Claim No: 351903

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Turner v. O'Neil, 2011 NSSM 56

BETWEEN:

SEAN C. TURNER and TERRI I. TURNER

Claimants

- and -

PETER O'NEIL and O'NEIL'S PROPERTY SERVICES (OPS)

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on September 13, 2011

Decision rendered on September 20, 2011

APPEARANCES

For the Claimants self-represented

For the Defendants self-represented

BY THE COURT:

[1] The Claimants hired the Defendants on or about April 11, 2011 to supply and spread 36 yards of topsoil and 4 yards of peat moss on their property in Dartmouth. The Claimant Sean Turner grows pumpkins and squash competitively, and the soil and peat moss was intended to enrich his growing area.

[2] The parties signed a work order specifying a price of $2,716.30 (including tax). A deposit of $1,400.00 was provided. I note that there is nothing on that document that speaks to the actual date of delivery.

[3] This claim arises because as of approximately six weeks later, the material had not been delivered. Eventually, the Claimants cancelled the contract and demanded the return of their deposit.

[4] The defence is that weather conditions throughout the spring of 2011 were so wet that there was no opportunity to deliver and apply the material.

[5] As explained by the Defendant Mr. O'Neil, the Claimants' property is such that the large area requiring the soil is behind the house with no ability to get a truck in there. As such, the soil would have to be delivered and dumped on the road in front of the house, and moved in smaller loads with the Bobcat. The Defendant said that he was keeping himself aware of the conditions and the land was so wet that his machine got bogged down on the one occasion when he had it there (in the hope of getting the work started). He stated that he had a load of gravel delivered to help with traction. Unfortunately, he also had a mechanical

breakdown that cost a few days when - possibly - there might have been enough dry days to get the work done.

[6] The Defendant described the spring weather as exceptionally and relentlessly wet, a description that would have resonated with any Nova Scotian who was here to experience it. He said that he waited in vain for a few dry days so the Claimants' property could dry out and allow free movement of his Bobcat.

[7] The Claimants both testified, though mostly we heard from Mr. Turner. He testified that he normally plants his seedlings on or about the 2nd of May, which was not possible this year because the soil had not been delivered. He testified that he was still willing to complete the contract as late as May 26, after the Defendant had promised delivery that day, but on May 27 he lost patience and asked for a refund. The Claimants apparently did not do very well in the 2011 competitive pumpkin and squash season.

[8] The Claimants seek return of their deposit. The Defendant claims to be entitled to retain all or most of it as damages for breach of contract.

[9] I heard evidence from both parties about attempts to compromise and resolve their dispute. I draw no conclusions from those efforts. By then they had already retreated to their legal positions, and any abortive efforts at resolution are really not relevant to the validity of those positions. In particular, the fact that the Defendant may at one time have offered a refund (though he soon changed his mind) is neither enforceable as a bargain, nor evidence of a weakness of position, in my view.

[10] My analysis is that the contract contained an implied term that the material would be delivered as soon as reasonably possible. While Mr. O'Neil knew that the Claimant Sean Turner was a competitive grower, there was no clear understanding that the soil had to be delivered by a certain time, or else. I expect that neither of them anticipated the relentless wet weather that we would eventually experience, and time simply marched on without any opportunity to get the job done. My assessment is that Mr. O'Neil always intended to complete the job, and there was nothing that stood in his way except the weather, and perhaps the short delay because his machine broke down.

[11] The Claimants suggested that he ought to have rented a machine while his was out of commission, but I find that this was not a reasonable suggestion. I heard nothing to suggest that the Defendant was ever advised that time was so critical, that he could not afford to wait a couple of days for his machine to be fixed.

[12] Under the circumstances, since time was not explicitly of the essence in the contract, the Claimants had no contractual right to cancel the work and demand their money back.

[13] The Defendants claim to be entitled to the following amounts totalling $1,327.36, to substantially offset the $1,400.00 deposit:

a. $750.00 for labour, and
b. $577.36 for mark-up on the product ($1,612.00 contract price minus $731.00 wholesale cost to the Defendants)

[14] The position of the Defendants appears to me to be legally and factually sound. The Claimants did not offer any evidence or argument to refute the damages claimed, and the counterclaim has been established to my satisfaction.

[15] As such, the Claimant is only entitled to recover the trivial difference between the $1,400.00 deposit and the damages suffered by the Defendants, which difference is $62.64.

[16] I am prepared also to allow the Claimants to recover the cost of commencing this claim, which is $91.47. The Claimants will accordingly have a judgment for $154.11.

Eric K. Slone, Adjudicator