

Claim No. SCT 369639

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Bernard v. Bella Marble and Granite Inc., 2012 NSSM 28

BETWEEN:

Todd Bernard and Magna Bernard

Claimants

- and -

Bella Marble and Granite Inc.

Defendant

DECISION

Adjudicator: David T.R. Parker

Heard: August 13, 2012

Decision: August 28, 2012

Counsel:

The Claimants self represented

The Defendant was represented by Leon Tovey, articled clerk

Preamble:

1. Prior to commencing this matter the parties were asked if there were any questions about the procedure and process in the Small Claims Court.
2. The parties were also asked if they wish to make any changes to the claim and defence as pleaded in their documentation to the court. Hearing no response the court then went on to explain the burden of proof as well as some general comments related to evidentiary matters.
3. The court then went on to review the pleadings related to the claim and as they related to the defence and confirmed with the parties what was their claim and the nature of their defence.
4. The summary of the claim was that the claimants purchased a granite countertop from the defendant and the claimants felt that the granite cracked as a result of uneven support and a lack of support due to the company's failure to level the granite with sealants, metal rods or wood shims of any form.
5. The defence to this was that the claimants were made aware that the product was sold "as is" and the claimants acknowledged same.
6. The defence stated that the defendant inspected the countertop and discover a chunk of the countertop was missing. The defendant believed that a significant force and impact could have caused this damage.
7. **Analysis:**
8. None of the defendant's witnesses provided any expert or compelling evidence on what caused the crack in the granite countertop and also

what caused the piece to be missing from the countertop. All of their evidence was based on belief and in some cases experience.

9. Michel Martin the shop manager involved in delivering and installing the countertop advised the court that this countertop was 1 1/4 inches in depth and he only used additional support for countertops that were three quarters of an inch or less in depth. He explained a number of possibilities of what could have caused the crack to occur such as standing on the countertop while installing lights or contractors and plumbers dealing in the area and somehow causing damage.
10. Gunter K. Muscke provided clear evidence on what caused the crack in the countertop. He was a qualified expert witness having his PhD and specializing in rock fractures i.e. natural fractures. His background was in petrology including granite. He stated to the court that if you have a slab of granite that is supported by only two points as was the case in his examination of the countertop, the stress can lead to a fractured. He noted in his examination of the countertop that one side was higher than the other side indicating a stress fracture rather than through percussion. He looked for percussion marks and there was no indication. He indicated that because of the coarse size of the crystals in this particular granite it would be particularly important to support the granite versus more fine grained granite. He stated that granite will not fracture unless stress is involved. In this case the slab was not fully supported and there was stress involved.
11. Based on the evidence of the defence witnesses there was no support system for the granite through out the area it was laid.
12. The piece of granite was one of three pieces purchased and installed in the claimant's kitchen with the total contract price of \$6014 plus HST of

\$781.82. There was no evidence provided to the court as to what the cost would be to replace the granite or even fix the problem.

13. While the common law courts in Canada use an adversarial model it is sometimes necessary in the Small Claims Court in particular, to employ the civil law model which is inquisitorial. I am reluctant to do this when counsel represent both sides and I would do so only when it is blatantly obvious that the court should ask for clarification as to facts only.
14. In this particular case the claimants were self represented and they did not provide any clear evidence of what the cost or damages would be for the damage they suffered as a result of the granite being improperly installed.
15. Prior to the ending of the trial I asked the claimants if they can show me in the evidence they provided what the cost would be to replace the granite or the cost of the granite itself, as distinct from, the other two pieces of granite that were installed in their kitchen. Their response was that they chose \$3000.00 in their claim as they thought that was fair. They could not or did not point out to me the cost of that piece of granite that was purchased from the defendant. The claimant also informed the court that their main interest was to have the granite replaced.
16. The question is: can this court force a defendant to replace an item that was installed improperly rather than provide an order to compensate the claimant for the damage incurred by improper installation of the granite countertop? While the case before the court was not framed in either contract or negligence specifically I considered it from both perspectives.
17. I considered the remedy of specific performance. Specific performance is an equitable remedy and this court is created by statute and its powers are derived from the statute and its regulations. It is a statutory court

without inherent jurisdiction. Notwithstanding that the equitable remedy of specific performance has been advanced and considered in the Small Claims Court. Specific Performance is not as a general rule a remedy which will be enforced by the court in the execution of work to be done as a court cannot be there to supervise. In addition to employ specific performance as a remedy, the particulars of the work must be so clearly specified in order for the court to determine what work has to be done. It is also a remedy where damages would not be possible.

18. While it is not necessary to go into whether specific performance as an equitable remedy should be considered by this court as it would not be appropriate to apply it in any event.
19. Before leaving this issue ,I would point out the *Small Claims Court Act* does not provide the remedy of specific Performance and while it obiter I have ruled it out previously as a Small Claims Court remedy in an earlier decision:

Wacky's Carpet & Floor Centre v. Maritime Project Management Inc. [2006] N.S.J. No. 98 at para 40

40. “Therefore, it appears subject to contrary view from our Superior Court that equitable remedies such as unjust enrichment, quantum meruit, and set off are within the scope of the Small Claims Court authority provided it is a monetary award being sought under a contract, or a quasi contract, or where there is a special contractual type relationship arising. I would also comment here that the Small Claims Court would not be allowed to provide other equitable remedies which do not involve a monetary award and are clearly only within the authority of The Supreme Court of Nova Scotia and I refer to here such remedies as Specific performance or the prerogative remedies.”
20. The continuing problem I had with this particular case was the fact that

damages, that is the quantum for replacing or repairing the granite has not been proven by the claimants to the satisfaction of the court. No matter whether this case was framed in contract or in tort, that is the tort of negligence in installing the granite marble top, damages have not been proven to the satisfaction of the court.

21. During the hearing I specifically asked the claimants on what basis did they arrive at the \$3000.00 claim as noted in their pleadings.
22. The overall contract price was \$6745 plus taxes and the marble countertops involved three separate countertops in three locations areas. The claimants told the court that they found \$3000.00 was an amount they considered fair to replace the countertop, which was, as I determined from the evidence improperly installed.
23. The claimants could not provide me with any evidence to show an amount to either rectify the problem or replace the granite table top. As noted earlier the Claimants were self represented litigants and an inquisitorial approach was taken in order to try to determine damages.
24. While an inquisitorial approach can and should be taken by an Adjudicator it is necessary for an Adjudicator not to be soiled by the dust of conflict. This is a fine line. However saying this,, it is essential and necessary for a party to provide sufficient information or evidence in order to allow a judicial determination.
25. Justice Hood raised this exact point in a recent decision **Cragg v. Southwest Properties Ltd.**, 2012 NSSC 298 at paragraphs 17 and 18:

“[17] There are several things arising from that. The landlord was also self-represented. He did not have a lawyer in attendance. The role of an

adjudicator, although an adjudicator must take an active and inquisitorial role, means the adjudicator must stop before acting as an advocate for one party. Related to that is the issue of fairness to the other party. There could be an issue of procedural fairness if the adjudicator steps into the arena to assist one party but not the other. This is unlike *Charter* cases in criminal law where the trial judge has an obligation to raise *Charter* issues for the benefit of an accused person.

[18] I do not consider that the adjudicator has the role the Appellant suggests for these reasons. It is not up to the adjudicator in my view to raise legal issues but to be active and inquisitive to make sure that the adjudicator has all of the facts before him that the self-represented person should put in evidence....”

26. At the beginning of this oral decision I told the parties that I would be reducing my decision to written form in much more detail than delivered on the hearing date. At the end of my decision I told the parties that while there was an overall amount in the sales agreement of \$6014.00 plus HST the agreement did not delineate what the cost of each separate component of granite was that was placed in their kitchen. As a result I was only prepared to say to the claimants while you have proven your case as to the cause of the crack in the granite you have not given the court sufficient information as to damages.

27. Therefore damages will be a nominal amount of \$1.00.

28. I also note that the claimants were represented at one point by counsel prior to this court hearing. In a letter to the defendant from counsel on behalf of the claimants, counsel clearly stated that his instructions would be to commence legal action against the defendant for the full cost of improperly installing the granite plus [legal]costs in the event the defendants refused to replace the cracked countertop.

29. It is clear from that letter if legal proceedings were being pursued it would be for the full cost of improperly installing granite countertop and I assume counsel would have taken this approach. The claimant provided no evidence to show what the cost would be and for this court to make an assessment based on what the claimants' believe as to what is fair, would involve the court siding with the claimants without foundational support. That would be unfair.

30. I also explained to the claimants this court could not in law make an Order for the defendant to go back and replace the granite top because of the crack in it.

31. In the event the defendant wishes a formal Order I would be glad to receive one for review.

Dated at Halifax this 28th of August 2012