

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Cite as: Thomas v. S. Bennett Construction #863931028, 2009 NSSM 66**

**BETWEEN:**

**HOLLY THOMAS AND ALAN HUGHES**

CLAIMANT

- and -

**S. BENNETT CONSTRUCTION #863931028 (SHANE ABRAHAM  
BENNETT, CHRISTINA ANNE BENNETT)**

DEFENDANT

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**DECISION**

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DATE OF HEARING: November 18, 2009

DATE OF DECISION: December 4, 2009

PLACE OF HEARING: Dartmouth, Nova Scotia

HEARD BEFORE: Patrick L. Casey, Q.C.  
Small Claims Court Adjudicator

COUNSEL: Holly Thomas and Alan Hughes, Claimants,  
appeared on their own behalf

Shane Bennett and Christina Bennett, Defendants,  
appeared on their own behalf, and Shane Bennett  
appeared on behalf of S. Bennett Construction

## **BACKGROUND**

- (1) The Claimants, Holly Thomas and Alan Hughes, claim the sum of \$24,202.33 from the Defendants, S. Bennett Construction, Shane Abraham Bennett, and Christina Anne Bennett.
- (2) The claim arises from a contract entered into between the parties in May 2009.
- (3) Pursuant to that contract, the Defendant, Shane Bennett Construction, performed construction work at the home owned by the Claimants at 24 Flume Drive, Lower Sackville, Nova Scotia.

## **THE CONTRACT TERMS**

- (4) Two written quotes were provided by S. Bennett Construction to the Claimants, the first is dated May 15, 2009, and the second is dated May 27, 2009. The total quoted contract price, including applicable taxes, was \$25,436.40.
- (5) In addition, there was written evidence that as the project was undertaken, certain extras were agreed to between the parties. The cost of the extras was \$2,300.00, for a total contract price of \$27,736.30.
- (6) The work to be undertaken pursuant to the contract included:
  - (a) Painting part of the main living area of the home;
  - (b) Removing a wall in the basement and installing a support beam, sheetrock, and compound;
  - (c) Installing a new bath with tub surround, vanity, and toilet;
  - (d) Installing a wall in the front of the garage door, sheetrock, compound, and paint;
  - (e) Constructing a wall at the back of the rec room with a closet;
  - (f) Erecting a six foot wooden fence on one side of the property with two gates and a wooden link;
  - (g) Installing electrical for a bathroom, light and GFI outlet;
  - (h) Installing door and base moldings;

- (i) Installing a vent for an air exchanger on the wall backing where the unit is housed;
  - (j) Adding a kitchenette with a small sink, cabinets and counter to the back of the garage;
  - (k) Building a concrete walkway with concrete cement and a granite three step;
  - (l) Repairing shingles on the roof;
  - (m) Painting the trim;
  - (n) Installing new hardware for the stairs;
  - (o) Running 220 service on the outside of the house with a conduit for a hot tub;
  - (p) Building a new deck;
  - (q) Installing a new drain line in the backyard;
  - (r) Leveling out the backyard;
  - (s) Installing a waterline to the fridge;
  - (t) Installing a dishwasher range hood;
  - (u) Installing a closet.
- (7) The extras included:
- (a) Adding a two foot extension onto the deck;
  - (a) Moving the shed;
  - (b) Adding the electrical for the television;
  - (c) Building a subfloor in the basement;
  - (d) Additional fencing.

**OTHER EXTRAS**

- (8) The Defendant, Shane Bennett (Bennett), alleged that there were other extras agreed to beyond the items which the Claimant, Holly Thomas (Thomas), testified to as evidenced by the handwritten note which she provided in evidence.
- (9) He stated what the other extras related to to the best of his recollection.
- (10) I found his evidence to be unsatisfactory. Many of the items he mentioned as extras were listed in the contract already. His evidence was vague and, in some respects, self-serving. I am unable to conclude on the balance of probabilities that there were any extras agreed to beyond what Thomas testified to.
- (11) In Chittick v. Taylor, 1954 CarswellAlta 43, the Alberta Supreme Court held that an item specifically provided for in the contract is not an extra. Also, when a contractor supplies material of a better quality than the minimum quality necessary without instructions from the homeowner to do so, then he is not entitled to charge for an extra and when additional work is done or materials supplied that are not provided for in the contract and the contractor proceeds without instructions expressed or implied by the Defendant or without the consent of the Defendant, then the contractor is not entitled to charge for this work as an extra. I find, therefore, that the Defendant is not entitled to charge for extras beyond what was agreed to in evidence by Thomas.

#### **AMOUNTS PAID BY THE CLAIMANTS TO THE DEFENDANT PURSUANT TO THE CONTRACT**

- (12) The Claimant, Thomas, testified that the amount of \$24,602.33 was paid to the Defendant pursuant to the contract. In support of her position, Thomas produced evidence of various cash withdrawals and specified the amounts paid according to her recollection and the dates upon which they were paid.
- (13) The Defendant's evidence was less clear. He agreed that approximately \$16,000.00 was paid for by the Claimant for labor costs. He agreed that in addition to that, various materials were purchased, although he could not specify the actual amount purchased or even provide an accurate estimate.
- (14) Thomas' evidence on this point was clear and straightforward, and I accept her evidence. I find that the amount of \$24,602.33 was paid by the Claimant to the Defendant pursuant to the contract.

#### **NON-COMPLETION**

- (15) Work commenced on June 3, 2009, and continued until on or about July 10, 2009.
- (16) On July 14, 2009, Thomas spoke to Christina Bennett and advised her that she was not pleased with the quality of the work that was being done. She requested a meeting.
- (17) The Defendant terminated his involvement shortly thereafter. His stated reason was that the work being done with respect to the in-law suite was “illegal”, however, I do not accept his explanation. There is an implied term that the Defendant, as contractor, should obtain the necessary permits. If he was unable to obtain the necessary permits, then one would question why he would undertake the work at all.
- (18) At the end of the day, both parties acknowledge that the work pursuant to the contract terms has not been completed. There is a dispute, however, concerning the extent to which the work was or was not completed.
- (19) The Defendants’ evidence, in summary, is that the work was about ninety percent (90%) complete when the project was abandoned. The Claimants’ evidence, in summary, is that the work was about sixty percent (60%) complete (her evidence is that items totaling just over \$10,000.00 were “untouched”).
- (20) Neither party produced any expert evidence in support of their positions.
- (21) The Claimants produced a series of photographs which show some of the incomplete work but do not provide a comprehensive picture from which a conclusion can be reached concerning the extent to which the contract was completed.
- (22) The Defendant insists that many of the items which Thomas testified were “untouched” were in fact “prepped” meaning that while the item was not finished, some work had been started and urges the Court to find that the items were not “untouched”.
- (23) The burden of proof is on the Claimants. They must prove on a balance of probabilities the damages that they are seeking.
- (24) Based on the evidence before the Court, I find that seventy percent (70%) of the work contracted for by the Claimants, including the extras has been completed.

**ALLEGATIONS OF DEFECTIVE WORK**

- (25) The Claimants allege that some of the work performed by the Defendant was done in a negligent manner and that it is necessary for the Claimants to incur costs to remedy the defective work.
- (26) Two items were specifically referred to by Thomas in her evidence, firstly, the Claimants are seeking \$6,000.00 damages for repairs necessary to the walkway and stairs, yard, drainage, and completing the fence. In support of her position, she produced a quote from Plant With Pronk Landscaping for \$8,750.00 plus tax (with sod) and \$8,250.00 plus tax (with seed) for various work, including adding fencing, planters, step and walkway, removing gravel, repairing sods, removing stump and debris from the backyard, and sodding.
- (27) The person who provided the quote was not called to give evidence in this case, therefore, the Defendant did not have the opportunity to cross-examine. The difficulty in assessing this evidence is that some of the quote relates to work that was not completed pursuant to the contract.
- (28) The Claimant alleges in her evidence that the work relating to the drainage was done improperly, however, no independent evidence was offered to support this position. The burden of proof for this is on a balance of probabilities and rests on the Claimants. The same applies to her allegation concerning the leveling of the yard and other allegations.
- (29) Based on the evidence in totality and finding that there is a duplication contained in this quote as some of the quote relates to uncompleted work rather than defective work, I find that there is no reliable evidence to support the Claimants' assertion that there was defective work. I dismiss this aspect of the Claimants' claim.
- (30) The second alleged claim for deficiency relates to a claim for \$1,300.00 and in support, the Claimant provided receipts for \$1,664.44 for materials purchased for what the Claimants allege were materials required to repair the interior of the basement, holes in the ceiling, and other items. I find that the Claimants did purchase these materials, however, again, I am unable to conclude from the evidence provided and the receipts themselves that the work in any way related to defective work as opposed to uncompleted work. The Defendant described the reason why there were holes in the basement, for example, and I accept his explanation. These are not evidence of defective work, they are evidence of a work in progress. The cost of these materials is part of the uncompleted work not evidence of defective work. For these reasons, I dismiss this aspect of the Claimants' claim.

**GENERAL DAMAGES**

(31) The Claimants’ claim for general damages is dismissed as no evidence was offered upon which a claim for general damages could be based.

**SUMMARY OF PROVEN DAMAGES**

(32) The summary of proven damages are as follows:

(a)	Total contract price .....	\$27,736.30
(b)	Amounts paid by the Claimants pursuant to the contract .....	<u>(24,602.33)</u>
(c)	Contract price remaining unpaid .....	\$3,133.97
(d)	Work not completed pursuant to the contract (30% of the total contract price) .....	\$8,320.89
	Net damages (item (d) less item (c)) .....	\$5,186.92

(33) The general measure of damages for breach of contract is expectation damages. The Claimants should be put in the same position as they would have been had the Defendant performed his obligations under the contract. The usual measure of damages is the contract price less the cost to the injured party of completing the work.

(34) The Claimants in this case have failed to provide clear evidence of the cost of completing the work not completed by the Defendants. This has made it necessary for the Court to estimate the amount of the incomplete work from the evidence provided. In doing so, the Court has followed as close as possible the guidelines set out by the Nova Scotia Court of Appeal in Borcherdt Concrete Product Ltd. v. Port Hawkesbury (Town) (2008) 262 N.S.R. (2d) 163 and the case of Gwynne-Timothy v. McPhee (2005) N.S.C.A. 80.

**COSTS**

(35) The Claimants shall recover its proven costs of \$179.35.

**WHICH DEFENDANT IS LIABLE**

(36) All dealings were with S. Bennett Construction, a sole proprietorship of which Shane Bennett is the sole owner.

(37) The Order shall, therefore, be against Shane Abraham Bennett, carrying on business as S. Bennett Construction.

**SUMMARY**

(38) The Claimants, Holly Thomas and Alan Hughes, shall have Judgment against Shane Bennett, carrying on business as S. Bennett Construction, in the amount of \$5,186.92 plus costs of \$179.35, for a total of \$5,366.27.

Dated at Dartmouth, Nova Scotia,  
on December 4, 2009.

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Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)



