IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Tucker v. DeWolfe*, 2022 NSSM 30

Date: 20220830
Claim: No. SCP 515054
Registry: Pictou

Between:

Vernon James Tucker

CLAIMANT

And

Patrick Dwayne DeWolfe and Morgan May DeWolfe

DEFENDANT

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: July 5, 2022, in Pictou, Nova Scotia via Teams

Counsel: Vernon James Tucker, for himself, personally
Patrick Dwayne DeWolfe and Morgan May DeWolfe, for themselves, personally

Balmanoukian, Adjudicator:

[1] Sometimes you get what you pay for. And you should always pay for what you get.

[2] This is a construction dispute. The Claimant was engaged to build a house for a fixed price. He got in over his head. He was replaced, and now seeks compensation for the work performed. The Defendants say the $1,000 he was paid is more than fair, given what they received and what they need to do to fix it.

[3] The Claimant filed a claim for lien and *lis pendens*, and commenced this action, in Supreme Court. He subsequently elected to transfer to this Court. The *lis pendens* remains in place for the net balance claimed, $5,636.00. Although both parties were originally represented by counsel, they were self-represented in this Court and at the hearing.

[4] I will outline, sequentially by witness, the background, the general dispute and the testimony. I will then engage in my analysis. To the extent necessary, I will interpolate my findings where it assists the narrative or where evidence conflicts.

Vernon James Tucker

[5] The Claimant testified on his own behalf. He became acquainted with the Defendants' desire to build a home and met with the DeWolfes at the home of Peter and Sadie Boyles (the Defendants' parents/parents-in-law). After becoming familiar with what the Defendants had in mind for their home, he drew a sketch (on Bristol board), which the Defendants in turn took to a draftsperson for rendering. This was completed, apparently about a month behind schedule, which delayed the start of construction. Although the Claimant testified that he had been a contractor "all his life" (40 years plus), he actually built only four houses, with most of his work being renovations.

[6] Mr. Tucker prepared a document, presented in evidence, as his "contract," outlining what he would do for a fixed labour and materials price of $90,000 (HST is not referred to), with labour fixed at $22,000 and "wages to be paid every 2 weeks." Only Patrick DeWolfe signed it. There was considerable discussion about whether this was in fact a "contract" in the conventional sense of the word, or a quote prepared for financing purposes. For the reasons I will outline, this case does not turn on that question, nor is it relevant to the ultimate disposition.

[7] Mr. Tucker began to work, together with his son. Although he worked some six weeks, he was only paid $1,000, at a time when the appraisal referenced 60% completion (it should be noted that much of the construction was to be done by

others, such as plumbing, foundation, and electrical; the DeWolfes and Boyles were also involved in the work from time to time).

[8] Problems, and tension, quickly became evident; especially between Mr. Tucker and Mr. Boyles. Mr. Tucker testified that Mr. Boyles "took over," accused him (Tucker) of "stealing hours," and was eventually discharged from the job.

[9] He complained that he was not called back nor given the opportunity to address any problems.

[10] He submitted a claim for hours worked, but on cross-examination and final submissions, admitted that these were fabricated/reconstructed as he did not keep time records during the project. To his thinking, since it was a fixed price contract, such records were unnecessary; however, this does not detract from the fact that the time sheets he submitted were not only incorrect, but only admitted to be fabricated when confronted with date and time discrepancies on cross-examination (as he put it, "I made them up and I'm being honest"). When asked whether he inflated the hours, he answered, "take it any way you like."

[11] When asked how, other than through hours worked (at $15 per hour, according to the Claimant) he would be paid biweekly, he answered "I was prepared to take whatever he [the Defendants] gave me."

[12] He also admitted to purchasing a nail gun ($401.35 including tax) and platform ($191.17) on the Defendants' account, only agreeing to deduct it from his account when confronted with the invoice. The Defendants complained to the RCMP and the Claimant agreed to remove these amounts from his ultimate bill.

[13] As will appear, while I conclude that the Claimant is entitled to some compensation, I place no weight on the so-called time "records" in assessing that value. The nailer, but not the platform, was deducted from his claim as argued in this Court.

[14] On cross-examination, he confirmed that in at least one instance, he put one wall into position "with a sledgehammer," and that after he returned on one occasion to cut out stair treads, the Defendants "didn't want [him] back" and made it clear that the job was too much for him. He was also cross examined on the quality of various pieces of workmanship (such as nails protruding from frames), and could not explain why there were pieces left over from the floor joist system (and, as later appeared, at least one joist was installed upside down).

[15] When asked if he considered his work on the project "up to code," he said that he "tried."

Jimmy Tucker

[16] Jimmy Tucker, the Claimant's son, testified and was cross-examined primarily on days and hours worked. As noted, the discrepancies were ultimately proven and admitted and the 'records' as tendered established to have no probative value.

Reg Brightman

[17] Mr. Brightman testified for the defence. He was a most impressive witness.

[18] He was called in by the Defendants to "triage," and eventually work on remediation, for the build. He narrated in a clear, coherent, and objective fashion what he saw and how he liaised with the relevant building inspectors. He identified problems with the flooring (explaining that using 2' rather than 19-3/16" centres accounted for the "leftover" materials); the lack of jack studs; cripple studs above the picture window; the floor load exceeding the allowable limit; and problems with exterior plates. Internally, partitions were out of square and out of plumb. The deck, as designed (6' or 8') would need to be downsized to 4' to bear the allowable load; a "couple walls" were not fastened, and a cabinet wall was 2" out of plumb ("you could put your fingers behind it").

[19] He testified that he "brought in" a local municipal inspector, Mike MacKenzie, to set out what needed to be done to "save" the project. Mr.

MacKenzie was described as an inspector who had "two ways of doing things – my way, and my way." The objective, as Mr. Brightman relayed to the Court, was to determine what steps would satisfy the inspector at this stage of the build, and what modification would need to be made so as to avoid condemnation (or as Mr. Brightman put it, not to "bury it").

[20] I was impressed that he was fair to Mr. Tucker when circumstances warranted – for example, he appreciated that Mr. Tucker followed the plates on the plans (which were not "engineered drawings").

[21] On cross-examination, Mr. Tucker said that he "did not understand some of the terminology used" and that he "did not dispute" Mr. Brightman's knowledge; however, he asked why he was not given the opportunity to address identified issues. Mr. Brightman answered that it was not his place to determine such matters.

Doug Dickson

[22] Mr. Dickson, a family friend of the Defendants, assisted with the walls and trusses. Although not a carpenter, he testified that he asked why there were six plates on top of the foundation, and that it cost $3,000 to put wood across the top of them; he also testified that studs that had to be nailed in and replaced 2-3 times,

and that the Claimant did not know that the "diamonds" designated the layout design for the engineered flooring system. He was not cross-examined.

Morgan DeWolfe

[23] Ms. DeWolfe testified as to the original meetings between the Claimant and the Defendants. She said that Mr. Tucker claimed to have "built over 40 houses" and largely corroborated Mr. Tucker's evidence on the original sketch and Bristol board drawings. She testified that the Defendants needed a "quote for the bank" and did not think of the document prepared by Mr. Tucker as a contract. As I have noted above, although considerable energy was spent by both parties on this point, I do not consider the dispute as whether this was a quote or contract to be dispositive of the case.

[24] She also testified as to the discrepancies between Mr. Tucker's post-dismissal time sheets and her own observations; again, this was ultimately admitted. She also testified as to noticing the purchased nail gun, and confronting Mr. Tucker about it. She also testified as to the work methods (jamming walls in with a sledgehammer and cutting strapping to make it fit), inefficient use of time (lunch/coffee breaks, picking up materials instead of having them delivered), and that eventually Tucker admitted that he was "in over his head." She referred to the

resultant project and its remediation as the "puzzle house." She testified that she quickly lost trust in Tucker, among the unauthorized purchases, the work schedule, and the construction issues. Various text messages were introduced to that end.

[25] As to the payment schedule, Ms. DeWolfe testified that Mr. Tucker would be paid out of mortgage advances, and that the first advance was delayed due to a delay in obtaining the Lux builders' warranty. The $15/hr rate was agreed on at the second pre-construction meeting.

[26] On cross-examination, she emphasized her perspective on the pricing being a quote not a contract, and for banking purposes. She reiterated that the payment out of the first advance was not effected due to the Lux warranty issue.

Sadie Boyles

[27] Ms. Boyles is Ms. DeWolfe's mother. She knew Mr. Tucker from a local service club, and that he was looking for "something to do," and to "tinker with." She said that her understanding was that money was not his prime motivation, and that a project such as the one in dispute would give both him and Mr. Tucker's son a task since the son "was not doing anything right now." The $15/hr rate was mentioned then or soon thereafter.

[28] Shortly after the project began, Ms. Boyles confronted Mr. Tucker with discrepancies such as the aforementioned nailgun and platform, hoses, and a sawhorse. Again, the time sheet discrepancies formed part of Ms. Boyles' testimony.

Peter Boyles

[29] Ms. DeWolfe's father also testified. He said that Mr. Tucker never referred to a "contract" until the issue of hours spent came up. He queried hypothetically why one would sign a "contract" if it was unknown if mortgage financing had been approved.

[30] He testified that the building inspector identified issues, and denied ever saying "don't worry about a building inspector." He testified that Mr. Tucker agreed that he was "over his head" and would come back to finish the trim work at the appropriate time.

[31] He referred the issue of the nail gun and platform to the RCMP.

[32] He said that Mr. Tucker returned to "learn" how to cut stair treads, a characterization denied by Mr. Tucker.

[33] By his calculation of hours spent at $15/hr, less the platform, the Defendants owe the Claimant approximately $1,700.

Argument

[34] The Defendants, in argument, reiterated the wage claim discrepancies in detail, and emphasized the admission that the Claimant was "over his head." They further reiterated their position on the *prix fixe* document as a quote versus a contract, and noted that they did not counterclaim for the noted defects.

[35] The Claimant, while admitting the fabricated/constructed timesheets, emphasized that he believed he had a contract and that he was not given an opportunity to remediate the alleged defects, nor for the promised finish work. He said that many if not most of the problems were caused by the Defendants or their "buddies" who were assisting with the work.

[36] He says he "made up" his hours because he wanted to be paid for his (and his son's) six weeks' work.

Analysis

[37] As I have said, I do not need to decide whether the impugned pricing was a contract or a quote. In law, the Claimant was engaged by the Defendants to do

work, and it is agreed that the reference rate is $15/hr (again, apparently without regard for HST). It was a contract for services, and the Claimant is, subject to any offsets for defects (there being no counterclaim), entitled to be compensated on a *quantum meruit* basis. In plain English, that means that once there is a contract in law (that is, offer, acceptance, consideration by competent parties) he is entitled to compensation for what his work is worth.

[38] The time sheets are worthless for this purpose. They are telling, however, in assessing credibility and reliability. While there is some merit to Mr. Tucker's assertion that he gave a fixed price for labour and didn't have the same need to track hours as in some other instances, it is overshooting the mark to say there was no need to track time. They more or less came as their lives and weather conditions permitted ("something to tinker with" is perhaps the most telling descriptor) and were not the only people on site, even for the labour within the scope of engagement.

[39] It is also perplexing how Mr. Tucker would expect to be paid periodically without any time records, even on a fixed price total. To say that he expected to be paid out of draws is fallacious when one remembers that he was to be paid biweekly, a statement inconsistent with a "bank draw" schedule. His only explanation is that he would "take what he got."

[40] Further, I do not accept that the lender appraisal of "percentage complete" is relevant to assessing value provided by the Tuckers. First, I have no evidence of how much of this consists of work done by the Claimant versus other trades (e.g. plumbing, electrical, foundation, etc.), or even by other carpentry labourers. Second, it does not take into account the repairs/retrofitting that had to be done to satisfy the municipal authorities (or aesthetic sensibilities).

[41] As a matter of law and of common sense, the Defendants were justified in putting an end to Mr. Tucker's involvement with the project, and acted reasonably both in doing so and in mitigating their situation through redesign and remediation.

[42] The only halfway reliable evidence that I have of value provided, in addition to the $1,000 interim payment made, is that of Mr. Boyles who calculated the net balance to be approximately $1,700 (after accounting for the nail gun and platform). I do find that the work the Tuckers performed after receiving that $1,000, while questionable as to time expended and quality rendered, is not worthless despite the Defendants' assertion that they are in effect "square" given all of the circumstances. Mr. Tucker is entitled to be paid for it. Certainly $15/hr is a very conservative figure for carpentry/labour, by any standard; but it is a rate set by the Claimant and it is fair to say is reflective of the skill and ability ultimately brought to bear by him. I find that the costs of remediation/adjustment,

while annoying and in some cases significant, are somewhat compensated for by this modest wage rate. Put another way and to reiterate the opening comment in this decision, "you get what you pay for."

[43] In summary, and after having reviewed the verbal and documentary/photographic evidence, I find that Mr. Boyles' net calculation of a $1,700 balance is sustainable and reasonable, and takes into account the relevant factors of work performed, rate charged, deficiencies noted, and lack of reliable alternate evidence of value provided. I so award. Upon payment of this amount, the lien and *lis pendens* are to be expunged from the parcel register.

[44] This matter began in the Supreme Court, with the involvement of counsel in late 2020. It was transferred to this Court in April 2022. There is no indication of what if anything was done to advance the litigation in that time. I award 4% simple interest pursuant to Section 16 of the Small Claims Court Forms and Procedures Regulations from December 29, 2020 to August 29, 2022 (that is to say, $90.67).

[45] The DeWolfes have been substantially successful. In my discretion, I order that each party bear their own costs, including the filing of the Supreme Court

action, the registration of the claim for lien and *lis pendens*, and, should this judgment be satisfied, the discharge of same.

Balmanoukian, Adj.