SCCH 32929

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Morgan Creek Developments Ltd. v. Kephart, 2010 NSSM 68

Between:

Morgan Creek Developments Ltd.

CLAIMANT

- and –

George Kephart and Monique LeBlanc

DEFENDANT

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: July 6, 2010, September 13, 2010, September 14, 2010, November 1, 2010, and November 2, 2010.

Decision: December 23, 2010

Counsel: Kendrick H Douglas represented the Claimant

The Defendants were self represented

Parker:-this is a claim in the amount of $14,113.25 along with a counterclaim of $1639.63 for garbage bin removal and a set off of $4500.00.

The parties entered into a renovation building contract whereby the claimant was contracted to do certain renovations pursuant to building plans prepared by a local architect.

The claimant is requesting payment under the contract including payment for extras. The defendants in their pleadings stated that they agreed to a contract price of $120,910.00 inclusive of HST and that they paid the total amount of hundred and $120,560.63: (comprised as follows) $116,091.00 to the claimant, $2830.00 for flooring and tile as per the flooring allowance and $1639.63 to a subcontractor who was not paid by the claimant.

The defendants stated in their pleadings that on March 11, 2010 the claimant submitted a letter where the balance owing including that of extras was $11,663.70. The defendants did not agree with this statement of final cost, "but in good faith and relying on the extras letter [March 11, 2010] they made payments on March 12 and April 5, 2010 totaling $5500.00.

Towards the end of the contract work the defendants required clarification on the additions and changes and those items being subtracted from the work completed. The defendants provided an outline to the defendants with respect to same. On March 11, 2009 a response to the defendants' request was provided by the claimant outlining the materials and labor supplied for additions in the contract which costs amounted to $5020.00. From these additional costs the claimant subtracted flooring allowance of $2830.00 and a skylight allowance of $1000.00 leaving a difference of $1344.70 which is inclusive of HST. The balance remaining to be paid in the contract was $10,319.00 and that combined with the amount owing on extras less allowances of $1344.70 resulted in an amount outstanding from the claimant's perspective of $11,663.70. This was followed by a response from the defendants which they termed as a counterproposal to the March 11, 2009 letter of the claimant. This counterproposal was contained in a letter dated April 19, 2010. Matters were not resolved albeit the defendants had paid an additional $5500.00 as noted above. As result of matters not being resolved on the final amounts due and owing the claimant commenced a claim in the Small Claims Court on May 18, 2010. The amount of the claim was $14,113.25 however this was revised pursuant to a breakdown of extras with explanatory notes in a document provided by the claimant wherein the total amount of the claim was $14,968.91. This was broken down as follows: additional work not illustrated or specified on the building plans amounted to $16,919.95 +13% HST for a total of $19,119.54. The amount remaining on the contract agreement was $4819.00 leaving a combined amount inclusive of HST owing of $23,938.54. From this amount the claimant deducted credits for the following: flooring

allowance $2830.00, garbage bin containers paid by the defendants on behalf of the claimant of $1639.63, skylight elimination of $1000.00 and a deduction of $3500.00 for the sweat equity provided by the defendants on the projects for a combined credit inclusive of HST of $8969.63 leaving the outstanding balance as indicated of $14,968.91.

The claimant's owner Shane Kirk and his witness as well as the documentation entitled breakdown of extras with explanatory notes explained the work that was done at the defendant's home, extras and changes to the architectural plans which were completed as well as the costs associated with same.

The defendants engaged Kayne Homer a general contractor Who Operates a Company known as Homer and Son Renovations. Mr. Homer has several people working for him and has been registered under that name since 2005. Mr. Homer provided a letter to the defendants dated July 2, 2010 in which he discusses a number of items in the construction/renovation project which were unnecessary or done incorrectly and he provided his estimate of the costs on a number of items. Mr. Homer's letter has a number of conditional comments, approximations and assumptions. He also says in his testimony what his price would be for number of items but the foundational basis for this is only upon his observations and his experience I presume. In Mr. Homer's words" the work was reasonable. I thought the price was high but I did not do a cost estimate through a look at the plans my ballpark figure was $80,000.00. In total and looking at his evidence globally there are sufficient gaps, assumptions and unknowns which result in a lack of reliance on his evidence. This was in part due to the fact that Mr. Homer was not involved throughout the project.

The claimant’s evidence supports his view which was at odds at times with Mr. Homer's position and at the end of the day it is not possible to tell if one view was better than the other. The defendants themselves brought in allegations of an engineered header not being an engineered header as claimed by the claimant but there's nothing to support the allegations of the defendants. The best evidence that I can rely on at this stage is the letter of March 11, 2009 which until the disagreements started occurring and ultimately resulting in the court action being commenced, articulated the position of the claimant and the amount owing to the claimant. It is

from that letter of March 11, 2009 that the most realistic position of the claimant can be gleamed. Therefore at that time there was $11,663.70 remaining under the contract which took into consideration the cost of the extras less flooring allowance and less skylight allowance. The only considerations it did not take in was the garbage bin removal of $1639.63 and the sweat equity which the claimant was prepared to provide and that based on the evidence of what the claimant stated and what the defendant stated they put into the project, the amount of $3500.00 seems reasonable. Therefore of the $11,663.70, the defendants had paid $5500.00 as well there would be a further deduction of the sweat equity amount of $3500.00 and also an amount of $1639.63 relating to the garbage bin removal paid by the defendants on the claimant's behalf therefore leaving the final amount owing to the claimant $1024.07. Based on the above reasoning the counterclaim shall not succeed.

I have two other comments with respect to first the court having allowed the defendants to amend their pleadings late into the trial and secondly on the extras not having been agreed to in writing between the parties.

At the beginning of each trial the parties are always asked if they wish to amend or change any part of their pleadings. In this case the defendants raised a issue that they were not certain of the factual basis of the claimant's claim. Even during the testimony of the claimant owner himself there was a lack of clarity at times in his position which gave rise to difficulty in understanding parts of his claim without further inquiry from the court on several occasions. This in itself was sufficient reason to allow an amendment to the defense but further than this the amended defence did not change substantively anything that was not said originally or which would be allowed in at the end of the day.

With respect to extras, Kendrick Douglas, counsel for the claimant summed up the law in my view correctly in his brief to this court. He provided the following information in his brief:

"In *Electrical (D.L.C.) Inc. v. Oxford* (2008), 270 N.S.R. (2d) 200 (SC) at issue between the parties were extras and the cost for same. At paragraph 27, Justice Warner referred to the

leading case describing the nature of extras - Chittic v. Taylor, 1954 Carswell ATLA 43 (S.C.).

> **"5 Generally speaking, in my opinion, the following rules should apply:**
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> **"6 Rule 1. An item specifically provided for in the contract is not an 'extra'.**
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> **"7 Rule 2. When the plaintiff supplied material of a better quality than the minimum quality necessary for the fulfillment of the contract, without any instructions , express or implied, from the defendant to do so, he is not entitled to charge the extra cost as an 'extra'.**
>
> **"8 Rule 3. When the plaintiff did work or supplied materials not called for by the contract (plans or specifications) without instructions, express or implied, from the defendant, or consent of the defendant, he is not entitled to charge for additional work or materials as an 'extra'. (This was admitted by the plaintiff in evidence.)**
>
> **"9 Rule 4. When the plaintiff did work or supplied materials not called for by the contract on the instructions, express or implied, of the defendant, he is entitled to charge for additional work or materials as an 'extra'.**
>
> **"10 What amounted to instructions from the defendant is dependent on the circumstances relating to each item. If the defendant, without giving definite instructions, knew the plaintiff was doing extra work or supplying extra materials and stood by and approved of what was being done and encouraged the plaintiff to do it, that, in my opinion, amounts to an implied instruction to the plaintiff, and the defendant is liable."**
>
> **[46] The issue of how extras are to be dealt with is usually covered in the contract. It may be expressed in different ways. If there is nothing in the contract that deals with how extras will be dealt with, then it is clear that the contractor must have the prior express approval of the owner before it is entitled to be paid for anything above and beyond the strict terms of the contract, or he/she risks not being paid.**

Further, in *Nu West Decorating v. Gateway* (1992), 80 Man R. (2d) 32 (QB), Clearwater J. Provided the following at paragraph 8:

> **[8] Neither counsel directed me to any authorities on these issues, although the question of payment for extra work or additional work and the question of what is or is not "extra work" has frequently been the subject matter of litigation. Goldsmith's text on Canadian Building Contracts (4th Ed.) At p. 4-13 under the heading "Nature of Extras" states:**
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> > **"Extras properly so called, ie., work which, although not expressly provided for in the contract, the owner is nevertheless entitled to require the contractor to perform, must be distinguished on the one hand from work**

properly called for by the contract, and on the other, from work which is substantially different from, and wholly outside, the scope of work contemplated by the contract. The former the contractor is obliged to perform without being entitled to any additional remuneration beyond the contract price; the latter the owner cannot compel the contractor to perform all without a new agreement being entered into between the parties. Whether a particular item of work is an extra or not must be determined by the reference to the terms of the contract, the nature of the work and the surrounding circumstances. ..."

The author goes on to state, at p. 4-15 and following:

> **"A contract may contain a provision expressly excluding the right to payment for extra work, in which case a contractor can recover any additional payment over and above the contract price only if he can establish a new contract, either express or implied, to pay for such extra work."**

At p. 4-17, it is stated:

> **"... <u>Whether or not a written order is a condition precedent to payment is a matter of construction of the contract. Even if it is, it may be waived by the owner's conduct or acquiescence</u>."**

C.C.J. McLellan of the County Court in *<u>Jones Builders Ltd. v. Gossen</u>* (1978), 40 N.S.R. (2d) 286 stated the following at paragraph 8 of the decision:

[8] The third legal question which must be decided herein is the effect of paragraph 3 of the contract which is quoted in full above. I accept the plaintiff's evidence that there were many items which were discussed between the parties as the work progressed which can properly be designated as extras to the contract. During the discussions, pro and con, respecting these items the parties drifted into a more or less casual relationship which, I am satisfied, effectively resulted in a waiver of the writing to which the defendants would otherwise be required to affix their signatures before the plaintiff would be entitled to recover the item as extra. ... The owners are at any time entitled to waive any provision of a contract for their own benefit and I hold that the defendants waived this provision of the contract by their course of conduct."

It is the last comment by Justice McLellan which characterizes exactly what happened in the relationship between the plaintiff and defendants. The defendants are estopped from now defending their position against the claimant by saying we will not pay for extras because the contract required all extras to be acknowledged in writing.

It Is Therefore Ordered that the defendants pay the claimant the following sums:

$1024.07
$ 89.68 court costs
$1113.75 total

It Is Further Ordered that the counterclaim against the claimant and defendant by way of counterclaim is dismissed with no order as to costs.