SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *3290166 Nova Scotia Limited v. EXP Services Inc./Les Service EXP Inc.,* 2023 NSSM 24

Date: 20230203
Docket: SCCH 514985
Registry: Halifax

Between:

3290166 Nova Scotia Limited

Claimant

v.

EXP Services Inc./Les Service EXP Inc.,
M. Lawrence Engineering Ltd. and Mark Lawrence

Defendants

Reasons for Decision and Order

Adjudicator: Eric K. Slone

Heard: October 28, 2022, via zoom in Halifax, Nova Scotia

Appearance: For the Claimant, Barb Scott
For the Defendant EXP, Richard Smith
For the Defendants M. Lawrence Engineering Ltd. and Mark Lawrence, Mark Lawrence

BY THE COURT:

[1] In about 2015, the Claimant began the planning and construction of a commercial building in Fall River, Nova Scotia at 3187 Highway 2. The building was designed to house a restaurant and dental clinic.

[2] The Defendant EXP Services Inc./Les Service EXP Inc., hereafter referred to simply as "EXP," provides certain civil engineering services. The Defendant
M. Lawrence Engineering Ltd., or "MLE" (whose principal owner is the Defendant Mark Lawrence) also provides professional engineering services.

[3] The property in question did not have access to municipal water or sewage services and had limited land upon which to situate the septic system. Also, given the type and quantity of waste water that is generated by a restaurant, a specialized septic system had to be used.

[4] The reason that there were two sets of engineers was because EXP specialized in customized septic systems. MLE was responsible for the mechanical systems inside the building, including a grease trap for the waste water leaving the restaurant. EXP's area of involvement nominally began at the point that the waste water stream left the building and engaged with the septic system. Of course, each of the engineering firms ought to have been aware of what the other was doing in order for the system to work as intended.

[5] The building was completed in about late 2016, and the businesses took occupancy in early 2017.

[6] This claim arose because, once it began receiving the waste water flow from the occupied building, the septic system did not work properly. Specifically, it began to emit a strong, unpleasant odour that was significant enough to cause serious issues for the commercial tenants in the building. Both EXP and MLE worked to try to diagnose and solve the problem. Various measures were tried, without success. Finally, in about 2020 (after 3 years of recurring problems) a solution was found, and the system now functions as it should, but not before the Claimant had spent approximately $70,000.00 investigating and eventually rectifying the problem. It holds both Defendants responsible for what it says are design flaws in the original conception of the

septic system.

[7] The claim in this court is for the maximum of $25,000.00 - which the Claimant seeks as a contribution toward its losses.

[8] As described in testimony by Barb Scott, one of the owners of the Claimant company who has been involved intimately with this project throughout, she and her associates recognized that they would need a specialized type of septic system for this building and retained EXP because of their specific expertise.

[9] The unit that EXP sourced (which was installed by another contractor, Shaw) is called a Biopro AT-30. It was mostly EXP's responsibility to set it up and make it work.

[10] As the engineers responsible for setting up all of the mechanical systems within the building, MLE specified a single grease trap in the restaurant.

[11] It is not necessary to recite all of the proposed solutions that did not work. From December 2016 to June 2020, the system did not function properly. It continued (at least periodically) to emit a strong odour which was severe enough to interfere with the businesses operating in the building.

[12] What has emerged in hindsight is that the trapping of grease - actually, fats, oil and grease - so-called "FOG" - was not adequate to allow the septic system to operate properly. A septic system can only "digest" so much FOG without getting clogged and becoming ineffective at breaking down the organic content. One factor was that the dishwasher in the restaurant drained through the grease trap, allowing large amounts of hot water to carry dissolved FOG out to the septic tank. This created two problems: excess hot water can kill the active bacteria that break down waste, and dissolved FOG does not get trapped (and at least partly eliminated) before it enters the septic tank.

[13] The solution that was ultimately found was to install two additional grease tanks of approximately 1,000 gallons each, located outside the building, to receive the waste stream from the restaurant. These tanks allow the waste water to cool sufficiently to allow the FOG to separate and not be fed into the septic

tank. A second line from the building emptied all of the other (non-greasy) waste directly into the septic tank.

[14] As noted, the Claimant spent in excess of $70,000.00 attempting to fix the problem. The Defendant EXP itself billed for about $20,000.00 in engineering services as part of this endeavour. MLE was much less involved in the efforts to find a solution.

[15] The Claimant contends that one or both of the Defendants should be held responsible for its losses. It pleads that the design of the system was inadequate. In light of what occurred, it is hard to suggest that the original design was ever going to suffice.

[16] EXP raises several defences. Mostly, it says that it was not responsible for the design of the grease trap and that it exercised due diligence in finding the ultimate solution that was adopted, which involved upgrading the grease trap capacity.

[17] EXP pleads that it was MLE's negligence, and not its own, that caused the damages claimed.

[18] MLE pleads that its design was correct and according to standard engineering standards. It blames the contractor who installed the systems, who is not a party to this Claim, for deviating from the plans in two ways:

a. The plans call for both a grease interceptor and an upstream solids interceptor, the latter of which was omitted. This might have affected the performance of the grease interceptor.

b. The plans specify that the discharge from the dishwasher should not drain through the grease interceptor because the hot water will have the effect of re-liquefying the grease and allowing it to flow through to the septic field.

[19] Mr. Lawrence conceded on cross-examination that the lack of a solids interceptor would not have made any difference to the issue of FOG becoming liquefied and entering the septic tank.

[20] The Claimant says that it reasonably relied on both Defendants who should bear responsibility for the additional expense in getting the system to work.

[21] I should say that although Ms. Lawrence was personally named as a Defendant, the facts do not disclose any basis to hold him personally liable. The contract was between the Claimant and his company MLE.

Discussion and findings

[22] It is remarkable how many engineers and other professionals played a role in trying to make this system work as expected.

[23] I do not ignore the fact that the construction appears to have deviated from the original plans in two respects. The MLE plan called for a solids interceptor, essentially a glorified strainer, which appears to have been omitted because it was thought to be unnecessary by the building contractor. And the contractor plumbed the dishwasher outflow through the grease trap, contrary to the plans. But these deviations were discovered early on, and did not explain why the system could not be made to work for several years.

[24] One fact is indisputable, which is that the Claimant is entirely innocent in the sense that it placed its faith in the supposed experts and took their advice.

[25] In my opinion, it is impossible to parse out the respective faults of EXP and MLE. They were not working in silos; at least, they ought not to have been. They both knew of the existence of the other and understood the overall objective which was to deal with wastewater from a building which included a restaurant. In my view, they had a duty to work together to deliver what the Claimant was paying them both for.

Legal framework

[26] The legal framework that I propose to follow is that provided by the *Contributory Negligence Act*, R.S., c. 95, which has long been held to apply to contractual causes of action as well as torts: *Finance America Realty Ltd. v. Speed and Speed*, 1979 CanLII 4269 (NS CA). That statute provides as follows:

Apportionment of liability

3 (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

Interpretation of Section

(2) Nothing in this Section operates so as to render any person liable for any damage or loss to which his fault has not contributed.

Determination of degrees of fault

4 Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault.

Questions of fact

5 In every action, the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

Power of court

6 Where the damages are occasioned by the fault of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

[27] I find as a fact that the original design of the septic system was inadequate. I find that the work and responsibility of both MLE and EXP fell short of what was expected, and they were both responsible for failing to provide what they were retained to provide, namely a functioning system to deal with the liquid waste generated within this building.

[28] In accordance with s.3 of the statute, I find that their degrees of fault are not possible to establish, and I apportion their liability equally.

[29] I do not consider it just to attribute any responsibility to the Claimant itself. As for the possible liability of third parties, I do not make any findings as they were not before the court.

[30] I am ordering that each of the Defendants EXP and MLE pay damages of $12,500.00. The Claimant is entitled to its costs of $199.35 which shall be split between the Defendants.

[31] The claim against Mr. Lawrence personally will be dismissed.

ORDER

[32] IT IS ORDERED THAT the Defendant EXP Services Inc./Les Service EXP Inc. pay to the Claimant the sum of $12,500.00 plus costs in the amount of $99.67 for a total of $12,599.67.

[33] IT IS ORDERED THAT the Defendant M. Lawrence Engineering Ltd. pay to the Claimant the sum of $12,500.00 plus costs in the amount of $99.67 for a total of $12,599.67.

[34] IT IS ORDERED THAT the claim against Mark Lawrence be dismissed.

Eric K. Slone, Adjudicator