

**SCCH 347897**

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

*Cite as: Ocean Mechanical Inc. v. Solid Homes Construction Ltd., 2012 NSSM 36*

Between:

**Ocean Mechanical Inc.**

**CLAIMANT**

- and -

**Solid Homes Construction Limited**

**DEFENDANT**

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**DECISION**

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**Adjudicator: David T.R. Parker**

**Heard: August 3, 2011, August 23, 2011, September 27, 2011 and November 1, 2011**

**Counsel: Peter C. Rumscheidt represented the Claimant/Defendant by Counterclaim**

**Kevin A. MacDonald represented the Defendant/Claimant by Counterclaim**

Parker:-this case involves a contract between the parties for the supply of labor and materials to a condominium being built by the defendant. The claim amount in the pleadings was for \$22,233.30. The amount the claimant is now seeking is \$25,000.00

which amount has been reduced to fit within the monetary jurisdiction of the Small Claims Court. In addition the claimant is requesting interest and costs.

In its defence the defendant makes a general denial of all allegations and that the defendant has suffered significant delay, interest charges and deficiencies which have to be repaired all due to the claimant. In the counterclaim that was pleaded the defendant/claimant by way of counterclaim stated that the lien that was registered against the property of the defendant was false and that no monies were due and owing in the alternative were subject to a set off for failure to complete the contract.

The counterclaim speaks of a set off and notes the amount of \$25,000.00.

Ali Alwarith ["Ali"] was involved or at least associated with the claimant and during this time he contacted Eli Abraham ["Eli"] who was part owner along with his brother Naji Abraham of the defendant business. The defendant was building a new condominium complex which was composed of residential and commercial space and Ali approached Eli with a view of having the claimant provide certain ventilation equipment for the defendant's project. Initially the claimant provided a one-page letter written agreement dated July 31, 2008 which main body stated:

**"To supply and install all ductwork, grills, diffusers, fans, HRV's, motorized dampers, louvers, wall boxes, fire dampers, dock access doors, drywall access doors, pipe, flex, range hoods, lint boxes, booster fans, A/C units, CO2 system (supply only), and air balancing as per plans and specifications.**

**The supply of all labour, materials, supervision, equipment and tools required to complete all HVAC systems and related work for the above-noted project for the sum of**

**= \$89,700.00 plus tax**

This letter dated July 31, 2008 was signed by Ali above the name of the claimant. The words that are italicized as noted above were in fact scratched out or had a line running through them. There were also other figures on the page in the hand writing of Ali of 82,000 and also 75,000 and also 78,000. This letter was never signed by the defendant

A subsequent letter dated September 9, 2008 relating to the same matter as the previous letter was signed by David Nowe owner of the claimant company and also by Eli above the words approved. This letter or intended agreement between the parties was substantially different than the one dated July 31, 2008. However to indicate what was contained in the letter it stated the following:

**"To supply and install all ductwork, grills, diffusers, fans, motorized dampers, louvers, wall boxes (*supply only*), fire dampers, duck access doors, HRV's, CO2 system (supply only), pipe, flex, booster fans (quantity required as per plan) and air balancing for hallways and parking level.**

**3/3 tons split system A/C unit by Lennox. 1 fantech 500cfm HRV to be located in parkade. Rough in refrigeration lines and condensate lines for future mini split A/C. Spiral pipe to be 28gauge snap lock pipe. Relocate 5" diameter lines for washrooms and air handling units in commercial space to rear of building.**

**The supply all labor, materials, supervision, equipment and tools required to complete all HVAC systems and related work for the above noted project for the sum of**

**= \$79,000.00 plus tax"**

signed by David Nowe Of Ocean Mechanical Inc.

approved by Eli Abraham

the italicized words above were scratched out. However this turns out not to be the final agreement between the parties.

A final letter of agreement dated September 10, 2008 was the one relied upon by the parties according to their evidence before this court. In that letter there were a number of items scratched out and additions which were put in.

This agreement was to the attention of Naji Abraham you assigned the bottom by David Nowe beside the name Ocean Mechanical Inc. and also signed by Ali. It stated following:

**"to supply and install all ductwork, grills, diffusers, fans, HRV's, motorized dampers, louvers, wall boxes, fire dampers, duct access doors, pipe, flex [range hoods-- range hoods was struck out and below the words range hoods was the handwritten word 'Removed'] lint boxes, CO2 system(supply only), and air balancing.**

[No -this word was struck out] **booster fans by wall boxes**[above this sentence in hand written form for the words *as per plan as required*] [2-the number 2 was struck out and insert was number 3] **3 split system AC units by Lennox.**[Above 3 split system where the handprint words *3 tons each*] **one fantech**[above this was the hand written word *heat pumps*] **500 cfm HRV to be located in storage room in Parkade. Rough in refrigeration lines and condensate lines for future mini split A/C units. Spiral pipe to be 28 gauge snap lock pipe. Relocate 5 inch diameter lines for washrooms and air handling units and commercial space to rear of building.**

**The supply of all labor, materials, supervision, equipment and tools required to complete all HVAC systems and related work for the above project for the sum of [\$78,000.00 plus tax this was scratched out and in his place was \$79,000.00 plus HST"**

The letter of agreement was signed by David Nowe and Eli.

As noted above there were several wording changes in the letters as well as price changes. The parties were also referencing a set of plans for the condominium and it was from those plans that the parties attempted to hammer out the materials required and the price. While these were not sophisticated, lengthy and detailed contractual agreements between the parties they were apparently comfortable with each other and undoubtedly wanted to or felt they could draft a clear binding agreement that would suffice their

needs. Unfortunately this did not work out as planned and has resulted in this matter being brought to court in order to make a determination what was meant and to resolve the issues between the parties.

**Witnesses:**

**Ali Alwarith ["Ali"]**

Ali advised the court that he was employed with the plaintiff as operations manager in charge of hiring workers. He said he spoke with the defendant's owner who wanted the claimant to do the ventilation system in his building. He said the defendant wanted 2 split units not 3 and that was why the price on the September 10, 2008 letter of agreement was originally \$78,000.00 plus tax. He said the defendant changed this again from two split units to 3 split units and that is why the price was scratched out on September 10, 2008 letter of agreement and inserted in its stead was \$79,000.00 plus HST. Ali said there was to be one Fantech HRV 500 CFM to supply fresh air to the hallway and this was to be located in the parkade on the lower level. He said at the beginning of February 2010 the building was not airtight and there were lots of delays. Further he said the engineer did not approve the Fantech 500. He wanted the unit located on the roof as per the original diagrams. He said the rooftop unit was not put in as of September 2010. He said the three A/C units were not installed as the defendant did not want these, so the three units were not installed. He said he left in 2009 and 95% of the job was completed with no complaints. Ali made reference to invoice 188 in Exhibit 2 and said that someone damage

materials and this invoice resulted as the defendant wish to present the invoice to his insurance company. This amount was one \$11,159.31. He said this invoice was not paid and it was separate from the original contract. With respect to invoice 230 Ali said the defendant did not like outside Vance so we gave him a new price for covering the Vance, we did the work and invoiced in the amount of \$1412.50. He said he was not involved in payment of this invoice. Invoice 249 was a result of the defendant wanting timers. He said this was separate from the contract and was in the amount of \$734.50. With respect to invoice 247 he said that he was not with ocean at this time. He said that Enertak was not ordered by the claimant as it was not in the contract. He said the booster fans are \$30.00 and the split systems are about \$2000.00

**David Nowe:**

David Nowe is the owner of the claimant company which is involved in heating, air-conditioning and ventilation systems he said that Ali Alwarith asked me if I wanted to quote on the project and I told Ali to see what they wanted and negotiate a contract with them. He said that Ali took the contract to them and they wanted changes. He said they wanted a 3 ton unit and then they wanted 2 ton unit and then back to a 3 ton unit. He said the Fantech HRV 500 was not supplied as the engineer wanted an Enertrak unit on the roof. Mr. Nowe referred to invoice 223 and said that the defendant paid \$4727.08 and there was still \$4199.92 owing. With respect to invoice 247 he said the defendant did not want a 3 ton A/C units plus a 5 ton A/C unit so I gave the defendant a credit. The credit on the invoice was for \$5308.25 plus HST of \$690.07 for a total of \$5998.32. He said

with respect to invoice 188 it related to work to repair or replace damage and stolen material in the amount of \$11,159.31 and this was not paid. With respect to invoice 230 the defendant wanted covers put on the vents this was a separate addition to the contract and was for the amount of \$1412.50. With respect to invoice 249 the defendant requested the bathroom timers and/or bath fans and this was done and separate from the contract. The amount of this invoice was \$650.00 plus \$84.50 for a total of \$734.50. Mr. Nowe said that the defendant owners said they were going to pay as we were after them to do so all the time. He said that prior to filing a lien he went over everything with Ali what was owed and what was paid. He said I was not aware of any \$15,000 credit [invoice number 149 \$13,800.00 plus HST of \$1794.00 for a total of \$15,594.00] and it should not have been a credit it was never done. He said this invoice 149 outlining a credit was a mistake made by the claimant's accountant.

He said that the defendant wanted to change the building but the engineer would not approve his changes. He said that the machine [Enertrak] was not ordered by the claimant. It was the Fantech unit that was not part of the contract. In reference to, exhibit D4 which relates to invoice 149 the defendant requested changes and if those changes went through the defendant would have received a \$15,000 credit for this work however this work was never approved by the engineer so therefore no credit. He also said that the defendant is saying that the credit is for Ductwork in the commercial space which was not done by the claimant. However the claimant owner, Mr. Nowe said the contract did not call for Ductwork in commercial space.

**Eli Abraham [ "Eli"]:**

Eli said this was our first condominium project. Ali came to us and would give us a quote on the project. At first we said no but he was insistent on getting the job. He said we gave Ali the building plans and he came up with a quote. He said I made it clear I wanted three heat pumps so it was an oversight from the engineer but I insisted on heat pumps. He said the plans called for A/C but I wanted heat pumps. He said the September 9, 2008 agreement letter mentioned 3 system A/C but I wanted heat pumps. He said he wanted boosters and heat pumps so "I crossed booster and I put 3 ton each heat pumps". He said they always paid on time. He said they ended up paying for equipment themselves and they gave us credit after we paid for it. He said he met with the claimant's accountant on June 4, 2010 and at this time the job was not completed and I explained to the accountant they owed us money. The reason for this credit was for the ductwork for the three heat pumps for the commercial units. Ali said that by removing the ductwork from the job this was why there were going to give me a \$15,000 credit and Mr. Nowe told me this. As well they were to give me a credit of \$8409.22 on heat pumps and labor plus they were to give me a credit to supply machine rentals.

He said there were delays about the rooftop machine which the claimant says is not part of the contract. Without these machines we cannot finish the building. They were supposed to order Enertrak but I had to go and pay Enertrak. He said from April to October the delay was because there was no machine. We could not finish the building and it was leaking as the roof was not finished. He said the claimant was to provide fans



or timers and these fans were part of the original contract. He said that Mr. Nowe told him he may not be able to do ductwork. The ductwork he said was included in the original contract and he referred to the letter agreement dated September 10, 2008. He said the ductwork was for the commercial space in the condominium which gives rise to this credit in invoice 149 and the original contract included ductwork through the entire building for commercial space in the contract. He said that he gave the contract to Ali but he did not get the contract to the engineer. He thought that FanTech was part of the plans [for the condominium] he said that since May of 2009 Ali knew he had to pay 50% of the Enertrak machine and he actually knew before this. He said in August 13, 2009 he paid 50% of the Enertrak machine and on September 22, 2009 he paid the balance. He said it was ordered in April and it should have been installed by June 15, 2009 but the machine was not installed until four months later. With respect to the booster fans he said he showed the claimant the plans and they gave me the quote.

Naji Abraham ["Naji"]

Naji indicated that he has been the president of the defendant company since 1998 and that Eli his brother does the accounting and he, Naji is the general contractor. He said that Eli met with Ali and they signed the contract. He said that the ventilation is for the roof and this was never changed and this is what Ali had from the beginning. He said after he saw the contract it had to be on the roof and if Ali wanted it in the garage he had to contact the engineer. He said that Mr. Nowe told him the \$15,000.00 was not really a credit. It shows up on the invoice for ductwork not done so was not a credit. He

said because Nowe did not do that he provided a credit.

He said the vent covers, the wall box we brought this to their attention and they covered them and we paid the extra for this. He made reference to a journal that he kept every day and was found in exhibit D4-11-9.

He said that the \$13,795.00 was paid by the defendant to Enertrack however that was part of the original contract.

**Analysis:**

The following is a list of what the parties have agreed:

**Items:**

• Original contract \$79,000.00 plus HST	\$ 89,270.00
• Invoice#188-repair and replace damaged and stolen refrigeration lines-exhibit C-2	\$ 11,159.31
• invoice#179 extra for repairs exhibit D-4, tab11/2	\$ 1,389.06
• invoice#183 extra for repairs exhibit D-4,Tab 11/2 p.2	\$ 547.32
• invoice#230-vent covers exhibit C-2,p.7	<u>\$ 1,412.50</u>
This amount totals	\$103,778.19

The next issue I will deal with relates to the invoice 249 which refers to the supply and installation of 13 bathroom timers and or bath fans for the cost of \$650.00 plus HST of \$84.50 and a total amount of \$734.50. This was not quoted in the original contract and I would allow same as an extra. Therefore allowing invoice 249 as an extra the total amount due the claimant would be \$104,512.69.

Credits:

### **Booster fans**

The contract of September 10, 2008 indicates "booster fans or access doors by wall boxes." The claimant's position is that eight booster fans were required in the plans at a cost of \$229.00 +13% HST for \$2070.16. These fans were installed and then the defendant requested they be removed which the claimant alleged cost \$210.00 plus HST for total of \$1898.40 and therefore the credit to the defendant should be the difference between these two amounts or \$171.76. The defendant's position is that the booster fans should allow the defendant to receive a credit of \$5932.50. The defendant argues that the plans envisaged 15 booster fans and they would have cost \$350.00 per fan plus HST leaving a total amount of \$5932.50. The amount of the \$350.00 was a quote provided by cunning energy. It would appear there was another quote provided by the defendant at \$225.00 per booster fan. I will accept the defendant's evidence that there were 15 booster fans required and I shall accept the claimant's amount of \$229.00 per booster fan. Total credit therefore would be \$229.00 x 15 booster fans +13% HST for total of \$3881.55. I also accept the fact that it was defendant who required removal of the booster fans. With respect to the cost of removal that amount should be reduced by the markup of 25% as there was no explanation for same and the hourly rate of \$45.00 would be more appropriate at \$25.00 as there was no explanation related to the time involved and who

did the work. It would be reasonable however to suggest that some time was required.

There were only eight booster fans removed therefore the total cost to removing those fans at the defendant's request would have been \$1220.40.

Therefore the total amount associated with the booster fans would be a credit of **\$2661.15**

### **Heat pumps:**

The claimant's position with respect to a credit is that the defendant should receive a credit of \$1456.29 for the heat pump that was not installed as well as a credit of \$820.81 which would relate to the installation of one heat pump.

The defendant's position is that it should receive a credit of \$12,290.37 representing three heat pumps at a cost of \$4096.79 each plus a credit related to the installation of the three heat pumps in the amount of \$820.91x 3 for a total amount of \$2782.54. The agreement of September 9, 2008 indicated 3/3 ton split system A/C unit by Lennox. The final agreement on September 10, 2008 while somewhat primitive in the way it was drafted ultimately leads to disagreement between the parties. The claimant had typed in the agreement "2 split system A/C units by Lennox." The number 2 was crossed out and above it was inserted in hand written form "**3 3 tons each HEATpumps**" this would be consistent with Eli's evidence that the defendant wanted heat pumps not just air conditioning systems. In addition to the lies evidence the preponderance of evidence is that there were to be heat pumps installed as part of the contract and this was not done. The claimant provided evidence that they could supply heat pumps at a more reasonable

price being \$7114.66 plus HST or \$8181.86. While the defendant was seeking a credit of \$12,290.37 for the three heat pumps that they eventually had installed it would be more appropriate to allow them a credit of **\$8181.86** plus the installation credit related 3 heat pumps in the amount of **\$2782.54**.

**Fantech:**

The Fantech unit was according to the contract to be located in the storage room in Parkade. The cost of this unit according to the documentary evidence provided by the claimant would have been \$1630.00 plus HST for total amount of \$1841.90. The engineer apparently would not go along with this and it was to be installed on the roof as per the plans. The defendant negotiated for an Enertrak system at a cost of \$13,795.00. The appropriate amount here would be a credit of \$1841.90. While there was argument that the claimant had agreed on ultimately paying for Enertrak it would be appropriate to follow the contract. Therefore there should be a credit of **\$1841.90**.

**Ductwork/ventilation system**

Invoice number 149 from the claimant indicates a credit of \$13,800.00 plus HST of \$1794.00 per total credit of \$15,594.00. The claimant claims and this was a mistake by the accountant and further no ductwork was required in the commercial section pursuant to the plans. It is certainly not clear from the plans where the ductwork was required. But the contract certainly states "to supply and install all ductwork." Ali apparently went

along with this at the time and agreed to it. On August 21, 2009 invoice number 149 shows a credit of \$15,594.00 related to "a credit for the change in price of a ventilation system." The claimant indicated that this was in error made by the accountant. The defendant asserted its owner met with the accountant who confirmed it was a credit. The accountant was never called to give testimony in this case and that in itself allows for an adverse inference to be made by this court. David Nowe owner of the claimant company said in his evidence in relation to invoice 149, that the defendant requested changes and if those changes went through the defendant would have received a \$15,000 credit for this work but it was never approved by the engineer so therefore no credit. Eli it would appear negotiated this contract and notwithstanding it is not clear what ductwork meant in the September 10, 2008 letter of agreement it does say all ductwork. That in conjunction with the fact that there was no support the show it was an accounting error, the accountant was never asked to provide evidence of same and the fact that the defendant's owner did provide evidence that he had a conversation with the accountant confirming the credit leaves the court allowing this as a credit. Therefore I shall allow the credit of **\$15,594.00**.

The counterclaim with respect to damages which it were incurred as a result of the claimant's actions is not supported by any clear supportable evidence and therefore the total estimated losses of \$95,913.21 will not be allowed.

Therefore the following figures with respect to this claim would be as follows:

**Deficiencies:**

The deficiencies of \$932.25 are acknowledged by both parties.

With respect to the other items such as scissors lift there is insufficient evidence to allow a clear determination.

**Items:**

• Original contract \$79,000.00 plus HST	\$ 89,270.00
• Invoice#188-repair and replace damaged and stolen refrigeration lines-exhibit C-2	\$ 11,159.31
• invoice#179 extra for repairs exhibit D-4, tab11/2	\$ 1,389.06
• invoice#183 extra for repairs exhibit D-4,Tab 11/2 p.2	\$ 547.32
• invoice#230-vent covers exhibit C-2,p.7	\$ 1,412.50
• invoice#249-bathroom timers and or bath fans	<u>\$ 734.50</u>
• total amount the contract	\$104,512.69
less amount paid to date	<u>\$ 74,030.38</u>
<b>amount owing to the claimant prior to credits</b>	<b>\$ 30,482.31</b>

**Credits:**

• Booster fans	\$ 2,661.15
• heat pumps	\$ 8,181.86
• installation of heat pumps	\$ 2,782.54
• Fantech unit	\$ 1,841.90
• Ductwork/ventilation system	\$ 15,594.00
• <u>Deficiencies</u>	<u>\$ 932.35</u>
Total credits	\$31,993.80

Therefore the amount owing to the defendant for overpayment would be \$1511.49

I would not order costs in this matter

In the event a formal order is required I would ask that the defendant prepare a draft for the court

Dated at Halifax this 23rd day of January 2012