Claim No: 319663

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: MacDonald v. Wang, 2010 NSSM 13

BETWEEN:

RYAN MacDONALD

Claimant

- and -

JEFF WANG

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 5, 2010

Decision rendered on January 13, 2010

APPEARANCES

For the Claimant self-represented

For the Defendants Kent McNally, counsel

BY THE COURT:

[1] The Claimant Ryan MacDonald operates a proprietorship, Next Level Contracting, to carry out his business doing landscaping and related work.

[2] The Defendant owns a fairly new home in Cow Bay.

[3] This case involves a claim by the Claimant for unpaid amounts arising from a contract to landscape and construct an exposed aggregate driveway for the Defendant. The Defendant denies that any money is owing and has counterclaimed for an amount which he says was caused by defective work done by the Claimant.

[4] The Defendant had been in his home less than two years and was finally about to tackle the landscaping and driveway in the fall of 2009. Because the onset of bad weather was pending, he was extremely anxious for the work to get done before the winter.

[5] The Claimant represented to the Defendant that he had the resources to complete the job in a timely manner. The Defendant was a hard negotiator and drafted a contract dated October 20, 2009, which obligated the Claimant to complete the scope of work by November 15, 2009, weather permitting. That scope of work included ordering and spreading 20 or more tractor loads of lawn soil, excavating the driveway, preparing it in all respects, pouring the concrete and doing everything necessary to create the exposed aggregate effect.

[6] The total price for the job was $23,356.40, including materials cost.

[7] Work started a few days later.

[8] The Defendant paid directly for all of the materials used and to be used by the Claimant on the job.

[9] There is no dispute that the Claimant stopped work on the driveway on the 9th of November and that work was eventually completed by a different contractor. The parties are in disagreement over a number of issues, most notably:

a. Was the Claimant fired or did he abandon the contract?

b. Was the Claimant's work to date satisfactory, and

c. Was there any reasonable prospect that the Claimant could have completed the job in a timely and workmanlike manner?

[10] The evidence satisfies me that the Claimant was not on track to finish this job in a timely manner. By his own admission it was the largest job of this type that he had undertaken, and there is good reason to believe that he had significantly underpriced it. His progress up to November 9 was far from encouraging. During the landscaping portion of the work, he had been using at least one if not two inexperienced workers, and the bobcat that they were operating had broken down several times and run out of fuel several times, leading to periods of idleness. It is fair to say that the Defendant, who works from his home and was present to observe, was not impressed.

[11] Perhaps the best measure of how far the Claimant had gotten, and how much he had miscalculated, can be drawn from the evidence of the contractor who took over the job.

[12] Wayne Johnson was called to look at the situation and quoted $31,000 to complete the job. He noted that the previous contractor (the Claimant) had excavated too far, with the result that many extra loads of gravel (130 tons) would be needed. After being hired, he worked with a crew of as many as ten guys to finish the job over the course of a week.

[13] It is noted that the Claimant had planned to do the driveway with a crew of fewer than half the number of workers that Johnson needed. Also, given the amount of his contract that had already been spent on topsoil (almost $8,000 for materials alone) that meant that he had a budget of perhaps as little as $10,000.00 to construct this complex and large driveway.

[14] The Claimant pointed out that there appeared to be some differences between the specs for the driveway that he was contracted to build, and that which Johnson completed. While I am in some doubt about the actual square footage, there appears to be no question that the basic dimensions were the same in both contracts. It was to be a large, high-end driveway.

[15] It is clear on the evidence that the Claimant was ill-equipped to complete the job, and that he could not have done so within his available budget. Had he continued on, there was a considerable risk that the job would have dragged on much longer and that he either would have had to overspend his budget (losing considerable money) or that the job would have been substandard.

[16] I find that the Defendant was justified in raising the alarm when he did, as he could clearly sense what was likely to happen if he did not act.

[17] As for whether the Claimant was fired or quit, I am more inclined to the view that the decision was a mutual acknowledgment that the contract should not continue. The Claimant knew that the Defendant was concerned and unhappy, and the work ended. The Claimant and Defendant parted ways.

[18] From a legal point of view, I do not think it really matters who pulled the plug. It might have mattered had the Defendant counterclaimed for the extra amount it cost him to have Mr. Johnson complete the job - an amount well in excess of $10,000. Such a claim would have been premised on the Defendant getting the “benefit of the bargain,” namely the low price quoted by the Claimant. In fact, he has absorbed that extra cost. All that he seeks in his counterclaim is some additional costs that he says were incurred because of the over-excavating that the Claimant allegedly did, which created a need for extra gravel and labour to apply it.

[19] I have already found that the Claimant cannot claim the benefit of the bargain, in the sense that he is not entitled to any profit he believes he might have made. In fact, I am certain that he would have lost money had the contract continued and he was, or ought to have been, relieved that he was not required to complete.

[20] In my view the evidence does point to the Claimant having created some extra cost by excavating too far.

[21] On the other hand, the Claimant did provide some value in that he and his workers spread approximately 20 tractor loads of topsoil with the bobcat. In advancing his claim the Claimant testified that he provided 107 hours of bobcat use at $55 per hour. I find that this amount is exaggerated, given all of the technical problems (including running out of fuel) that the Defendant observed and about which the Claimant appeared to know little.

[22] In my view, the fairest result is to offset the value of the work done on the landscaping portion of the job against the additional problems created on the driveway, with the result that the claim and the counterclaim should both be dismissed.

[23] Neither party should receive any costs.

Eric K. Slone, Adjudicator