me that dark grout would be more suitable for a pool, because of the wetness factor, and it is also difficult to believe that Mr. Royale would not have been aware of that. As such I find that Mr. Royale supplied an incorrect and inappropriate grout colour which has significantly undermined the usefulness of the project.

[30] All parties appear to be in agreement that removing large amounts of grout is almost as much work as replacing all of the tile. Grout by its nature is very hard and would have to be removed with considerable force, which would be hard to do without damaging the tile. In other words, repair of just the grout is not feasible.

The dye lot problem

[31] It is also a matter of common knowledge that material such as ceramic tile can vary from dye lot to dye lot. Over an area with multiple rooms or divided areas, allowances can be made, but in a large area such as this pool deck the transition from one dye lot to another creates a very poor appearance. The photographs in evidence disclose that the transitions are quite obvious and the effect is unattractive and unprofessional.

[32] An experienced tile installer such as Mr. Royale ought to have anticipated and resolved such a problem. If a consistent supply could not have been obtained from his supplier, he ought not to have bought from that supplier unless his client were fully apprised and waived the consequences, preferably in writing. Every effort ought to have been made to assure a consistent colour throughout. In this respect Mr. Royale failed. Either he never turned his mind to the problem or he took a calculated risk that the differences would be so subtle as not to be noticeable. The end result is the same. The workmanship was substandard.

Other deficiencies

[33] The Hotel produced an expert report from an engineer, Michael Geislinger, detailing these alleged deficiencies and offering the overall opinion that this was not a job well done. A second opinion from Orlando Di Mattio of European Tile & Flooring reached the same conclusion.

[34] Mr. Geislinger described his initial reaction when first viewing the job, which was “oh my God, what happened here?” I believe this was a telling reaction from a qualified and essentially disinterested party. I believe this reaction speaks to the magnitude of the deficiencies evident in the areas where the Claimant worked.

[35] Given my overall finding that the work done was fundamentally deficient because of the grout and dye lot issues, I do not need to go into detail about the other deficiencies. I believe that some of them could have been fixed and others perhaps lived with.

The Counterclaim

- [36] The Defendant counterclaims for the anticipated cost to redo the entire pool. It has lived with the result for about two years now, in part no doubt because it awaits closure in this litigation.
- [37] According to the quotes obtained, the cost to have another contractor remove what is there and redo the work will be well in excess of what the Claimant seeks in his claim. The lowest of the quotes obtained and placed into evidence is \$33,000.00.
- [38] I do not accept that the Hotel will inevitably have to spend \$33,000 or more. In a matter as significant as this, it would behove the Hotel to obtain further quotes and perhaps get the cost down. This accords with its duty to mitigate its damages. The fact that the Claimant originally quoted this job for the amount that it did, is evidence that I am entitled to consider which satisfies me that the cost of redoing the job would not necessarily be as high as \$33,000.00. However, I do have to make a finding for purposes of the Counterclaim and, based upon the quotes obtained and the original cost of the work, find that the likely cost to replace the work would be \$30,000.00, all-inclusive.

Legal principles

- [39] The law is not complex. A party such as the Claimant is not entitled to succeed on its claim for the price of work done if that work is fundamentally deficient, as I find it to be. It may be that a hotel with lesser standards might be willing to live with a second-class job, but that is not

the situation here. It is my finding that the work has no value; indeed to the extent that it costs money to remove it, it is a liability.

[40] Mr. Cragg in argument likened the situation to where someone paints a house entirely the wrong colour. The analogy is imperfect because colour choice can be a purely subjective matter, while the difference between good quality work and poor quality work has an objective component. Nevertheless, in both situations the party is entitled to the benefit of their bargain and should not have to accept something totally different.

[41] On the Counterclaim, and using my figure of \$30,000.00, it is my understanding that the Defendant is essentially saying that it will cost \$30,000.00 to get the benefit of the contract that it entered into with the Claimant. While styled as a counterclaim, it seems to be partly a defence and set-off. If in theory it would have cost \$5,000.00 to repair the Claimant's work, it would have been asking for a \$5,000.00 abatement to the price. Here it is essentially saying that it owes the Claimant nothing because it will still cost \$30,000.00 to get what it contracted for in the first place.

[42] The matter only really becomes a Counterclaim to the extent that it will actually cost the Defendant more than the amount offsetting the claim, to get the benefit of what it originally bargained for.

[43] The amount claimed on the original contract is \$23,427.00. I have already found that the demolition cost was not an extra, but was included in the price. So the end result is that the Defendant is entitled to recover against the Defendant the difference between \$30,000.00 and \$23,427.00, or

\$6,573.00. The Defendant is entitled to a judgment for that amount. No interest should be awarded because the amount has not been spent.

Costs

[44] The Claimant obviously should not have its costs. The Defendant would have paid \$56.60 in each of the two actions to file the Counterclaim. In my view it ought to recover these amounts. No other costs have been claimed or proved.

Result

[45] In the result the Defendant is entitled to the following amounts on its Counterclaim:

Damages	\$6,573.00
Costs	\$113.20
Total	\$6,686.20

Eric K. Slone, Adjudicator