Claim No: 444742

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Dunlop v. Harbour Ridge Developments Ltd., 2015 NSSM 56

BETWEEN:

JOHN DUNLOP

Claimant

- and -

HARBOUR RIDGE DEVELOPMENTS LIMITED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on December 8, 2015

Decision rendered on December 15, 2015

APPEARANCES

For the Claimant	Terry Degen, counsel
For the Defendant	Allen Baker, owner

BY THE COURT:

[1] This case arises out of a real estate transaction.

[2] The Defendant company is a builder which had built and was selling a home in Porter's Lake in late 2013. The Claimant agreed to buy it for $290,000.00. However, because of the lateness of the season the landscaping had not been completed, and the parties negotiated that there would be a $10,000.00 holdback on closing, to be released after the Defendant completed the landscaping in the spring.

[3] There was a separate verbal agreement that the HST rebate on the home would be split between the parties, when released by the government.

[4] The long and the short of it is that the Defendant never did any landscaping after the closing. Also, it received the full HST rebate of $4,539.12 and never provided the Claimant with his agreed-upon half.

[5] The Claimant seeks to retain the $10,000.00 holdback, which is in his lawyer's trust account, and also seeks payment of half of the HST rebate in the amount of $2,296.56.

[6] The Defendant does not dispute that it owes half of the HST rebate, but it resists allowing the Claimant to retain the $10,000.00 holdback. It says that it was prevented from doing the landscaping by the Claimant, who (it says) was unreasonable in his demands for what that landscaping would consist of, and who (allegedly) prevented the Defendant from completing the work. The Defendant acknowledges that the Claimant eventually had others complete the

landscaping job, but it says that it would have cost less than $10,000.00 for it to do what it was contractually bound to do. As such, it seeks to be paid some of that holdback money.

[7] The evidence at the trial made clear that the parties (Mr. Dunlop and Mr. Baker) do not get along, and see the situation very differently.

[8] Fortunately, there is a written contract which prevails over any individual's personal view.

[9] The original agreement of purchase and sale (signed November 6, 2013, included a page with the handwritten words added, and initialled by both parties:

> "Rough landscaping (to be completed in spring) $10,000.00 holdback"

[10] About a week later, as it appears, the Claimant (with the help of his lawyer) created a 2-page document which he called Attachment A - which was to be incorporated into the agreement. This document added detail in a lot of areas where the original agreement was silent or simply lacked detail. Mr. Baker appears to have accepted the terms, as he initialled the document. Only a small part of that document referred to landscaping, in the following terms:

> "7. Landscape: Tree line will be left around the complete property at rear and sides similar to section existing on left side of house, all other trees will be removed and or burned. Landscaped area will be leveled and covered with 4 inches of top soil and sods installed, unsodded areas such as planters near driveway and on step rock retainer risers will be prepared with cloth and mulch or cedar chips and ready for planting. Gravel will be installed in driveway in front and side of house."

[11] Further down the document there is a paragraph:

> "Some landscaping will be performed this year with majority to be done spring of 2014, a hold back of $10,000 will be retained from the $290,000 and held by the buyer's lawyer until such work is completed in spring of 2014."

[12] I believe both of Mr. Dunlop and Mr. Baker had a part to play in the eventual dispute over what landscaping was to be done, and when, although in my view Mr. Baker's responsibility for the misunderstanding was by far the greater. It appears that Mr. Dunlop had some very definite plans for the landscaping, which included the cutting of a significant number of trees and the consequent grading and sodding of those areas. On a fair reading of the Attachment A, this was Mr. Dunlop's plan all along, and it seems probable that he also made this known to Mr. Baker in their discussions before closing. I have real doubts as to whether Mr. Baker ever fully appreciated what he was committing himself to do, when he signed Attachment A some days after signing the original agreement. It seems that he was very anxious to get this property sold, as it had been sitting on the market for some time and he had reduced the price considerably.

[13] When spring of 2014 arrived, Mr. Baker was not easy to contact or motivate, but he did eventually show himself willing to start the landscaping. The problem was that he did not appear to appreciate the scope of what he had committed himself to doing. He told Mr. Dunlop that he expected to be able to complete the work in three days, which made Mr. Dunlop concerned because he knew that the work he was expecting would take a lot longer than just three days. From that point on, he effectively shut the door on Mr. Baker.

[14] Mr. Baker's evidence was that Mr. Dunlop told him that whatever he did would not be good enough, and he would never get paid. He also accused Mr. Dunlop of intimidating and threatening behaviour. Mr. Dunlop denies those accusations. In the end, communications broke down, and was only being conducted through lawyers, who were trying to negotiate some compromise arrangement whereby the holdback money would be divided. In light of the Claimant's threat to the effect that he would never get paid, the Defendant was only willing to start the work if some of the holdback money was immediately released to him. The Claimant did not agree to such an arrangement, and a stalemate occurred. Eventually, in the summer and fall of 2014, Mr. Dunlop had the work done by another contractor and this court claim was eventually brought.

[15] The cost to have the other contractor complete the landscaping was in excess of $55,000.00, although Mr. Dunlop concedes that at least $20,000.00 of that was for work that would not have been the Defendant's responsibility. Still, some $28,000.00 (plus HST) was for tree removal, grading, topsoil and sodding, all of which (according to the Claimant) was supposed to have been done by the Defendant. The Claimant has <u>not</u> sought to recover any of the extra cost from the Defendant; he only seeks to get the holdback money and his share of the HST rebate.

[16] Mr. Baker testified that it would only have cost him about $7,000.00 to do the work. In other words, he says he lost a profit by not being allowed to complete that work. He created a written estimate (Ex. 13) to illustrate what he thought had to be done.

[17] I find that this estimate was totally unrealistic, and moreover it betrays Mr. Baker's misunderstanding of the obligations he had undertaken. He does not appear to have budgeted anything for the cutting of trees and removal of stumps, although this may be subsumed in his overall labour estimate. He also allows for 3 tandem loads of topsoil and 8 pallets of sod - at a material cost of less than $1,500.00, which is minimal and seems out of all proportion to the actual amount that Mr. Dunlop paid his other contractor for topsoil and sod, which was in excess of $25,000.00, although that also included the labour.

[18] In short, I believe that Mr. Baker had a flawed understanding of his obligations. It could very well be that Mr. Dunlop told him that he would never get paid, and he may also have been intimidating or threatening in his manner. This behaviour would not have been helpful, under the circumstances, but he was probably right in a sense: what the Defendant was likely to do, if allowed on the property, would not have satisfied him.

[19] In the end, Mr. Dunlop may have done the Defendant a favour by not allowing it to do any work in the spring of 2014. Given their disparate views on the scope of the work to be done, Mr. Dunlop would inevitably have been dissatisfied. There almost certainly would have been an even greater dispute thereafter, with the result that the Defendant might have spent money and put in effort that would still not have been compensated. By way of example, had the Defendant done grading and sodding in areas without doing the expected tree cutting, that work could have been wasted, in whole or in part, if another contractor had to be called in to cut the trees and re-grade the land.

[20] In the result, I find that no part of the $10,000.00 holdback should be released to the Defendant. At no time did the Defendant show itself willing and able to fulfill its obligation under Attachment A to the agreement of purchase and sale. I have no doubt that the Defendant does good work, as he claimed, but the issue is the quantity, rather than the quality of work to be done.

[21] The Claimant acted reasonably in having someone else do the work, and is entitled to the $10,000.00 holdback as a contribution to that expense.

[22] I have given some thought to the Defendant's argument that it has incurred an extra cost of $1,500.00, because of the HST charged on the entire purchase price of $290,000.00, rather than on the reduced price of $280,000.00. Ultimately, HST is a cost to the purchaser, not the vendor, in the case of new home construction. The vendor only passes that cost along. If the effect of this decision is to reduce the effective purchase price by $10,000.00, perhaps the Defendant can file an amended return and recover the extra $1,500.00 from the government. Even if that is not possible, I do not see any justice in releasing any of the holdback to the Defendant. The amount held back was a mutually agreed upon amount, and the Claimant has actually spent a lot more than that to get the work done by someone other than the Defendant.

[23] The Defendant should also disgorge one-half of the HST rebate, as had been agreed, namely $2,296.56. The Claimant is also entitled to his cost of filing in the amount of $199.35.

[24] An order will issue accordingly.

Eric K. Slone, Adjudicator