Claim No: SCCH-452010

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Woodrow v. Gerald Mitchell Contracting Ltd., 2016 NSSM 47

BETWEEN:

JOHN WOODROW and DIONE WOODROW

Claimants

- and -

GERALD MITCHELL CONTRACTING LTD.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on August 9, 2016; final argument made through written submissions

Decision rendered on September 8, 2016

APPEARANCES

For the Claimants	self-represented
For the Defendant	Jeremy Smith, Counsel

BY THE COURT:

[1] The Claimants contracted with the Defendant in March 2007 to have a new home in Fall River constructed for them.

[2] The Defendant is a well-known construction company which has built hundreds of homes in Nova Scotia over the last 40 years since Mr. Mitchell began. This was the second home built by the Defendant for these Claimants.

[3] The home was ready and occupied by the Claimants in July 2007.

The claim

[4] This claim began its legal life in 2014 as part of a much larger claim in the Supreme Court of Nova Scotia, against a number of parties, with an allegation of deficiencies in the construction that cumulatively caused the home to be much more expensive to heat than the Claimants had anticipated. While I do not know, and probably should not know the details, the Claimants evidently settled their claims against everyone other than the Defendant, their general contractor, who remains before this court as a result of the matter being transferred (on consent) from Supreme Court to the Small Claims Court.

[5] The claim before me is based on a fairly narrow premise. The Claimants contend that the Defendant failed to supply what are known as “Low E Argon” windows which, had they been used, would have significantly raised the R-value in the home, and consequently lowered the heating costs these past nine years. Low E Argon windows have argon (an inert gas) between the two panes of glass, and also have a coating that reduces the amount of heat getting in or out.

[6] The damages they seek include some of the excess heating costs, as well as the cost to replace all of the window panes with Low E Argon glass. Together these damages add up to approximately $17,000.00, the bulk of which is to replace the panes on the entire house with Low E Argon glass.

The defence

[7] The Defendant disputes the contention that the contract specified Low E Argon windows. In fact, the Defendant says, the Claimants (specifically Mr. Woodrow) consciously chose conventional windows rather than pay the extra cost that Low E Argon windows would have added at the time. The Defendant also pleads that the cause of action should be barred by the *Limitation of Actions Act* as it was in 2014 when the action was commenced, at which time the statute of limitation for contractual actions was six years.

[8] The Claimants say that the claim is not statute barred because of the "discoverability principle." They say that the cause of action only arose when they discovered in about 2013 that they did not have Low E Argon windows. They say that they assumed they had such windows until they investigated and learned otherwise.

The contract

[9] Normally one would look to the signed contract to determine what had been agreed to. The difficulty here is that there is not one fully-signed, definitive version of the contract. What the evidence discloses is several versions (some

signed) of an Agreement (ostensibly) dated March 28, 2007, with different versions of the Schedule “E” Building Specifications, none of which are signed or initialled. It is in Schedule “E” that one finds all references to windows, and different versions of the document say different things. It is impossible to say which of the different versions of Schedule “E” was the last created and which would form part of the contract.

[10] I expect it is not uncommon for some of the formalities of contract formation to be ignored, such as initialling the Schedules, and in many cases nothing would turn on it. But here, that lapse creates an open question.

[11] Exhibit 1 at the hearing is a version of Schedule “E” proffered by the Claimants. In the section on windows there is a pre-printed option for Low E Argon glass at additional cost, beside which there is an “X” indicating that it is the choice. The nature of this document suggests that it was the first version, as it is partly handwritten (such as the names of the purchasers) and partly pre-printed. It is logical that this version was to be further refined in the office such that the handwritten information would be typed in.

[12] Exhibit 2 is a version of the contract and Specifications that was clearly created sometime after Exhibit 1. It is not signed. The Schedule “E” is further advanced, in the sense that there is less handwriting. The names of the buyers are now typed in. The various options are still checkmarked by hand, and there is a checkmark next to the item “Low E Argon glass at additional cost.” The Claimants say that this is the latest version of this schedule.

[13] The Claimants rely on these two documents as proof that they selected Low E Argon glass.

[14] There is, however, a third version of the document. Exhibit 10 was put forward by the Defendant as the document from its files. It has no checkmark next to the Low E Argon option. The contract is signed, but the Schedule is not initialled.

[15] One of the issues then is whether Exhibit 10 was created before or after Exhibit 2. The fact that the contract itself was signed suggests that it was created later, but it is far from clear that the version of Schedule “E” now stapled to it was attached to the contract at the time. The fact that it was presented to me stapled together is very thin evidence that it was attached to the contract at the time the parties were signing.

[16] On its face the contract part of Exhibit 2 (not necessarily the Schedule “E”) appears to be a more primitive version of the document, containing errors and handwritten notations that appear to have been corrected in a later version, namely Exhibit 10. But the Schedule E attached to Exhibit 10 may well have been an earlier version.

[17] Given the ambiguity associated with these unsigned, undated Schedule E’s, I must look to other evidence to ascertain the contractual intention of the parties.

[18] The reference to Low E Argon windows “at additional cost” raises the question of whether the Claimants were ever billed for the extra cost, and if so, why not?

[19] As is common in many construction projects, there are changes made along the way, which result in either extra charges or credits. There is a document which was sent to the Claimants in preparation for closing, which lists thirteen extras added to the price totalling $43,822.31, as well as two credits totalling $10,653.85. There is no mention of Low E Argon glass as an extra. The only explanation offered by the Claimants is that they assumed that Low E Argon was already built into the price. There is no evidence to support this theory. The failure to include Low E Argon as an extra points to there being no agreement to supply Low E Argon.

[20] Another point to consider is the evidence of Joy Manuel, who was the General Manager of the Defendant at the relevant time. She was responsible for getting a window quote from their supplier, Burnside Windows & Doors Ltd.

[21] The Claimants had been encouraged to visit the Burnside showroom to see the types of windows that they stocked. Ms. Woodrow was the one who went, with her house plan in hand. Tom Conrod of Burnside went over the design and suggested certain changes to make the design more interesting. The recommendation was to use a more elaborate (rounded) style of window on the back. After these design changes, Burnside provided a quote on the total window order and faxed it to Ms. Manuel at the Defendant’s office.

[22] Exhibit 11 is that faxed quote sent by Tom Conrad of Burnside to the Defendant on March 16, 2007. In his handwriting it specifies all of the sizes and model numbers and concludes with a price. At the bottom of the document, also in handwriting, there is a notation “to add Low E Argon add $1,535 plus tax.” On the copy introduced in court, produced by the Defendant, that sentence is scratched out with an almost illegible note which I believe reads “as per Joy” or something close to that.

[23] Mr. Conrad testified that he had met with Ms. Woodrow about the window design, and that he had mentioned that Low E Argon windows were a possibility, which is why he put it in as an option.

[24] Ms. Manuel recalled that she received the quote and had a conversation with Mr. Woodrow. She says that she directly asked him whether they wanted to pay the extra cost for Low E Argon windows. She recalls that he said that he did not want them at that time. As a result of that conversation, Ms. Manuel scratched out the notation at the bottom of the quote and faxed it back to Burnside. The windows were accordingly manufactured and shipped as conventional windows, without the Low E Argon feature. There was no extra added to the contract price.

[25] Mr. Woodrow simply denies that he had this conversation.

[26] Mr. Mitchell testified, but it appears that he never discussed the Low E Argon issue with the Claimants, one way or another. He did say that back in 2007, Low E Argon windows were not as well established as they are now, where they have become pretty much the norm. He did recall a conversation

with Mr. Woodrow where they discussed the possibility of adding a garage. He recalls Mr. Woodrow saying something to the effect that he was glad that they did not go for Low E Argon windows, so they could put that money toward the garage. Mr. Woodrow denies making any such comment.

Was Low E Argon part of the contract?

[27] In order to succeed in this claim, the onus is on the Claimants to prove on a balance of probabilities that the Defendant breached its contract, as a result of which they have suffered a loss. The considerable weight of the evidence satisfies me that the parties never agreed that Low E Argon windows would be part of the contract, and as such there was no breach.

[28] In determining what is the binding contract between parties, the court must look beyond the subjective beliefs of the parties and find an objective basis to conclude that there was a "*consensus ad idem*" - or a common understanding as to the disputed term. In the case here, the objective facts suggest that there was no common understanding that Low E Argon windows would be supplied. If anything - and I need not go this far - the consensus was otherwise.

[29] There is no question that there were discussions about Low E Argon, but there is no definitive version of a written document that says so. Looking to surrounding facts, had it been a selected option, one would expect to see it included on the extras list. There is not a shred of evidence to suggest that the Defendant was prepared to build it into the overall price.

[30] Most convincing to me, however, was the evidence of Ms. Manuel. I found her to be credible. She recalled discussing the question with Mr. Woodrow, and

recalls him declining the option. This is the logical explanation for why she would cross out this option on the Burnside quote. It is not logical that she would have done so without instructions. Furthermore, she would have had no incentive to negate this option, since it would otherwise simply have been billed as an extra.

[31] It is not enough for the Claimants to suggest, as they have, that they would have chosen Low E Argon, had they understood all of the implications. This clearly was not the understanding held by the Defendant, and there is nothing in the evidence that would bind the Defendant to any obligation to supply Low E Argon windows. As such, it has not breached any contract, and the claim must be dismissed.

Damages

[32] Although their claim fails on the issue of liability, I must make some findings on damages. The Claimants have sought the cost of replacing the glass with Low E Argon panes, which they say is $14,282.11 based on a quote from one window company. Mr. Mitchell testified that this is a full retail cost that, were they actually being ordered, would almost certainly be discounted. Normally the court does not rely on one estimate alone. I believe that, if the Claimants were to shop around and bargain harder, they could bring that cost down considerably.

[33] There is also a question raised in the evidence as to whether it would be advisable to replace all of the windows. Mr. Mitchell pointed out that Low E Argon glass has the tendency both to keep heat out and keep heat in. Keeping heat out may not be the best approach for those windows facing south, where

passive solar heat can be useful in the colder months. I believe that an expert might conclude that certain windows, but not others, might benefit from Low E Argon glass.

[34] In the result, I assess the Claimant's damages on this head at $8,000.00.

[35] The balance of the claim includes $400.00 for scaffolding, which seems reasonable, and $2,353.39 for 30% of the Claimants' excess electricity costs for a number of years. Although I accept the principle that excess electricity costs might be recoverable, I find that there is very little evidence to support this calculation. Had I found liability, I would have asked for additional evidence to support this claim.

The Limitation Defence

[36] Although it is not strictly necessary to decide the issue, I will comment on this defence. Clearly the breach (had I found one) would have occurred more than six years before the claim was commenced. On the face of it, the claim would be barred. However, it could have been saved in one of two ways:

a. If the claim was found not to have been "discovered" until some later time, such as 2013 or 2014, then the limitation period would not have run until the (alleged) breach was known, or ought to have been known, by the Claimants.

b. The Claimants could ask the Court for an order under s.3 of the (then) *Limitations Act* to extend the limitation by up to four more years.

[37] On the question of discoverability, I am not satisfied that the Claimants ought not to have known about the lack of Low E Argon windows long before

they say they did. I have already found that Mr. Woodrow explicitly instructed the Defendant not to order Low E Argon, so a finding that he did not know about this lack would be inconsistent, if not outright perverse. Also, on their own evidence, they started to receive higher than expected heating bills as early as 2008. This ought to have put them on their inquiry as to whether or not they had Low E Argon windows. As such, since legal action was not commenced until 2014, the claim would be barred, or close to it.

[38] As for Section 3 of the *Limitations Act*, this section gives the court a discretion to extend the limitation period:

> (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
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> > (a) the time limitation prejudices the plaintiff or any person whom he represents; and
> >
> > (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

[39] Subsection 4 goes on to specify what factors should be considered when exercising the discretion:

> **Factors considered**
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> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
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> (a) the length of and the reasons for the delay on the part of the plaintiff;
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> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
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> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
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> (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
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> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
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> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

[40] Looking at these factors, the case for an extension is thin, but on balance I would grant such an extension, principally on the basis that the difference between six years and seven years is not significant. I will not elaborate further as it is an academic question, given my earlier disposition.

Conclusion

[41] In the result, the claim is dismissed. I am not aware of any allowable costs in Small Claims, so the dismissal would be without costs.

Eric K. Slone, Adjudicator