

Claim No: SCCH - 479727

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Ferris v. Sampson*, 2018 NSSM 102

BETWEEN:

ALLISON FERRIS

Claimant

- and -

KEITH A. SAMPSON and STILLWATER CONTRACTING LTD.

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on October 18, 2018 and November 1, 2018

Decision rendered on December 13, 2018

APPEARANCES

For the Claimant

self-represented

For the Defendants

Billy Sparks
Counsel

BY THE COURT:

[1] In May of 2017 the Claimant and her then-fiancé decided to fence the small backyard of their townhouse in Dartmouth, in part to protect them from an aggressive dog next door. They turned to the buy and sell website Kijiji and found the Defendant, Stillwater Contracting Ltd. (“Stillwater”), which advertised that it built fences.

[2] The Defendant Keith A. Sampson (“Mr. Sampson”) is the principal of Stillwater. He supplied the Claimant with pictures of some fences that he had built, which looked good to the Claimant. Mr. Sampson came out to look at the property. On or about June 15, 2017, a quote was given and accepted for \$2,100.00 plus HST for labour only.

[3] The reason that this was a labour-only contract was because the Claimant’s brother (who actually had an ownership interest in the property at the time) was employed by a large building supplies company and could obtain all of the needed materials at a wholesale rate.

[4] In addition to the \$2,100.00 the Defendant Stillwater also quoted \$675.00 to remove and dispose of some railway ties in the back yard. That quote was also accepted.

[5] The work commenced a few days later.

[6] It soon became obvious that Mr. Sampson had miscalculated how the fenceposts would be secured to the ground. He had assumed that the holes could be dug with an auger, but he quickly encountered large rocks that could

not be dug out by hand. He advised the Claimant that he would have to bring in an excavating contractor (at no extra expense to the Claimant) to bring in a small excavating machine to dig a trench and take out the rocks. This, in turn, created its own set of problems.

[7] Specifically, the back yard was not easily accessible and the only way to get a machine in was to go through a neighbour's yard, which would inevitably cause damage to the lawn. The neighbour was gracious in allowing this to occur, in part because of a promise by Mr. Sampson to repair the damage after the job was complete. This was a promise that was never properly fulfilled, in part because the damage was more extensive than originally contemplated (at least as far as the neighbour was concerned).

[8] In the end, the excavation occurred, and that company looked after placing the sonotubes in the trenches and sinking the poles in concrete.

[9] The Claimant believes, and the evidence supports her contention, that the excavation process disturbed the roots of some trees in her backyard, causing them to become unstable. One of the trees blew down the first winter, ironically causing some damage to the new fence. The remaining trees are vulnerable are the Claimant anticipates removing them before they also cause damage.

[10] The fence construction was completed on or about June 29, 2017. The Claimant paid the quoted amounts.

[11] The first thing that the Claimant noticed amiss was that the fence was not exactly the style she had selected. In the end, she has not made a real issue

out of this discrepancy, and it plays no part of her claim. More significantly, over the next months various problems were noted:

- a. Damage to the neighbour's yard was much more extensive than originally projected. The Claimant and her fiancé ended up doing some repair themselves because (they say) the Defendant neglected to do it. Even so, not all of that has been done because of the incomplete state of the fence.
- b. There was a discrepancy of several inches between the height of the sides and the back portion of the defence. The Claimant says, and I agree, that they should have matched up.
- c. The gate hardware was asymmetrically installed, and the gate itself very soon began to warp. The latter problem was corrected by adding a top gate latch.
- d. There appeared to be numerous screws missing, leaving many of the fence panels only loosely attached to the posts. The Defendant returned to correct this problem.
- e. There was a saw cut visible on one of the posts, where a cutting error had obviously been made. This error, minor and cosmetic though it is, has never been corrected.
- f. Some months after construction, black streaks began to show up, running down the panels from many dozens of screw heads. What eventually became clear was that after the initial supply of screws ran out, one of the Defendant's employees went and purchased a box of the wrong type of screws. He bought flooring screws which are intended for indoor applications and which rust when exposed to the elements. The end result is that a good many of the panels are streaked with these long "cry marks" and need to be replaced. Mr. Sampson attempted to blame the supplier for the error and went so far as to demand free replacement panels, but the Claimant put a stop to that and the panels were returned. I have no hesitation in saying that the error was made by employees of the Defendant and the attempt to blame someone else does no credit to Mr. Sampson.

- g. Perhaps most significantly, some of the fence posts are loose, despite the fact that they are supposedly sunk into concrete. One of them is more seriously loose, which appears to have been the one hit by the falling tree.

[12] The Claimant has repeatedly complained to Mr. Sampson, who responded initially but more recently stopped responding. By the end of August 2018, the Claimant concluded that she needed to bring this Claim. She seeks damages totaling \$5,662.66, about which more will be said later.

[13] The Claimant obtained the opinion of another contractor, Dominic Gaslard, who purports to have expertise in fence construction. He examined the fence and noted many deficiencies. In his opinion, nothing short of removal and replacement would give the Claimant the fence that she contracted for. Mr. Gaslard filed a written letter and made himself available for cross-examination over the telephone. I was not highly impressed with all of Mr. Gaslard's evidence, though some of what he stated is consistent with the other evidence and holds weight.

[14] Possibly the most serious problem that he noted is that all of the posts are loose. If this is true, and all of the evidence suggests that it is, then the fence is ultimately doomed. Mr. Gaslard did not know based on his inspection of the fence how the posts were affixed to the ground, but the court has the benefit of having heard from the Claimant and Mr. Sampson on this point. What all of the evidence points to is a serious error.

[15] The looseness of the posts is confirmed in a letter from a civil engineer retained by the Claimant, one Dan Monk P.Eng. Although he was not called as a witness, I am prepared to accept his observations as correct, and specifically

that the “fence and foundation can be moved with moderate pressure by hand, which should not occur.”

[16] Why are these posts loose, after all of the effort to excavate a trench and sink the posts in concrete? It appears that Mr. Sampson had delegated the task of setting the posts to the excavation company. It is not even clear that he witnessed the process. No one from that subcontractor was called as a witness.

[17] I conclude on all of the evidence that the posts were not sunk properly. Sinking posts in sonotubes is a well-recognized method, though not the only one. If that method is chosen, the hole should be at least one-third (or possibly even one-half) as deep as the height of the fence, which in this case means that the post should be sunk to an absolute minimum of 2 feet (for a 6-foot fence), or slightly deeper for a fence that is higher by a few inches, which this one is. The post should be placed, centred in the sonotube, sitting on a thin layer of gravel, and concrete poured around the post up to ground level, or at least an inch or two below. The approximately two feet of post sunk in concrete should provide stability.

[18] Apart from the fact that the posts are loose, there are other clues that suggests not enough of the posts were sunk in concrete. The Claimant points to photographs taken during construction, showing the amount of the 10-foot posts above the six-and-a-half-foot fence panels (before being cut down) as evidence that not enough of the posts was set into the concrete sonotubes. Based on a rough visual impression, it would seem that no more than one to one and a half feet of the posts is actually below ground.

[19] Mr. Sampson insisted that only about a foot of wood needed to be set into the concrete. He says that the important thing is that the concrete column extends as much as 3-½ feet below the ground. The Claimant's evidence suggests that the post should be set into the sonotube before concrete is poured, which would mean that the post itself would be set as much as 3-½ feet below the ground level.

[20] The Defendant's stated method makes no logical sense. How is it even possible to pour a continuous column of concrete measuring between 2 and 3 feet, while only having the fence post set one foot below ground? What stops the post from sinking lower into the soft concrete? Is the concrete poured in steps, such that the first two feet sets first? Would this not defeat the purpose of having a solid three-plus feet of concrete below ground? If the concrete is poured all at once, are the posts suspended in mid-air so that they do not sink?

[21] On all of the evidence, combined with common sense, I conclude that the setting of the fence posts was not done in a workmanlike manner. I find that the posts are vulnerable and will not last as long as they would had they been done properly.

[22] The cost to remove and replace the fence, according to Mr. Gaslard, would exceed \$11,000.00, which is considerably more than the Claimant seeks. Probably, the Claimant hopes to salvage some of the fence although she testified that no one she spoke to would be willing to repair the fence. It is common that contractors do not like to rectify another contractor's work. In many cases it is simply because they are unwilling to guarantee the work, but

faced with a willing customer and upon proper terms, they would likely change their tune and perform remedial work on some basis.

[23] All in all, I find that the fence construction was faulty and in breach of the express and implied warranties to the effect that it would be fit for the purpose and done in a workmanlike manner.

[24] I will not speculate on how this could have happened, given that the Defendants appear to have experience, but the end result is that the Claimant is worse off than she was before she hired the Defendant Stillwater.

[25] The Claimant has chosen to measure her damages not by the cost of replacement, but on a recovery basis, i.e. based on the cost of a fence that has no value and related costs. The items claimed are:

Paid for fence supplies	\$1,893.19
Paid Stillwater	\$2,415.00
Paid for pallets of soil (repair lawns)	\$454.14
Paid for grass seed	\$90.00
Estimated future tree removal	\$632.50
Total damages	\$5,484.83

[26] Although the Claimant had sought \$5,662.66, the numbers do not add up to that by my reckoning.

[27] In addition, she seeks costs of:

Expert costs (Gaslard)	\$345.00
Filing fee	\$199.35
Process server	\$149.50
Total costs	\$693.85

[28] In my opinion, the Claimant's demands for damages are reasonable, even conservative, and I allow the sum of \$5,484.83 in damages.

[29] I am also prepared to allow the costs, as claimed. It appeared to me that the Claimant sought and obtained a lot of relevant advice which was helpful to the court.

[30] As such the Claimant will recover \$5,484.83 plus costs of \$693.85, for a total of \$6,178.68.

[31] The order will be against Stillwater only. There is no basis to hold Mr. Sampson personally liable, and the claim against him is dismissed.

Eric K. Slone, Adjudicator