Claim no. 296972

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Armsworthy v. Doyle, 2008 NSSM 44

BETWEEN:

DEAN FRANCIS ARMSWORTHY

Claimant

- and -

AMY DOYLE and SCOTT DOYLE

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 22, 2008

Decision rendered on July 28, 2008

APPEARANCES

For the Claimant	self-represented
For the Defendants	Theresa Graham, articled clerk Matthew Moir, counsel

BY THE COURT:

[1] The Claimant is suing for the sum of $13,287.60 for what he claims are unpaid amounts, plus interest, owing on a contract to provide project management services on a residential construction project in the Portland Hills area of Dartmouth.

[2] The Defendants dispute the claim, on a number of bases, including the fact that there was about a four week delay in completion. They also complain of some deficiencies that have not been corrected. The Defendants feel strongly that the Claimant did not perform as expected.

The Facts

[3] The Claimant is an experienced project manager and tradesman. As explained, the role of a project manager in residential construction resembles the role of a general contractor, but differs in several important respects. The project manager does not enter into contractual relationships with the trades that are hired to perform the construction; the owners do. Furthermore, the project manager does not stand to gain or lose depending on the eventual cost of the project; essentially, he runs the project for a flat fee. The risk of cost overruns is borne by the home owners, who also benefit from any economies achieved.

[4] The Defendants were interested in having a new home built and were introduced to the Claimant, who was working on another project in the area. The Defendants had purchased a lot and had a house design that

they liked, which design was familiar to the Claimant as he had constructed that house on other occasions. I am satisfied that the Claimant explained the project management model to the Defendants, though I am less certain that they fully understood it. Ms. Doyle testified that she was expecting what would amount to a "turn-key operation" where she would not have to be involved with the construction and have little or no stress. That was probably an unreasonable expectation, which might nevertheless explain, in part, the Defendants' unhappiness with the construction process.

The Agreement

[5] The negotiation resulted in a Project Management Agreement, which was actually signed on the 3rd of November 2005, although work had already been proceeding for more than a month. The fee for project management services was to be $15,000. It was also anticipated that the Claimant would make certain expenditures on the Defendants' behalf (e.g. for materials), for which he would claim reimbursement. The Claimant also performed hands-on services as a finish carpenter for which he was paid an agreed upon fee of $4,500.00.

[6] Several provisions of the agreement are relevant to this case, including:

> **1.1 ..... Delay in expense reimbursement will result in 12% financing charges. (I.E. $120 per month per $10,000).** (I note and will comment further upon the fact that this is internally inconsistent as 12% per annum would not amount to $120 per month, no matter how calculated.)
>
> **8. This agreement shall be at an end when a valid Occupancy Permit has been obtained for the property, and all Project phases, Phases 1**

through 8 from Schedule "A", have been mutually agreed upon as completed, by the Owner and the Project manager.

[7] Schedule "A" to the agreement contained cost estimates. It seems clear that this was a working document that changed as costs became better refined. Most of the costs were expressed in round numbers. I find that they represented the Claimant's best guess at any given time as to what the actual costs would eventually be. I do not take them to be guarantees, as they might be under a general contract. This is significant because the Defendants take exception to the fact that the project went slightly over budget. The overage (which was approximately $10,000.00) does not strike me as unreasonable on a project of this magnitude given the many uncertainties that exist when trying to predict what subcontractors or suppliers will charge, or what unforeseen events may occur. For example, during the currency of this project Hurricane Katrina hit the southern US and had an immediate effect on the price of certain building supplies in Canada.

[8] The contract projected a 16-week construction phase, which the Defendants relied upon in making their moving plans. For reasons which I will discuss, the house was not ready until approximately 20 weeks after commencement. This is a delay which the Defendants say should negate the Claimant's entitlement to his full fee.

[9] It appears that there were three identifiable causes of delay, and perhaps other minor delays which could not be pinpointed.

[10] The first delay was in late September when the footings failed their initial inspection. After a minor piece was added by the foundation contractor, it passed. This cost the project at worst a couple of days. Even so it is hard to say that the Claimant bore any personal responsibility for this delay. It appears that the foundation contractor simply made an error which was easily corrected.

[11] The second delay concerned the shingling of the roof. The roofing contractor hired by the Claimant started work and then abandoned the project after shingling one section only. It took some time to get a new roofer to complete it. The Defendants insisted that the roofing phase took 28 days, but I find that this statement is not supported by the other evidence (i.e. a handwritten log kept by the Claimant) which suggests that the roofing took no more than 14 days from start to completion. As such, the actual delay would have been less than two weeks.

[12] Whatever the precise number of days lost, the Defendants blame the Claimant for that delay. I do not see that as a fair assessment. The Claimant was responsible to find and hire contractors, but he cannot conjure one out of thin air when one that has been lined up defaults. There was no evidence that suggests that there were roofers easily obtainable. Ordinary experience of which I take notice supports the view that during busy times it can be very difficult to get a contractor on short notice.

[13] The Defendants take their complaint a step further by suggesting that the delay in making the home roof-tight had the further effect of the inside structures becoming more saturated with water, necessitating more heat to dry it out later on during the construction. I cannot accept that criticism as

valid. As the Claimant testified, there is always a phase before the roof is shingled when the framing and subfloors are exposed to the elements. Here there is not a shred of evidence that the water incursion was any greater than might have been expected. Nor was there any evidence of floors or anything else being damaged by the elements.

[14] Even so, as mentioned, the Claimant was not contractually responsible for this delay and could not be responsible for whatever consequences flowed from it.

[15] The Defendants further blamed this delay and the additional water incursion for what they believed to be excessive electricity use during December and January. Their logic was that more heat was needed to dry out the structures that had gotten wet. I do not accept that argument. By then the home would have been drywalled and painted, and it is well known that both of those processes give off a lot of moisture, requiring heat and fans to assist the drying process. The large electricity bill was also indicative of the fact that there was no functioning oil furnace until the beginning of February. A home in the latter stages of construction requires heat, not only to drive out moisture but to keep pipes from freezing and provide a suitable environment for the work being done inside.

[16] There was also some further delay caused by a defaulting plumbing and heating subcontractor. The individual who had done the rough-in for the plumbing and heating was supposed to return to do the finish work. For reasons which are not germane, that individual refused to return to the job. The Claimant was unable to get another plumber or heating contractor right away. After discussions with the Defendants it was agreed that Mr. Doyle

would take a few days off work and do the finish plumbing himself. He also had a personal referral of a heating contractor and was encouraged by the Claimant to contact and hire that company to supply and install the heating system.

[17] Toward the end of the construction phase, the move in date had to be pushed forward a few more days because the furnace was not yet in place and functioning.

[18] In the result, what the Defendants had planned for an early January move became an early February move. They paid an extra month's rent where they had been living temporarily and incurred several hundred dollars in additional expense to store some of their belongings. The Defendants believe that these unanticipated expenses were the fault of the Claimant. As I have already indicated, I do not find any validity to these arguments.

Deficiencies

[19] The Defendants also base their resistance to payment, in part, on deficiencies. There were some problems that had to be addressed after they moved in. There were some leaking doors and windows that had to be attended to, with the involvement of the manufacturer. These were eventually resolved.

[20] At the trial the Defendants produced photographs of some minor items such as wallboard repairs that had not yet been made, and a few cracking ceramic tiles. The evidence was clear that the Claimant attended to those

that he knew about. Some of the items had never been brought to his attention.

[21] The Claimant clearly had and still has a responsibility to assist with the rectification of deficiencies, but there is no basis here to find that he has failed in his duty. He cannot fix what he does not know about. If there are deficiencies that he did know about but did not attend to, I find that they are minor in nature and would not merit any deduction from his fee.

Completion

[22] In the end, the Defendants moved into the property in early February 2006. A final Occupancy Permit was not obtained at that time because there were still some decks to be constructed, which were never contemplated to be part of the first phase. The final Occupancy Permit was issued on November 14, 2006.

[23] By sometime in early 2006 the Claimant had started looking for payment of his fee and expenses. His expenses totalled $12,384.34 and his fee was $15,000.00. The evidence shows that the Defendants paid $500.00 in February 2006, $8,000.00 in June 2006 and further $8,000.00 on August 31, 2006, leaving a balance owing of $10,884.34.

[24] The Claimant was not pressing for immediate payment of the balance, because he was prepared to wait for the Defendants to obtain their HST rebate. It turns out that the rebate that was approved was not as much as they had expected. The original estimates suggested that the rebate would be approximately $5,000.00, although it turned out to be less than half that.

By then, sometime in 2007, it was clear that the Defendants were unwilling to pay any of the balance of the account. After unsuccessful attempts to negotiate, the Claimant decided to commence this action.

[25] The amount he seeks is $10,884.34 plus interest at the contract rate of 12%.

Disposition

[26] This is a contract claim. The Claimant has satisfied me that he has reasonably performed his side of the contract. The Defendants have failed to demonstrate any breach of contract that would disentitle the Claimant to be paid according to the contract.

[27] Building construction is as much an art as a science. It involves managing people who can behave unpredictably. It is subject to weather and other variables. In the grand scheme of things, I am satisfied that the Claimant did a reasonable job. I cannot fault him for the project falling behind schedule or for the cost running over budget. That budget was never intended to be more than a best guess of what could be achieved. To hold the Claimant responsible for going over budget would be tantamount to treating him as a contractor quoting a fixed price, which is not the model used here. The only fixed price was his management fee.

[28] If the Defendants were upheld in their defence, the result would be that the Claimant built a house for them for less than $5,000.00. That would be grossly unfair, in my view.

[29] The Defendants do not take exception to the calculation of the basic amounts said to be owing. As such, for all of the above reasons I find that the Claimant is entitled to be paid $10,884.34.

The interest claim

[30] The Claimant asks for $2,403.24 which is 12% interest on the entire sum owing, calculated from August 31, 2006 to the date of trial.

[31] As indicated above, the interest provision in the contract is:

> **1.1 ..... Delay in expense reimbursement will result in 12% financing charges. (I.E. $120 per month per $10,000).**

[32] In my opinion, this contractual term is problematic on several bases.

[33] For one, the provision is a bit ambiguous, in that it calls for "12% financing charges" and then goes on to give an example that suggests $120.00 per month, which (if compounded monthly) would actually be more than 14.4% interest. This ambiguity arguably erodes the enforceability of the term

[34] Another more compelling reason is that I believe the term does not comply with s.4 of the *Interest Act*, a federal statute that governs all contracts and other interest bearing documents, such as financing agreements or promissory notes. That section reads:

> **When per annum rate not stipulated**
>
> 4. Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any

> written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

[35] The contract term here does not, in my view, clearly state what is the effective yearly rate of interest. The term "12% financing charge" is not specific, nor is it accurate. If the Claimant were purporting to charge $100 per month, or 1% per month, that would amount to compound interest at an effective yearly rate of 12.68%. There is no express statement in this contract of the effective yearly rate.

[36] As such, the *Interest Act* (which is essentially consumer protection legislation) provides that the rate must be reduced to 5% per annum, simple interest.

[37] Another problem which the Claimant faces is that the interest appears only to apply to "expense reimbursement" and not to the management fee. That is not entirely fatal to his claim for interest on the management fee, as he would be entitled to 4% prejudgment interest under the terms of s.16 of the *Small Claims Court Forms and Procedures Regulations*.

[38] In the result, I am prepared to award the Claimant interest from the date of the issuance of the final Occupancy Permit (November 14, 2006) - which date marks the end of the Claimant's duties under the contract - at the rate of 5% on the outstanding expenses, and at the rate of 4% on the balance

outstanding of the management fee, calculated to the date of this decision (July 28, 2008), which amounts to 622 days. The following is my calculation:

Balance outstanding for expenses	$3,884.34
Simple interest on $3,884.34 at 5% for 622 days	$330.97
Balance outstanding for management fee	$7,000.00
Simple interest on $7,000.00 at 4% for 622 days	$477.15
TOTAL	$11,692.46

[39] The Claimant is also entitled to his filing cost of $174.13. He has no claim for service of the Claim as he did that himself. The total judgment shall therefore be for $11,866.59.

Eric K. Slone, Adjudicator