

Claim No. SCCH 373005

The Small Claims Court of Nova Scotia

Cite as: Kelly-Massey v. Austin Contracting Ltd., 2012 NSSM 34

Between

Deanna Kelly-Massey and Lynda Kelly

Claimants

c/o Robert Cragg

Cragg Law

Suite 10,2625 Joseph Howe Drive

Armdale Professional Building

Halifax, NS B3L 4G4

-and-

Austin Contracting Limited

Defendant

c/o Bernie Conway

Atlantica Law Group

92 Webster Street

Kentville, NS B4N 1H9

Heard: March 19, 2012 and May 14, 2012

Decision: July 16, 2012

Counsel: **Robert G Cragg represented the claimants**
G Bernard Conway represented the defendant.

DECISION and ORDER

1. The pleadings of the claimant outline in the case as reflected in the evidence which was provided to this court.
2. In summary the claimants entered into a Purchase Sale Agreement with the defendants for a home which eventually did not close. The claimants and defendant agreed that certain materials [Windows and Doors] were provided by the claimants in the construction of the home. As the claimants ended up not purchasing the home it was agreed that the full purchase price of these materials being \$22,748.98 would be paid back to the claimants when the home eventually was sold by the defendant.
3. The payment was to be made in installments; the first installment being \$10,000.00 plus HST at the time the home sold and the remainder to be paid after two years [from September 14, 2009] subject to any warranty that may arise within the said two years. This amount was to be held in trust by the defendant's solicitor and would amount to \$11,484.98

Analysis:

4. The issue is whether or not the remaining funds, \$11,484.98 should be paid to the claimants.
5. Robert Wood who supplied the Windows and Doors to the defendant's property was paid by the claimant.
6. Mr. Wood indicated that there were some minor repairs dealing with screws and screens that had to be fixed but otherwise the windows and doors were in perfect shape. Mr. Wood indicated that he provided Austin Contracting Limited with a two-year warranty commencing September 1, 2009 for service related issues as

per the conditions of the manufacturers warranty. This did not cover installation issues which Austin Contracting Limited, the defendant would be responsible. He indicated that there was no issue within the two years from the sale of the Windows and doors. Mr. Wood indicated that after the two-year period he was called about the blinds in the Windows and he referred the matter to Craig Henderson.

7. Greg Henderson who was a service worker for the manufacture of the windows and doors indicated there was some doors that would not open and close and they were either installed incorrectly or it was a result of the house moving or shifting but it was not a warranty manufacture related issue. Mr. Henderson inspected the doors on June 23, 2010. Mr. Henderson's final comment was it would not be a manufacturers warranty but another warranty might result in their being fixed.
8. This is the crux of the case. The contract between the parties stated that the monies in question were to be held in trust to cover any warranty items that may arise after two years [September 14, 2011].... The whole thrust of the amended contractual agreement relates to the windows and doors themselves and not to the installation of the doors or the windows for that matter. Nor does the agreement envisage the destruction or the nonperformance of the windows and or doors due to the shifting of the home following construction or to any other damage done to the doors.
9. There are other problems with the defendant's case, in that invoices relating to purchase orders do not have the foundation to show that the purchase orders related to the doors prior to September 14, 2011. This was a question that could never be fundamentally answered by the owner of the defendant company or his witnesses other than through speculation. There is no evidence before this court to show the windows and/or doors were defective.

10. Grant Boutilier did do some work on the doors in 2010 and he did fix that problem with a cost of \$600.00 plus tax. It was difficult to determine with exactitude if it was an installation problem or manufacturer's problem if it was a manufacturer's problem the manufacture could deal with it, however in this case Mr. Boutilier was paid by the defendant and there is no evidence that the defendant was reimbursed by the manufacturer. Therefore that costs will be a cost attributed to the contractual warranty provided by the claimants.
11. The issue as to the funds being held in trust by the solicitor is not an issue that has to be dealt with by this court.

It Is Therefore Ordered That the defendant paid the claimants the following sums:

\$11,484.98
Less \$ 670.00 Grant Boutilier costs to the defendant
plus \$ 182.94 court costs
plus \$ 80.50 service costs
plus \$ 100.00 service charges
plus \$ 16.71 Courier costs
\$12,535.13 Total

Dated at Halifax this 16th day of July 2012