Claim No: 371739

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Dalton v. Quick Start Construction, 2012 NSSM 5

BETWEEN:

JESSLYN DALTON

Claimant

- and -

QUICK-START CONSTRUCTION and KEN CURRIE

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on February 14, 2012

Decision rendered on February 20, 2012

APPEARANCES

For the Claimant self-represented

For the Defendants self-represented

BY THE COURT:

[1] The Claimant is suing the Defendants for damages arising from what is claimed to have been substandard renovation work.

[2] The Defendant Quick-Start Construction ("Quick-Start") is a trade name registered by 3049646 Nova Scotia Limited. The Defendant Ken Currie is admittedly the owner of the company and operator of the business. He is also the recognized agent for both.

[3] In September 2009, the Claimant hired Quick-Start to do a major renovation on a bathroom in the basement apartment of her home. That work was done at a cost of approximately $11,000.00. It included constructing a tub and shower enclosure, with ceramic tiled walls. According to Mr. Currie, his own employees constructed the tub surround, while the tile work was subcontracted to an experienced tile installer.

[4] Less than two years later, during the summer of 2011 as she was readying the apartment for a new tenant, the Claimant noticed a leak around the toilet and called a plumber. The plumber noticed a water mark on the wall near the tub, and suggested that it ought to be investigated. To make a long story short, it was discovered that there was water getting behind the tiles in the shower area, getting the drywall wet, and leading to mould growth on the exterior walls. Needless to say, this was not good news.

[5] The Claimant called Mr. Currie and attempted to get him to take responsibility. He attended and viewed the problem, but seemed somewhat dismissive, suggesting that very little was wrong or needed to be done. He also

suggested that the problem resulted from a lack of proper maintenance by the Claimant. The Claimant was not happy with Mr. Currie's responsiveness, and instead decided to bring in a company that specialized in restoration - Winmar Property Restoration Specialists - whose employee Jason Sadler testified about what he found.

[6] Mr. Sadler testified that when he viewed the tile work, there appeared to be some gaps in the grouting that would have allowed water to penetrate. These were photographed and the pictures placed in evidence. There was also inadequate caulking around the bottom of the tile where it contacts the tub. To make matters worse, the drywall that he tore out was just standard ½" drywall, and not the green or blue board, or cement board, that is recommended for such areas. He found that the drywall had become saturated with water and was degrading.

[7] He further explained the steps that he took to remediate the mould before rebuilding the tub enclosure for the Claimant. Suffice it to say that these steps appeared to have been well thought out, not disproportionate to the issue and professionally accomplished.

The Defendants' position

[8] The Defendants take the position that the problem experienced by the Claimant is not their responsibility, for a number of reasons:

a. Mr. Currie says that it is beyond the one-year warranty period. I reject this ground, because there is nothing in the written contract from 2009 that limits the warranty to one year. Mr. Currie insisted

that one year is “standard in the industry.” That may be a common practice, but I expect it would almost always be in writing - even if only in small print. I believe that most people would expect this type of work to last for more than one year, and adding a one-year warranty would actually amount to a limitation of warranty. I will not imply such a limitation into a written contract that is otherwise silent on the question of warranty.

b. Mr. Currie argued that if there was anything missing by way of grout or caulking, that this should have been picked up and rectified in routine maintenance. I disagree. I very much doubt that most people would closely inspect the grout or caulking in a new tub enclosure this soon after construction. In this case, it was a rental unit, and the Claimant could hardly have been expected to enter and inspect with her fine tooth comb what was virtually a new bathroom.

c. Mr. Currie defended the work, stating that it had been done by a very skilled tile installer. That may be so, but even highly skilled workers make mistakes or have bad days. Not every hour is their finest hour.

d. Mr. Currie insisted that his employees would not have used standard drywall for a tub enclosure. Unfortunately, he had no personal recollection that would have contradicted the totally credible evidence of Mr. Sadler.

e. Mr. Currie was critical of the Claimant for not giving him a chance to rectify the problem. I disagree. In my view, he was dismissive of

> the problem and appeared unwilling to take responsibility. The Claimant was right to go elsewhere, particularly where there was mould involved. There was no evidence to suggest that Mr. Currie has credentials allowing him to remediate mould problems.

[9] In the result, I find that the original work was substandard and that there is nothing limiting the warranty on the work. The implied warranty was that the work would have been done in a good and workmanlike manner, using suitable materials, and in this case it fell short on both counts. As such, the Claimant is entitled to damages to rectify the work.

[10] Not all of the damages claimed are recoverable, however, as I will explain.

[11] $188.60 is the cost of the initial plumbing visit where the problem was identified. This is allowed.

[12] $437.00 is the cost to have a tub liner installed. The Claimant elected to use a liner rather than a tiled enclosure. She doubtless saved money, and avoided any further leakage problems. This should be allowed, as should the $260.51 worth of drywall and other supplies used by that contractor.

[13] $1,301.25 was the cost for the restoration work done by Winmar. This should be allowed.

[14] $575.00 is sought as a loss of rental for the month of August 2011. The Claimant's evidence, which I accept, is that she had a tenant ready to move in when this problem erupted. It was not until a month later that the tenant was able to move in and started paying rent. This is allowed as a direct consequence

of the poor workmanship. She also claims $50.63 as a utility bill which she elected to pay covering September and October of 2011, when the tenant was in occupation. She elected not to seek recovery of this amount from him, as a token for the fact that he still had disruption in his bathroom while the work was being completed. This is reasonable.

[15] The Claimant seeks $703.25 as an amount that was withheld for tax when she withdrew RRSP funds to be able to pay for the work. This amount is not allowable, for a number of reasons.

[16] First of all, damages must be foreseeable to be allowed in a claim against a third party. Here, it is not foreseeable that someone might have to incur a 20% penalty in order to raise funds.

[17] Furthermore, just because tax was withheld does not necessarily mean that she will have to pay this tax. Indeed, if her income is low enough she may have it all refunded when she completes her taxes for 2011. If her income is high enough, she may end up paying almost 50% of the amount she withdrew. These variables illustrate that the Defendant cannot be responsible for the Claimant's particular tax situation. (Nor would she likely wish to share her private information with the Defendants, and with the Court.)

[18] To illustrate the problem further, let us suppose that the Claimant had borrowed money from a shady source and was paying 10% per week in criminal interest. Would the Defendants be liable for these sums? Most people would say no. In fact, the courts have traditionally drawn a bright line and stated that when damages are recoverable, the most that a Claimant can obtain to compensate for the cost of money is interest from the time of expenditure, at the court's allowable

rate (here 4%) on the theory (or more appropriately the fiction) that money is freely available at commercial interest rates. No matter how I may feel about that principle, it has been endorsed by the UK House of Lords and the Supreme Court of Canada, and is (for now) about as incontestible as any legal principle can be.

[19] The last question is whether both Defendants can be held liable. The Claimant urges the court to place personal liability on Mr. Currie as well as on Quick-Start. I ruled at the hearing that there is no basis to hold Mr. Currie personally liable. These are my reasons on that point.

[20] Quick-Start is the business name being used by the numbered company, 3049646 Nova Scotia Limited. In law, the two are synonymous. The Claimant insists that Mr. Currie is the partner, because it is he who is a director and shareholder of 3049646, and the recognized agent of Quick-Start.

[21] The Claimant is simply misinformed. She has misread the corporate search documents that she filed in evidence. 3049646 is Quick-Start; Quick-Start is 3049646. It is a closed loop. Mr. Currie is not a partner. He was not personally carrying on business. Like many business people who have sought the advantages of limited liability, he started a company and carried on business through that company. He became an agent for the company, and his documentation as presented to the Claimant indicated to her that she was dealing with a company.

[22] It is only in some very limited instances that a corporate officer or director - even in the case of so-called “one man companies” - becomes personally liable for the obligations of the company. The obvious example would be where a

fraud is perpetrated. Liability for fraud will always stick to the human agent who perpetrates the fraud, and the courts do not permit such a person to hide behind the corporate veil. That is not the case here.

[23] Also, if there is nothing initially to show that someone is using a company, they may not be permitted after the fact to use the company as a shield. That is also not the case here.

[24] The Claimant fears that she may not be able to collect from the corporate Defendant, and there is nothing I can say to allay that concern. Even if that were known to be true, it does not change the fact that Mr. Currie did nothing to engage personal liability for the debt owed by his company to the Claimant.

[25] In the result the Claimant is entitled to a judgment against Quick-Start in the amount of $2,812.99.

[26] She is also entitled to interest and costs. I allow interest at the rate of 4% (which is the regulated rate for Small Claims Court) from November 1, 2011 (the approximate mid-point of her several expenditures) to the date of judgment, namely February 20, 2012 (112 days). This totals $34.53.

[27] She is entitled to $91.47 to issue the claim, $75.00 to serve the Defendants and $75.00 to serve the subpoena on Mr. Sadler.

[28] I disallow any claim for general damages as I have not been satisfied that the inconvenience suffered by her rises to the level of what is considered to be recoverable for “pain and suffering.”

Eric K. Slone, Adjudicator