

SCCH 357688

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

Cite as: Stonetile Atlantic Inc. v. Tench, 2012 NSSM 42

BETWEEN

**Stonetile Atlantic Incorporated**

**CLAIMANT**

-and-

**Lawrence Tench**

**DEFENDANT**

**Heard: February 2, 2012**

**Decision: March 8, 2012**

**Adjudicator: David TR Parker**

**Counsel: Michael O'Hara represented the Claimant**

**Michael C. Moore represented the Defendant**

**DECISION and ORDER**

This case came before the Small Claims Court on July 2, 2012. The claimant in the pleadings claimed \$9950.40; this amount has been amended to \$3950.40 as the defendant paid the claimant \$6000.00 on December 1, 2011. The claimant is also claiming prejudgment interest and costs.

The defendant in his pleadings stated that the balance due and owing under the contract between the parties would be \$3450.00. The defendant further stated in his pleadings that the claimant breached the terms of the agreement in that the claimant has not installed all non-stained stone tiles on the exterior of the home. The defendant stated that the claimant

breached the terms of the agreement in that numerous stone tiles provided and installed by the claimant have become stained contrary to the warranty and representations made by the claimant to the defendant which induced the defendant to enter into the agreement with the claimant. The defendant further stated that numerous stained stone tiles supplied and installed by the claimant have not been removed and replaced by the claimant and as a result no additional monies are payable by the defendant to the claimant pursuant to the agreement.

In a counterclaim to the court the defendant claimed the sum of \$5000 and damages representing the cost of installing the remaining stone tiles on the home on the property required to complete the agreement and the cost of removing and placing all existing installed stained stone tiles with new unstained stone tiles.

The claimant claimed in his evidence that it had received an initial payment of \$5000.00 in cash. The defendant said that he paid \$5,500.00 in cash and therefore any amount claimed should be reduced by that amount. I accepted the defendant's assertion on this point notwithstanding the e-mail evidence going back and forth between the parties indicated that \$5000.00 was paid in cash not the amount \$5,500.00 as asserted by the defendant. The defendant gave a reasonable explanation for this. Further the party that received the money in cash for the claimant did not provide any evidence either as a witness or in writing and the pleadings of the defendant are consistent with his position which he was very clear in his testimony. At the end of the trial I indicated to counsel that I found the defendant credible. The basis of credibility was not based on presentation of the defendant's testimony but rather on the totality of the evidence before this court.

The defendant admitted under the contract there would be an amount outstanding. I accept the defendant's analysis of what is due and owing under the contract after payments were received and credits for work provided and that being the amount of \$3450.00.

The next issue that I have to deal with is the counterclaim. Mr. Moore, counsel for the defendant said in his summation the only issue is; if there is a credit for the staining and some work to be done in replacing tiles. The evidence showed that six tiles were missing however four of those tiles were missing as result of work done to the defendant's home under the direction of the defendant after the claimant left the job site. Therefore there are two tiles missing. The claimant said he would be glad to put the two missing tiles on the residence. There is no evidence before me of what the cost of that would be if the claimant did not live up to its word. This court does not have the ability to make a Declaratory Order. As such no Order will be made forcing the claimant to put those two tiles onto the residence. I would expect however the claimant to keep his word. I do not know what the cost would be to install the two tiles therefore I cannot make an Order with respect to that as well.

The last issue deals with the credit regarding the staining. There is no question there is staining on some of the walls and window sills on the material supplied by the claimant. There are two questions that have to be answered here. The first question is; was this staining caused by a defect in the materials supplied by the claimant? Was it a defect in something the claimant did in installing materials on the home? There is no evidence before me that there was a defect in the materials. The only evidence I have is that water running along the walls of the house caused staining over a period of time. This comes from the testimony of the claimant. The claimant said this is going to happen until the defendant puts eve troughs up around his house in order to stop the water flowing off the roof and down the walls of the house. The defendant argues that the claimant should have advised him about problems caused where gutters are not used or problems with leaving holes in the Windows. Staining is, no doubt an issue but is not an issue with respect to what the claimant did or did not do. There is also no evidence of a warranty and or representations made by the claimant to the defendant with respect to staining or watermarks occurring on the stone tiles.

Even if the claimant was responsible for removing these stains, for doing something or to prevent them from staining, the defendant still would not succeed. Defendant's counsel

said correctly we have led no evidence as to what the damages would be to deal with the staining problem. The defendant's position is that some damages should be awarded. No damages however shall be awarded as there is no foundational evidence that the materials were defective or the workmanship was defective or if it was defective what the cost would be to remedy same. That is to say even if there was sufficient proof on the balance of probabilities of defective work or defective materials there is no evidence as to what the cost would be to rectify the problem.

**It Is Therefore Ordered that the defendant shall pay the claimant the following sums:**

\$3,450.40  
\$ 590.02 prejudgment interest  
\$ 86.25 service costs  
\$ 91.47 court costs  
**\$4218.14 Total**

**Dated at Halifax this 8th day of March 2012**