

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Johnston Investments v. Spears*, 2022 NSSM 29

SCCH 511742

Between

JOHNSTON INVESTMENTS cob as ALL-CRAFT

CLAIMANT

v.

DAN & CHRISTINE SPEARS

DEFENDANTS

DECISION AND ORDER

Hearing: June 23 and July 13, 2022
Appearances: For the Claimant – Craig Arsenault, Counsel
For the Defendants: Appeared in person

DECSICION AND ORDER

1. A contract is a legally recognized agreement made between two or more persons. Such agreement gives rise to obligations that may be enforced in the courts, the failure to observe which creates a liability to pay compensation in the form of damages. (John A. Yogis QC, *Canadian Law Dictionary*, 2^ded., (Hauppauge, NY: Barron's, 1990), p. 52)
2. When a contract is in writing, the terms, that specify the rights and obligations of the parties, are written in the main contract and any documents referred to and specifically included in it.
3. Oral communication before or during the contract do not vary the contractual terms. This was clarified in *Shaw (Gordon) Concrete Products v. Design Collaborative Ltd.* (1986), 72 N.S.R. (2d) 133 (S.C.A.D.), where MacDonald, J.A. states at paragraph 22:

... When a written contract exists, the terms of the agreement govern the rights and obligations of the parties. The contract is deemed to state finally the intent of the parties and the terms upon which they agreed and prior negotiations are deemed to have been merged into and settled by the contract as finally stated. For that reason courts have uniformly held that evidence of oral agreement is not admissible to add to, vary or contradict the written contract. However oral agreements are admissible in evidence to explain ambiguous parts of the contract or to show the parties' agreement as to a matter upon which the contract is incomplete or totally silent. See:

Cheshire and Fifoot, *The Law of Contract* (7th Ed.), page 104; Fridman, *The Law of Contract*, page 245 et seq ...

4. This case is about a standard contractual relationship between a home owner and a contractor to construct or renovate a home. The case demonstrates the importance of putting clear terms in the contract and of both parties understanding them. For the law of contract does not allow a party to pick and choose which contractual provisions they will be bound by. Once terms are agreed upon, subject to some exceptions that do not apply in this case, the entire contract applies to the parties' relationship.

The Contract

5. The Defendants planned extensive renovations to their condominium apartment at 50 Nelson Landing, Bedford, NS. They obtained three estimates and following discussions with the Claimant, selected All-Craft to undertake the work.
6. On February 25, 2021, the parties signed a contract, entitled 'ESTIMATE Effective this date'. In it the Claimants proposed

‘...to perform remodeling work on the above-mentioned residence per the following description and General Conditions

*Project Scope of Work:
Interior Renovation Project’*

7. The contract specifies details of work to be done in each room. These contractual conditions are noted because they are at the heart of this dispute.
8. Under 'START-UP' the contract states:
 - It is the Client's responsibility to remove all loose/persona; items from the work area prior to the start of the job...(Also see General Conditions 8)
 - 2-Year warranty on materials & workmanship at completion of project.
 -
9. The contract price, was not fixed but was an estimate, premised on '**The Following allowances/budgets/estimates ... included in contract** (emphasis in original). Eight items are listed. The contract then says:

Adjustment to contract allowances will be applied to Substantial Completion/Final Inspections Completed contract progress payment.
Actual cost will result in decrease or increase in payment. (sic)
10. A RENOVIATION PAYMENT SCHEDULE is included in the contract. The estimated costs included in the contract totaled \$81,906.70 + HST (\$12,286.01) for a total of \$94,192.71.
11. The contract provided that 95% of the price was to be paid by the time the project was 50% complete with the last 5% due at 'Substantial Completion' which was defined as 'the date when construction is sufficiently complete in accordance with the contract documents so that the Owner can occupy or utilize the Work or designated portion thereof, for the use for which it was intended.'
12. The contract required allowances to be adjusted based on costs incurred, which meant the sum due on substantial completion, i.e., the last 5% (estimated to be \$4742.71) might change.
13. On each of the six pages of the contract, the following appears immediately above the signature lines for the parties:

ACCEPTANCE: The above prices, specifications, conditions and Terms and Conditions are hereby accepted. You are authorized to perform the work specified.

The Defendants signed each page on February 25, 2021, as did the Claimant.

14. The General Conditions are referred to several times in the contract are made part of it. Para. 5 and 6 state:

5. TIME AND MATERIAL – If "Time and Materials" work is specified in the contract, or approved in a change order, labor will be charged at a predetermined hourly rate and materials will be charged at THE BUILDER cost plus fifty percent (50%). Upon completion of the work, the actual costs will be compiled and billed to the Owner through a contract change order. If T&M work is specified as an allowance, upon completion of the work, the Owner will be charged/credited any difference through a contract change order.

6. ALLOWANCE - An allowance is a specified sum of money set aside for an item about which there is not enough information to establish an accurate price. The specified sum is an educated guess and the actual cost may vary. Once an actual cost is established, owner will be charged/credited any difference through a contract change order. Allowances as noted, are at THE BUILDER cost plus twenty-five percent (25%).

15. Para. 18 of these Conditions states:

WARRANTY - THE BUILDER warrants that all home improvement work done pursuant to this Contract shall be of **workman like quality**, and shall be in accordance with applicable building codes. **Provided the Owner is in full compliance with this Contract and its payment provision, THE BUILDER shall remedy any defects**, excluding normal wear and tear, due to faulty BUILDER supplied materials or workmanship **which appear within a period of two (2) years from the date of substantial completion**. With respect to BUILDER supplied materials and equipment, any warranty furnished by manufacturers will be forwarded to the Owner. This express warranty is in lieu of and

excludes any other warranty, express, implied or otherwise. This express warranty applies to the Owner only, and to no other party whatsoever. (Emphasis added)

The Claim

16. This matter was initiated as a claim to recover the amount due under the contract as of substantial completion, namely \$8190.67. This sum had increased from the original estimate because change orders resulted in additional charges and credits.
17. The Defendants, who had unilaterally withheld payment of the final 5%, denied that the sum was owed and counterclaimed for a substantial sum. The total amount was not detailed in the Defendants' Counterclaim. One part of the claim related to the need to replace a stone countertop, which the Claimants were alleged to have damaged. Only when presenting his case did the Defendant advise the countertop was being replaced by the supplier, because of a production defect, so any damages claim resulting from it was withdrawn. This was the largest item in the counterclaim. The details of the claim were revealed in the evidence.

The Evidence

18. The Defendant¹ Dan Spears worked across Canada, over a long career, in progressively more responsible positions in the insurance industry. He spoke of his familiarity with contracts and how they work and with construction and renovations.
19. Dave Covey, the Site Supervisor, Jody Rushton, the Project Manager and Brian Johnston, the owner, testified for the Claimant.
20. Work started on September 7, 2021. The Defendants had rented the guest suite in their building during the estimated duration of the renovations.
21. During the project the Defendants visited the site frequently. Mr. Covey indicated there were an excessive number of questions to him and workers on the site. Though this appeared to be a nuisance, and was addressed with the Defendants, it did not add to the overall time taken to complete the work.

¹ In these reasons, Defendant refers to Dan Spears. 'Defendants' refers to both Dan. and Christine Spears.

22. The contract did not specify a start or completion date. At the outset of the project, knowing the Defendant booked the rental unit for 5-6 weeks. Mr. Rushton indicated to the Defendant best efforts would complete the work in that timeframe, noting that contract changes and unforeseen circumstances could affect timing.
23. Mr. Rushton spoke of issues raised by the Defendants regarding the quality of the work. He saw nothing out of the ordinary that could not be rectified under the Claimant's contractual obligations.
24. After change orders were added and credits subtracted the cost of the renovation totalled \$110647.46. The Defendants paid all but the last payment, the one due on 'substantial completion. The amount due was \$8190.67. The Claimant invoiced this amount. The Defendants disputed the amount. The Claimant proposed that until discussions about the final amount were resolved, that sum be paid into a lawyer's trust account. The Defendants refused to do so and withheld the payment.
25. The Defendant, Dan Spears, testified. He described himself as a note-taker who kept careful records. Based on his career he said he knew his way around construction and renovation projects.
26. In his initial discussions with the Claimant, he says he was told the work would be done by their own forces, except for electrical and plumbing work.
27. To prepare for the renovation, the Defendants moved most of their possessions from the apartment, except for a couch, box spring and mattress and their washer and dryer. He indicated Jody Rushton and Dave Covey complimented them on the removal of their items. He said that if what remained needed to be moved to accommodate the work, he would do so.
28. On August 9 they met Jody Rushton and Dave Covey on site. Work started on September 2, 2021
29. The Defendants' said they were pleased with the work done by All-Craft personnel. Their issue was with the work of subtrades.

30. During the job, he says they visited the site for 5-10 minutes a day. Mrs. Spears often brought refreshments for the workers.
31. Taylor Flooring was hired to install the floors which was done after demolition was complete. Mr. Spears expressed concern that the floors were being installed first and that the Claimant was using a sub-contractor. He was told the Claimant did not have enough staff to do it themselves. Mr. Rushton said the floor would be covered to protect it during construction. There was a further issue relating to the quantity of flooring ordered. This issue was not addressed in Mr. Spears testimony.
32. Mr. Spears spoke to All-Craft about the job falling behind schedule. He was concerned about the slow pace of the electrician's work.
33. The Defendants were staying in a guest suite in their building. Mr. Spears says because of the delays he was told to book the guest suite for another week and that they could move back in on October 15, with minor matters to be completed. He extended the booking of the guest suite for 2 more weeks, beyond what he believed the initial completion date would be. The cost of this additional rental forms part of the counterclaim.
34. Mr. Spears described the work of the painter as a 'disaster'. He says he was all over the place; no drop cloths were used; he had no proper clothes for clean-up; he made a mess. He described the work of the drywaller similarly.
35. He spoke with Mr. Rushton who agreed to take these workers off the job. It was agreed Mr. Spears would make a deficiencies list which contained '31 lines of things done incorrectly'. Mr. Spears said Mr. Rushton agreed with all items on the list. Mr. Rushton was not asked by the Defendant to confirm thus statement. He added he stopped counting at 70 paint spots.
36. Mr. Spears had photographs to demonstrate his concerns. They included signs the floors were not properly covered when painting was done; poor application of drywall; plaster drops were not removed before painting; the kitchen ceiling has ripples, two coats of paint were not universally applied; and pencil marks were still evident after painting.

37. The Defendant spoke with Mr. Johnston, who claimed the job was now substantially complete, and the final payment should be made as required by the contract. Mr. Johnston's evidence was deficiencies would be addressed under the contractual warranty.
38. The relationship between the parties deteriorated when the Defendants refused to pay the balance owing into a lawyer's trust account and to allow the Claimant to correct the deficiencies. The Claimant filed a lien under the *Builder's Lien Act*. Mr. Spears said he no longer trusted All-Craft and was not willing to have them repair the defective work.
39. The Defendants stated that the Claimant's accounting and record keeping was inaccurate. They also claimed they were overcharged in some areas where there were allowances. They suggest the electrical work was not done efficiently and more time was taken than was required.
40. Mr. Spears outlined these items as included in the counterclaim.
41. Ceiling - The renovation required removal of an interior wall. In the rooms adjacent to the wall there were popcorn or stucco ceilings. The original plan had been to place drywall on the ceilings to allow for installation of pot lights. This would cover the popcorn finish. To reduce the price, the Defendants forewent the pot lights, so no drywall was added and All-Craft had to match the area where the wall had been with the rest of the ceiling.
42. The Defendants were not happy with the work and allege the match is not satisfactory. Mr. Rushton stated efforts were made to create a close match, but it was his view it would be difficult to achieve perfection without replacing the entire ceiling, as was originally planned. The damage claim, alleging this work is not good enough, is included in a quote for repairs of \$1500.
43. It is noted this quote covers other items. The estimate for 'repair textured ceiling' is \$875+ HST. The work has not been done
44. Washer damage – The Defendants left their washer and dryer in the apartment. Though the contract specified 'personal items' were to be

removed, the Defendants did not remove the washer. Mr. Spears believed the contact provision did not apply to appliances or that he agreed to move the remaining furniture if necessary.

45. The washer had to be moved to complete the renovations. Without a clear explanation of how they occurred, a leg on the washer broke and the front panel was dented. Though Mr. Covey removed the dent, a small crease remained. In his testimony the Defendant estimated the damage because of the dent to be about \$200.
46. Bathroom lights – The Defendant had concerns about the overall costs of electrical work, stating it was substantially more than the \$2500 allowance. The only area where there was a specific claim related to pot lights in the bathroom. The original plan was to install 3 lights. The electrician installed only two. There was considerable evidence about where they were to be located, as the original plan was to center them over mirrors to be installed. In the end the Defendants purchased a single mirror.
47. The Defendants presented an estimate to relocate the wall sconces and repair the walls for \$1075 + HST.
48. Delay – The Defendants allege that because of poor scheduling and failure of trades to work diligently, the job took longer than anticipated and they incurred costs for two extra weeks of rental.
49. Building permit – The Defendants suggest they should be reimbursed the cost of a building permit from the city or \$897.68.
50. Soaker tub – The Defendant's say they were charged too much for this.
51. Plumbing – The Defendant's say the amount charged was too high as there was no additional work that required a change order and thus the original estimate should prevail.
52. Miscellaneous issues – The Defendants stated there were numerous issues with the painting, plaster left on walls, master bathroom door and light switches with gaps at their edges. There were also scratches and minor

damage to the main door of the apartment, likely caused by the movement of men and equipment in and out. Mr. Spears tendered two quotes from At the Top Construction for \$2150 and \$1450, plus HST, to remedy the work not done properly. Both quotes are noted as 'estimates only. Changes will affect cost of labour and materials.

53. The final witness was Mike Mullins, the owner of At the Top Construction. He was familiar with the project as he considered quoting on the job. He presented two quotes to Mr. Spears to rectify the problems he identified.

54. He opined the work was never finished; it looked rushed. This was his conclusion based on marks on the laminate flooring, the quality of the painting throughout, and scuff marks on the bathroom floor where it appears an abrasive brush was used.

55. He quoted to remedy these items and others noted by Me. Spears.

56. In cross examination he said it was not uncommon to have issues like he observed at the end of a renovation. He tells his customers let him know what needs to be done and he returns to do it.

57. Mr. Mullins did not offer an opinion on the overall quality of the work or say it was substandard.

Findings

58. The contract sets the terms of the relationship between the parties. There is a dispute about whether the Defendants received a copy of the General Conditions, which are part of the contract. Mr. Spears was adamant he did not receive them. Mr. Johnston, for the Claimant, was equally adamant they were delivered at the time the contract was signed.

59. I accept the Claimant's evidence on this point. The General Conditions are not only referred to several times in the contract, on each page where the Defendants signed the agreement, there is mention immediately above the names of the parties to the 'Terms and Conditions'. Mr. Spears, who holds himself out as a careful person, who pays attention to details, which is clear

from the manner he presented his evidence, would not have allowed something as crucial as the referenced document to be part of the contract without having it.

60. Even if the General Conditions were not delivered to the Defendants, they were a part of the contract and binding on the parties.
61. The parties contacted for a renovation based on estimated costs and no firm timeline for commencement of completion of the job. The contract did not stipulate who was to do work. A completion date was not included in the contract, though the Defendant states he was assured of this. Because the costs of alternate accommodations during the renovation was to be borne by the Defendants. The claim for extra rent for the guest suite is denied.
62. The contract provided estimates for costs such as the plumbing. If the costs were higher than the estimate, that does not entitle the Defendant's to a credit for the difference between the estimate and the final costs. The same is true for the costs of the soaker tub. There was some risk accepted by the Defendants in entering a renovation contract where prices were not fixed. Claims for any amounts charged that exceeded the estimates are denied.
63. The contract set the standard to which the renovation work was to be done as 'workman like quality and shall be in accordance with applicable building codes.'. It is common knowledge, and I take judicial notice of the fact, deficiencies are a common occurrence at the end of a construction contract. The contract provided a warranty:

THE BUILDER shall remedy any defects, excluding normal wear and tear, due to faulty BUILDER supplied materials or workmanship which appear within a period of two (2) years from the date of substantial completion.

This was the provision available to the Defendants to have All-Craft address the issues they suggest were not done properly or of 'workmanlike quality'. The warranty was available only after full payment of amounts due. The contract provided mediation and arbitration mechanisms, using the facilities of the Better Business Bureau.

64. By unilaterally failing to pay the sums due at substantial completion the Defendants usurped the mechanisms they had agreed to when they signed the contract. By failing to pay the balance due and relying on the warranty clause, the Defendants breached the contract and believed they could start a separate process to claim damages.

65. That might have been an option for them had the Claimant breached the contract. But that did not occur. The Claimants acted in accordance with the terms agreed upon. At the date of substantial completion (when the Spears could move back into the apartment), the Claimant should be paid the amount remaining under to contract. Once that sum was paid, the Defendants could demand the Claimant return and address the deficiencies. There was no breach of contract by the Claimant entitling the Defendant's to claim monetary damages in lieu of completion of warranty work.

66. A breakdown of a relationship does not free either party from its obligations.

67. Without exception the items listed by the Defendants and addressed by Mr. Spears in his evidence fell within matters to be rectified under the warranty. There was no evidence, in particular from Mr. Mullins, to suggest the standard of work overall fell below what the contract required. Deficiencies are expected and the contract provided a means to have them addressed.

68. The Defendants cannot unilaterally breach their obligations and then seek an alternative remedy based on breach of contract when the Claimants have met their contractual responsibilities.

69. The Defendants ask for a credit because no building permit was obtained. Mr. Spears testified he was told by someone at the City a permit was required. This person was not called to testify. Mr. Johnston explained why, based on his experience working with city by-laws and rules, a permit was not required for this interior renovation. Given that no evidence from the city on the necessity for a permit was tendered, I accept the position of the Claimant.

70. Somehow the washing machine was damaged during the renovation. It is not clear how. Though it ought to have been removed by the Defendants, All-

Craft failed to insist on compliance with that provision. I find the damage was because of something unknown done by the Claimants or its sub-trades while the site was in its possession. The Defendants are entitled to damages for done to the washer in the amount named stated by Mr. Spears of \$200.

71. All other issues raised by the Defendants are the proper subject of a warranty claim and must be addressed under the contract.
72. Subject to the next paragraph, the Claimant is entitled to an order for its full claim, plus 4% interest from the date the payment was due plus costs for filing its claim, service if such costs were incurred.
73. The Counterclaim is substantially dismissed except the Defendants are entitled to compensation for damage done to the washer, which I set at \$200 and the same sum for damage caused to the exterior door of the Defendants' apartment. These damages were caused by the Claimants but repairs were not part of the contract covered by their warranty. The total to be deducted from the Claimant's award is \$400.
74. If an order is required, Counsel for the Claimant should prepare it for my signature.

Dated at Halifax, Nova Scotia on August 3, 2022.

Darrel Pink, Adjudicator of the Small Claims Court