

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Devison v. McNeil*, 2017 NSSM 77

Date: 2017-11-13

Docket: Sydney, No. 462819

Registry: Sydney

Between:

Travis Devison

Claimant

v.

Cory McNeil

Defendant

Adjudicator: Patricia Fricker-Bates

Heard: June 21, August 23, 2017 in Sydney, Nova Scotia

Final written submissions: September 13, 2017

Appearing: Stephen Jamael, Counsel for the Claimant
Darlene MacRury, Counsel for the Defendant

BY THE COURT:

[1] The Claimant, Travis Devison, filed a Notice of Claim against the Defendant, Cory McNeil on April 25, 2017, alleging the following:

Breach of Contract—I completed construction work according to a contract we had. He did not pay.

Legal counsel Stephen Jamael represents the Claimant.

[2] In response, the Defendant filed a Defence and Counterclaim against Travis Devison doing business as WP Construction Ltd., on May 16, 2017, stating:

Claimant has overcharged for work and materials to residence and also based upon estimate given. I counterclaim for cost of finishing work to premises and also correcting and repairing deficient work of claimant.

Legal counsel Darlene MacRury represents the Defendant.

[3] The Claimant is seeking \$20,265 in principal from December 2016, plus interest calculated at 3.5% per month for a total of \$25,000.00. The Defendant maintains that any outstanding bill is in the vicinity of \$12,000 to \$13,000 but that he is willing to settle the matter for the sum of \$15,000.00.

[4] There were a total of 11 exhibits before the court and two witnesses—the Claimant and the Defendant. This Adjudicator heard evidence on June 21, 2017, August 23, 2017, and, with the consent of counsel for the Defendant, approved the request of counsel for the Claimant that final summations be made in writing. The filing date for summations was September 13, 2017. The Court extends thanks to counsel for both the Claimant and the Defendant for their written submissions on this matter.

[5] The Claimant, Travis Devison, testified that he does business as WP Construction Ltd., a company incorporated in April 2016. Previously, he had worked in carpentry for other companies including Woodland Homes (Glace Bay, NS), Woodland TimberMart (Dominion) and Devison Properties (owned by his father). He testified that he had been nine (9) years in the regular army but was discharged after being hurt in his second tour of duty in Afghanistan. The Claimant indicated that he has three children under 10 years of age. According to the Claimant, he charges \$50.00 per hour, tax included, which is, according to him, below the average hourly rate as he is trying to establish a reputation in the business by being competitive. Besides himself, the Claimant employed two workers at the outset of his work for the Defendant. The renovation work at the

Defendant's property, 61 Wilford Place, Albert Bridge, NS, commenced on or about September 19, 2016.

[6] The Claimant testified that he first met the Defendant in July 2016 through the Defendant's ex-wife for whom he had done some work. Based on the text messages in Exhibit No. 6 dated Tuesday, October 4th, 2016 at 7:52 a.m. and Friday, October 14, 2016 at 8:59 a.m., the Claimant was having both domestic and business difficulties:

“Got some shit going on with my ex baby momma and I'm letting it affect work”: October 4th, 2016 text.

“Liston (sic) 2 of my Guys quit do go do their own thing”: October 14, 2016, text.

In his testimony, the Claimant indicated that he has been back and forth to court with his ex-girlfriend/wife since his return from Afghanistan. He testified that his domestic problems affected the progress of his work, not its quality. He acknowledged under cross-examination that his two workers had quit but couldn't recall when he had hired the replacement worker(s). The Defendant disputed the presence of two carpenters on the site at all times during the renovations.

[7] The Defendant testified that he bought the house at 61 Wilford Place, Albert Bridge, Nova Scotia in 2014. In order to get a mortgage on the home, the Defendant had to make renovations to the property, renovations that began in November 2015. The Defendant testified that he first made contact with the Claimant in June or July 2016 through his, the Defendant's, ex-wife/partner. In order to qualify for a mortgage and to buy out her interest in the residence at 61 Wilford Place, Albert Bridge, NS, the Defendant had to renovate the house to make it liveable. According to his evidence, prior to his contact with the Claimant, some demo work and partial renovations had been undertaken at the house. The Defendant wanted an inflated renovation estimate from the Claimant, site unseen. He wanted to ensure he had enough funds to cover the renovations—present and future. I note that the Claimant testified that the estimate of August 29, 2016 for \$38,900.00 was, in fact, a second estimate. The first estimate dated July 18, 2016 was for \$14,800.00 (see Exhibit No. 6). I note as well that the Defendant also had gotten an estimate dated July 18, 2016, from Darrell Sidney Renovations Inc. for

more global renovations, including vinyl siding, soffits, fascia, and stripping and re-shingling the roof. That estimate, taxes included, was for \$35,200.00 (see Exhibit No. 7). The Defendant testified that he wanted a comparable “padded” quote from the Claimant.

[8] There was considerable evidence before this court concerning the renovations, the alleged prices of materials used, what exactly the Claimant did and did not do during the course of the renovations, and the protracted time period over which the renovations occurred, originally estimated at two weeks (10 working days) with a two-week overrun period for unexpected delays. However, the Claimant maintains that it was his understanding that the total hours of labour would not exceed two weeks. I note that the Claimant introduced Exhibit No. 4 (black and white; the colour version is found in Exhibit No. 10), a letter with photos attached from Brian AuCoin of McCharles Aucoin Appraisals dated December 19, 2016, addressed to the Sydney Credit Union. That letter states:

I have personally viewed the above property for the purpose of completing a mortgage inspection. All pertinent data has been gathered.

...

It is my opinion that renovations to the property located at 61 Wilford Place, Albert Bridge, NS are 100% complete.

The Claimant acknowledged in cross-examination that his work at the Defendant’s residence stretched from September 19, 2016 to on or about November 18, 2016. He also acknowledged that he had no knowledge of any further renovations to the house between November 18, 2016, and the date of Mr. AuCoin’s inspection on or about December 19, 2016.

[9] The Defendant testified that he was “not knocking his [the Claimant’s] work, that he did good work but he didn’t finish it and it was overpriced.” The main bone of contention between the Defendant and the Claimant appears to be the use to be made of the estimate from WP Construction Ltd. dated August 29, 2016 (see Exhibit No. 1, Estimate No. 1019) prepared, according to the Defendant, at the inflated amount of \$38,900.00 at the Defendant’s request for submission by the Defendant to the mortgage company. The Defendant acknowledged that he did receive the full amount of \$38,900.00 through a mortgage and a line of credit.

However, it was his understanding from his interaction with the Claimant that there would be ample money left over, even after the Defendant satisfied the Claimant's bill, for additional renovations.

[10] In the end result, however, the Claimant billed the Defendant \$17,900.00 for supplies on September 9, 2016 (see Exhibit No. 1), and then a further \$20,465.00 for installation/labour costs on November 18, 2017 (see Exhibit No. 1). Based on the evidence before this court, the bill for \$17,900.00 already was paid by the Defendant. However, on January 20, 2017, counsel for the Defendant wrote to the Claimant seeking clarification as to the amount outstanding of \$20,265.00 (see Exhibit No.5). The Defendant did a "Breakdown of Invoice" dated January 22, 2017 (see Exhibit No. 1) starting with a total estimate of \$38,900.00, the alleged inflated estimate he prepared for the Defendant on August 29, 2016, for submission to the mortgage company. This, then, is the area of contention. The total of the Claimant's demand would swallow up the mortgage the Defendant secured in the amount of \$38,900.00, leaving nothing left over as had been the Defendant's original understanding when the estimate was prepared in the first instance.

[11] In her Post-Trial Submission date-stamped September 12, 2017, counsel for the Defendant writes (at paras 18, 24):

18. Mr. McNeil is not questioning the material costs or in large part the quality of the work performed. He does seriously question the labour costs submitted by Mr. Devison.

...

24. Mr. McNeil testified for the most part he is very pleased with the work performed on his home by Mr. Devison. He does not seriously challenge the material costs however he respectfully submits that the labour costs are greatly exaggerated and do not reflect the work done at the home.

The main focus of dispute appears to be the \$14,920.00 that the Claimant charged for labour (see Exhibit No. 1, "Breakdown of Invoice" dated January 22, 2017; and see Post-Trial Summation of Claimant's counsel, Darlene MacRury, at para. 24.). The Claimant charged \$50.00 per hour for two (2) workers, sometimes three (3), for total work hours of 149.2 hours. Maintaining that he did not charge for the

third worker, a helper, the Claimant charged for each of the two workers at \$50.00 per hour for the full 149.2 hours for a total of \$14,920.00.

DECISION OF THE COURT

[12] The Defendant, based on the evidence before this court, challenges the final bill (see Exhibit No. 1 “Breakdown of Invoice”) primarily on the ground that the Claimant calculated backwards from the inflated figure of \$38,900.00 knowing that that figure was “padded” to secure a more substantial mortgage with a cushion for further renovations. The Defendant “is not questioning the material costs or in large part the quality of the work performed”: Post-Trial Submission of Counsel for the Defendant at para. 18. The Defendant’s counterclaim “for cost of finishing work to premises and also correcting and repairing deficient work of claimant” is therefore dismissed.

[13] The Claimant alleges breach of contract. As the person claiming the agreement, the Claimant “bears the onus of establishing, on an objective standard (it would be clear to “the objective reasonable bystander”) that the parties manifested ‘their intention to contract and the terms of such contract’: *Cormier v. Universal Property Management Ltd.*, 2011 NSSC 16 at para. 26”: see *Wambolt v. Armstrong*, 2012 NSSC 363 at para. 93.

[14] Based on the evidence before me, I am satisfied that the second estimate—Estimate 1019 dated August 29, 2016 (Exhibit No. 1)—prepared by the Claimant for \$38,900.00 was purposively inflated by the Claimant at the request of the Defendant so as to enable the Defendant to secure a mortgage sufficient to cover current and future renovations to 61 Wilford Place, Albert Bridge, NS. Although the Claimant is alleging breach of contract, in the absence of a mutual understanding between he and the Defendant to enter into an agreement—oral or otherwise—that included Estimate 1019 as a term of that agreement, I find that there was no contractual agreement in place that incorporates the renovation estimate of \$38,900.00 as the starting point for billing purposes as per the Claimant’s “Breakdown of Invoice” dated January 22, 2017 (see Exhibit No. 1). As well, there was no mutual understanding or agreement between the parties that

a monthly penalty of 3.5% interest would be charged from November 18, 2016 until satisfaction of the invoice. There is nothing before the court to support an inference that a percentage charge of 3.5% on outstanding accounts is the norm in the construction industry. Accordingly, the penalty of 3.5% interest monthly calculated from November 18, 2016, is disallowed.

[15] There is no doubt that the Defendant engaged the Claimant to do renovation work for him at 61 Wilford Place, Albert Bridge, NS. However, I find, based on the evidence before me, that as of October 14, 2016, the Claimant's two workers had quit and, in cross-examination, the Claimant acknowledged that he was unsure when he had hired a replacement worker(s). The hourly rate of \$50.00 (taxes included) cited by the Claimant is not correlated to the qualifications of his workers (those two who had quit) or the alleged replacement worker(s) (commencement date uncertain). For the same reason, the Claimant's reference to a comparable hourly rate of \$58.50 from Woodland Homes (see Exhibit No. 2) is not helpful.

[16] The Claimant had not itemized his account dated November 18, 2016 (see 'Invoice No. 1016' at Exhibit No. 1) and did not do so until January 22, 2017, in response to correspondence from counsel for the Defendant. He erroneously started from the premise that his second estimate—Estimate 1019 for \$38,900—was his starting point for outstanding billing minus the \$17,900.00 already paid. For the reason stated in Paragraph 14 herein, the monthly penalty of 3.5% on the unpaid allowance is disallowed by this court.

[17] I find that the Claimant has not established, on an objective standard, his claim for breach of contract in the amount of \$25,000.00. I therefore dismiss his claim for \$25,000.00. However, I find that there was no dispute that the Defendant had engaged the Claimant to do renovations at 61 Wilford Place, Albert Bridge, NS. Based on the evidence before me, including the conflicting evidence over the intended use of Estimate No. 1019 for \$38,900, the number of workers employed, over what period, and the industry standards supporting a labour rate of \$50.00 per hour, I find that the claimant overcharged for work to the residence. Accordingly, I am reducing the hours attributed to labour from a total of 298.4 hours (149.2 hrs x 2) to 205.4 hours in total. I find that the amount due and owing to the Claimant

from the Defendant for work completed at 61 Wilford Place, Albert Bridge, NS, is \$15,615.00 [$\$20,265 - (93 \text{ hrs} \times \$50) = \$15,615$]. This amount is not subject to a penalty of 3.5% interest for the reasons stated herein at paragraph 14.

[18] Accordingly, the Defendant is to pay to the Claimant the sum of \$15,615.00.

[19] As indicated above, the Defendant's counterclaim is dismissed.

[20] There shall be no costs awarded in this action.

Patricia Fricker-Bates, Adjudicator
Small Claims Court of Nova Scotia
November 13, 2017
