

Claim No: 291383

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: K.B. Clarke Disaster Kleenup Ltd. v. Beals, 2008 NSSM 22

BETWEEN:

K.B. CLARKE DISASTER KLEENUP LTD.

Claimant
Defendant by Counterclaim

- and -

ROGER BEALS and VALERIE BEALS

Defendants
Claimants by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on March 18, 2008

Decision rendered on March 25, 2008

APPEARANCES

For the Claimant - James Geddes, project manager

For the Defendants - self-represented

BY THE COURT:

- [1] The Defendants Roger and Valerie Beals experienced severe smoke damage in their house from a stove-top fire in June 2007. They made a claim on their fire insurance policy. The Claimant was the company recommended by the insurer and retained by the Defendants to perform cleanup and restoration.

- [2] The claim was filed to recover the cost of the work, namely \$9,767.47. A cheque for that amount was issued many months ago by the insurer, payable to the Claimant and Defendants jointly. The Defendants were unwilling (until the date of trial) to endorse and release the cheque because of deficiencies in the work which they had asked be rectified. The Counterclaim seeks a determination of the value of those deficiencies. The amount claimed is \$3,186.90.

- [3] The Defendants produced photographs purporting to show the many deficiencies that have clearly disappointed their expectations. Many of them are fairly minor, such as paint smeared on door hinges, or minor maladjustment of cupboard doors. What the claim ultimately boils down to is the following items:
 - A. Painting deficiencies which are estimated to cost \$1,150.00 to remedy.

 - B. Scratched glass from a china cabinet which is estimated to cost \$96.90 to replace and repair.

- C. The \$200.00 cost to replace two ceiling fans which are said to be the wrong colour.
- D. The cost of sanding a pine staircase that was allegedly spattered with paint, for which they paid \$240.
- E. The replacement cost for two end tables, the surfaces of which were allegedly damaged by unknown solvents or substances used by the Claimant's staff, which amount is said to be \$1,200.00.
- F. The cost of a cutting board for the kitchen, said to have been missed in the replacement, and which is estimated to cost \$300.00.

[4] The contract for the job was placed in evidence. One clause is significant. Under paragraph 6 of the Terms and Conditions - Warranties - it is stated:

“The workmanship of the contractor shall be guaranteed as per our Warranty Form unless specified otherwise, during which period the contractor shall at his own expense correct any defect arising from his workmanship. In the case of questionable warranty items the owner is responsible to determine and prove the exact cause of the defect.”

[5] I bring up this clause because there were clearly many communications between the Defendants and the Claimant about deficiencies, but in the end there was not agreement that some of these items were the fault of the Claimant. Moreover, the Defendants at some point decided that they did not want the Claimant to perform deficiency work.

[6] Although I would not normally expect to hear about settlement attempts, it came out at the trial - and indeed the parties made a point to bring out, to demonstrate their reasonableness - that the Claimant had been prepared to offer \$500.00 as a global amount to address deficiencies, while the Defendants were holding out for \$2,500.00.

[7] In the final analysis, the contract is clear that the Defendants have a burden to prove that the deficiencies were caused by the clean up effort and were not preexisting conditions, or caused by something else for which the Claimant is not responsible. As I will go through the items, it is clear that I do not believe that they have proved that all of these claims should rest at the feet of the Claimant.

A. Painting deficiencies: \$1,150.00

[8] The photographs placed in evidence show that in some areas the original wall colour is bleeding through. Another coat should have been applied. A number of photos purport to show careless painting. Not all of these instances are obvious to me, as I view the photos, and I must base my decision on the evidence received. The quote of \$1,000.00 plus HST seems to me to be proposing to repaint entire areas that may not need to be repainted. It also includes doors which according to the Claimant were not part of the original quote. In the end, the best I can do is estimate that an allowance of \$350.00 should be adequate to allow the Defendants to have someone in to bring the paint job up to a higher standard.

B. Glass replacement: \$96.90

[9] There was not a great deal of evidence about these items. On the evidence I am prepared to accept that they were damaged during the cleaning process and the estimate seems reasonable. I will allow the \$96.50 claimed.

C. ceiling fans: \$200.00

[10] The two ceiling fans that were replaced appear to be suitable and functioning properly, but are apparently not for aesthetic reasons precisely the fans that the Defendants want. They want ones with blades that match the wood colour of their cabinets, while the ones supplied have tan blades. The Claimant says that these were the ones specified and supplied. I am not aware why the Defendants did not protest immediately upon seeing the fans, if they were indeed wrong. In the end, I do not believe that this claim is justified.

D. sanding pine staircase: \$240

[11] The position of the Claimant is that there was splattered paint on this staircase before the work ever began. Although I did not view the videotape made before the work started, I was told that on the tape one can clearly see the paint splatter on the staircase.

[12] The Defendants hired their son and paid him \$240.00 to sand the staircase down to bare wood. He had to rent a special sander for the purpose. I was told that he spent several hours working at it.

- [13] I am a bit concerned about valuing this work at \$240.00. This was not an arms length transaction. Be that as it may, I am not satisfied on the evidence that the Claimant was responsible for the paint, nor that an entire sanding would have been necessary to address the problem - assuming the Claimant were responsible. I allow nothing for this claim.
- [14] I wish to note that I do not believe that the Defendants have fabricated this or any other claim. I do however believe it is possible that they are attributing something to the Claimant of which they were simply (and understandably) unaware prior to the fire, and honestly believe that the condition was caused by the Claimant and its workers.

E. End tables: \$1,200.00

- [15] This is the biggest ticket item. The Defendants say that there are some small discoloured areas on their living room tables that cannot be repaired, and that would justify replacing the tables. Some light-coloured spots are visible in the photographs filed. The discoloured areas are said to have been caused by sponges or other cleaning supplies. It is noteworthy that these spots appear not to have penetrated the surface finish, which suggests that they were not caused by anything that would have eaten away at the finish. Whatever it was, it just caused these light spots to appear.
- [16] The Defendants produced two written quotes which both recommend that the tables be replaced rather than repaired. The authors of the quotes were not present at trial.

- [17] The Claimant called as a witness an experienced wood refinisher, Gerard Wolfe, who testified that he inspected the tables at the Claimant's request. He believes that they would be refinishable, although the precise colour might not be matched. He could not explain the genesis of the damage, but was quite sure that it could not have been caused by water or a solvent since that would in all likelihood have etched the surface.
- [18] In the end, the damage is a bit of a mystery. However, I accept the evidence of the Defendants that this happened on the Claimant's watch, so to speak, and that the Claimant should be responsible.
- [19] The \$1,200.00 claimed is based on the original purchase price. The items were part of a group of furniture pieces bought and shipped from Ontario in September 2005. The total cost was \$5,690.00, and included a 3-piece living room set, a 9-piece dining room set, an 8-piece bedroom set and several lamps, along with the 3-piece coffee table set which included these two end tables. The prices are not broken down.
- [20] I find it impossible to believe that these two small tables represents 21% of the purchase price of a package that includes so many much larger items, most of which are supposedly in cherry. It was only the word of the Defendants that placed the value of the two end tables at \$1,200.00. I find that they must be mistaken.
- [21] Regardless of what the Defendants do, they will not end up with precisely what they had before, whether they buy something new or refinish the pieces. In the end, they will have to establish their own priority.

[22] It is my finding, based on all of the evidence, that an allowance of \$500.00 is fair compensation for the damage to these two items.

F. Kitchen cutting board: \$300.00

[23] This claim is based on the fact that the new kitchen cabinets did not come with a cutting board.

[24] The Claimant says that it subcontracted this out to Mike's Country Kitchens, and that if there was supposed to be a cutting board then it was not in the budget as approved by the insurer. The Claimant suggests that the insurer might still be willing to amend the claim to allow for the supply of a cutting board.

[25] In the end, I am unable to find on the evidence that the Claimant owes any contractual duty to supply a cutting board. There is nothing in the contract between the parties that refers to the supply of a cutting board. This may indeed be something that the insurer would still honour.

Conclusion

[26] In the end, I allow the following sums on the Counterclaim:

Painting deficiencies	\$350.00
Glass replacement	\$96.90
end tables	\$500.00
TOTAL	\$946.90

- [27] This is not entirely the end of the matter, as the Claimant seeks interest on its claimed amount of \$9,767.47, plus costs of issuing and serving the claim. As noted, the Defendants held on to the cheque from the insurer for a period of six or seven months, and refused to endorse it over to the Claimant until the Counterclaim was dealt with.
- [28] In the circumstances, I believe the decision to hold on to the cheque was done in good faith out of a concern that their issues would not otherwise be dealt with. In the exercise of my discretion, I do not believe that any prejudgment interest should be awarded.
- [29] The Claimant did spend \$170.88 to issue the claim and \$57.50 to serve it. The Defendants have spent \$56.60 to issue the Counterclaim. I believe that the appropriate order is for each party to bear their own costs.
- [30] As the Claimant has received its cheque for the full amount of its claim, the only order that is necessary is for the Claimant to pay to the Defendant the sum of \$946.90 on the Counterclaim.
- [31] Should the Claimant have any trouble negotiating the cheque that was handed over at the trial, because of it being possibly stale dated, the court will retain jurisdiction (if necessary) to amend its order to take this into proper account.

Eric K. Slone, Adjudicator