SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Widmer* v. *Jesso*, 2024 NSSM 8

Date: 20240315
Docket: SCD-527870
Registry: Digby

Between:

Christopher A. Widmer

v.

Timothy Jesso

Adjudicator:	Sarah A. Shiels
Heard:	February 29, 2024
Decision	March 15, 2024
Counsel:	Christopher A. Widmer, Claimant (self-represented) Timothy Jesso, Defendant (self-represented)

By the Court:

Introduction

[1] This claim is based on a verbal agreement for the scaling, sand blasting, and painting of steel beams located in the basement of a residential property. The defendant agreed to complete the work for a fixed price of $16,500 which was paid up front, in cash. This amount was to cover labour, the cost of supplies, and transportation. The project was estimated to take two weeks or less to complete. The possibility of early termination was not discussed by the parties at the time the contract was formed. The claimant seeks reimbursement for the money paid to the defendant less the defendant's time and expenses.

Background

[2] The hearing proceeded on February 29, 2024, notwithstanding (1) correspondence from counsel for Mr. Jesso requesting an adjournment and (2) a preliminary objection by Mr. Jesso on the basis that he required additional time to access evidence contained on his cell phone, which he stated was currently undergoing repairs and would be available in a few days. The claimant opposed Mr. Jesso's request for an adjournment, which he viewed as a delay tactic.

[3] The timing of Mr. Jesso's request was of significant concern to the court. Mr. Jesso had previously informed the court that he was surprised to learn of the original hearing date scheduled for February 22, 2024 after missing the pre-trial held on January 25, 2024. He stated that he had rejected the paperwork that was previously served to him. On February 22, 2024 Mr. Jesso was afforded a short grace period to obtain the claim document from the court, copies of materials previously filed, and to submit any evidentiary materials he might seek to rely on by February 27, 2024.

[4] While it may have been helpful to view the records contained on Mr. Jesso's cell phone, the court determined it would not be fair to offer a further extension to Mr. Jesso given that it was his decision to reject the claim documents from the outset.

Hearing

[5] As stated above, a hearing with respect to this matter was heard on February 29, 2024. The claimant, Christopher Widmer, testified along with his wife Cynthia Widmer. The defendant, Mr. Jesso, testified on his own behalf. No other witnesses were called.

Factual Findings

[6] This claim is for the recovery of funds prepaid to the defendant to complete painting work at the claimant's property.

[7] The terms of the parties' verbal agreement were summarized by the claimant in the claim document submitted to the Small Claims Court as follows:

> The Defendant was engaged by the Claimant to paint steel beams that had rusted at the Claimants house located at 1789 Broad Cove Road, Culloden – Digby County, NS. The Defendant inspected the job and advised that the beams would have to be scaled and sand blasted before paint could be applied. The Defendant gave an estimated duration of two weeks for his work (1 day mobilization, 1 day demobilization, 10 days work) and including materials (paint $1794.55) – the total cost of the job would be $16,500 and asked for this amount to be paid up front in cash. The Claimant paid $16,500 to the Defendant in cash.

[8] The claimant's testimony at the hearing of this matter was consistent with this description. Prior to initiating the work, Mr. Jesso inspected the beams in the presence of Mr. Widmer. He informed him that welding services would be required during the course of the project in order to patch the beams where they had worn thin. Mr. Widmer was agreeable and informed Mr. Jesso that he had a contact he was prepared to call on. This requirement for a third-party to assist with welding was reflected in the partial record of text messages exchanged between Mr. Widmer and Mr. Jesso, as filed by Mr. Widmer. The following appears to have been a message from Mr. Jesso to Mr. Widmer:

> $16,500 cash we'll cover the supplies I need and labor.. also includes two coats of epoxy primer international 300.. and three top coats off epoxy paint
>
> ,,two part paint also..and clean up what we can get after sand blasting is done… So we will be knocking some of the rust off first then sandblasting it
>
> then you will have to supply a welder and the metal to reinforce or fix any holes in the beams, we do not supply that so that will be an additional cost
>
> to you,, which you would deal with with whoever you hire to do the welding… I would like to also sandblast any new metal they put on for reinforcement

> before I put epoxy on it…. So when the welding and repairs are done on whatever beams […]

The message was cut off after this point.

[9] At the hearing, Mr. Widmer confirmed that termination was not discussed when the contract was formed. The court therefore finds that the contract did not contain any terms with respect to termination by default, convenience, or otherwise.

[10] Mr. Jesso proceeded to collect supplies and commenced working on the beams. Around Tuesday, August 1, 2023 Mr. Jesso informed Mr. Widmer that Mr. Widmer's welder friend would be required to do some work on the thin spots.

[11] Mr. Widmer testified that Mr. Jodie Handspiker went to view the work with Mr. Jesso and subsequently informed Mr. Widmer that to invest further in the beams would be putting good money after bad. He said it was a waste of money to do this; that the work was futile given the poor condition of the beams.

[12] Mr. Widmer promptly informed Mr. Jesso to stop working and to give him an accounting for his work to-date and cost of supplies, and to return the balance of the pre-paid funds. His text message to Mr. Jesso included the following statement:

> Morning Tim
>
> Update and it's not good nor easy…
>
> We've reached out to several people about what direction we should go with the beams and it looks very costly…more than what we're prepared to deal with right now.
>
> It may take several weeks for us to get this figured out. So for now, it would make sense for you to collect your gear when you can.
>
> We are looking into alternatives to steel as well, so regrettably we may or may not need further services from you.
>
> In light of all this, we need to discuss being reimbursed for the money we've prepaid you less your time and expenses. If you could please let us know your costs to this point we would greatly appreciate it.
>
> Obviously we have been blindsided by the scope of what it's going to take to repair the foundation of our house and we can't tell you how sorry we are to give you this news and how it may have affected your business.
>
> […]

[13] On August 9, 2023, Mr. Jesso appears to have responded with the following message:

> $4,800 is what I have for you..,, plus the paint I dropped off along with the new blaster when I picked up my stuff ..

[14] Mr. Jesso confirmed in his testimony during the hearing that he agreed to reimburse Mr. Widmer $4,800, but did not pay this amount because he did not want to deal with Jodie Handspiker, Mr. Widmer's local agent. He ultimately returned the paint, without providing information on where it was purchased. He also agreed to return a "new blaster" which he estimated was worth a few hundred dollars.

[15] By contrast, the claimant estimated that the reimbursement amount should be $9,068.36. This amount was based on the claimant's assessment that work on the site terminated after two days and with one day for mobilization and one day for demobilization at $1,225.45/day, the total contract labour was $4,901.82

[16] The claimant submitted a letter apparently signed by a professional engineer, Mr. Paul Buxton, stating that he personally inspected the job immediately following Mr. Jesso's exit from the site and that no more than 20% of the anticipated job had been completed. Mr. Buxton was not called to testify.

[17] For his part, Mr. Jesso testified that approximately 80% of the preparatory work was complete.

Analysis

[18] The facts of this matter are relatively straightforward. A simple oral agreement was entered into between the claimant and the defendant for a fixed price and funds were paid up front. The defendant then proceeded with the work.

[19] The claimant appeared to take issue with the defendant's failure to warn him that the work would be futile. Mr. Widmer testified Mr. Jesso informed him that the beams were in "rough shape" and that Mr. Jesso banged on one of the beams to show how much it had deteriorated. However, he also said that Mr. Jesso informed him he'd be able to sandblast the beams and that they'd be good for many years in the future. There was conflicting evidence as to how long the beams might last and how many coats of paint might be required.

[20] I do not find Mr. Widmer has established a case of negligent misrepresentation because I do not think it was reasonable for Mr. Widmer to rely on Mr. Jesso's assessment of how long the beams would last. Mr. Jesso made it clear to Mr. Widmer that thin areas in the beams would require repair work and that he would rely on Mr. Widmer to supply a welder to remedy defects. Mr. Jesso did not hold himself out to be an expert with respect to the condition or integrity of steel beams. The advertisement image submitted by the claimant states "Painting Services" for "Boats" and "Houses". Mr. Widmer could have consulted with an engineer or welder prior to engaging Mr. Jesso in order to fully understand the scope of the work that would be required and to determine whether it was worthwhile to proceed. After Mr. Widmer consulted with an individual having the appropriate expertise, he promptly switched tact and disregarded any assurances that he may or may not have received from Mr. Jesso.

[21] The court finds that the claimant unilaterally elected to terminate the contract after receiving advice from a third party. The contract was not terminated due to any breach on the part of the defendant. At the time of termination, Mr. Jesso's work was underway but not complete.

[22] Termination, or repudiation, of an agreement has been addressed by the Supreme Court of Canada as follows:

> *Guarantee Co. of North America v. Gordon Capital Corp*., 1999 CanLII 664 (SCC), [1999] 3 SCR 423
>
> 40 Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* [1923 CanLII 430 (UK JCPC), [1923] 4 D.L.R. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44. [Emphasis added.]

[23] Based on the evidence, the court finds that Mr. Jesso did impliedly accept the repudiation of the contract by Mr. Widmer. He stopped working at the site and returned the painting materials. Mr. Jesso came to pick up the compressor and dropped off the paint he had brought. He offered to reimburse Mr. Widmer $4,800 but refused to give this to Mr. Widmer's agent in Nova Scotia, preferring to wait until Mr. Widmer returned to the province in person.

[24] The paint was returned to the original seller for the amount of $1,794.55.

[25] Because the contract was terminated by the claimant and there are no contractual terms that speak to termination, I view this claim as a request by the claimant for compensation flowing from unjust enrichment on the part of the defendant following termination. The law on this point has been summarized as follows:

> The right of the party in breach to recover what has been paid is an example of the law of restitution or unjust enrichment: the innocent party will be unjustly enriched if, after being compensated for its losses, it retains what the other paid. (*Canadian Contract Law,* 4th Ed. (Swan, Adamski, Na) §7.125)

[26] Given my analysis stated above, Mr. Jesso was the innocent party so far as termination of the contract is concerned. Accordingly, I look to the claimant to prove on a balance of probabilities that Mr. Jesso has been unjustly enriched.

[27] As provided in *Wacky's Carpet & Floor Centre v. Maritime Project Management Inc*., 2006 NSSM 4, at page 13, equitable remedies such as unjust enrichment, quantum meruit, and set off are within the scope of the Small Claims Court authority provided a monetary award is being sought under a contract or a quasi contract, or where there is a special contractual relationship arising. Further, as recognized by Adjudicator Pink in *Sheehan v. Samuelson*, 2023 NSSM 27 at para 60, the law with respect to unjust enrichment was recently considered in the case of *Canada (Attorney General) v. Geophysical Services Incorporated*, 2022 NSCA 41 as follows:

> [91] In *Kerr*, Cromwell J., for the Court, noted the wide variety of situations where the law of unjust enrichment has been used to provide redress for claims of inequitable distribution on the breakdown of domestic relationships. He commented on the law's recognition of categories where retention of a conferred benefit had been considered unjust, but the Canadian law of unjust enrichment was not limited to those categories. He explained as follows:

> [31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, 1992 CanLII 21 (SCC), [1992] 3 S.C.R. 762, at p. 788. **For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason**. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see, generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed. 2007), c. 4-11, 17 and 19-26.
>
> [32] Canadian law, however, does not limit unjust enrichment claims to these categories. **It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment**: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788. [Emphasis added.]

[28] I have difficulty accepting the daily rate suggested by the Claimant. There was no evidence before the court that the parties had discussed a daily rate. Moreover, there was to be welding work performed by a third party after the initial scaling and sandblasting. Once the metal was reinforced or holes fixed, then any new metal put on for reinforcement would subsequently be sandblasted. So, it may well have been that the defendant's work would be periodically interrupted while welding work was performed.

[29] Although I found Mr. and Mrs. Widmer to be highly credible, there was insufficient evidence both of the allocation of the contract price to components of the work to be performed and of the overall value of the work that had been completed.

[30] A letter was filed on behalf of a Mr. Paul Buxton, P. Eng. indicating that he had personally inspected the job immediately following Mr. Jesso's exit from the site and could further state that no more than 20% of the anticipated job had been completed. Since Mr. Buxton was not called to testify, it is not clear what he meant by "the anticipated job" and he did not provide a dollar valuation of the work that was performed by Mr. Jesso.

[31] For his part, Mr. Jesso testified that he was not able to put a value on the work done, but that he had 80% of the beams done. He also described this as 80%

of the prep-work done. He said all that was left was a little blasting to paint. He stated that he charged $275/hr to run his compressor. He ran the compressor for approximately 30-33 hours. It also cost approximately $400 to transport the compressor to and from the site, each way, and approximately $100 for fuel every time he had to visit the site. He stated that all that was left was a little blasting to paint. He also stated that he didn't use any of the 25-30 bags of sand because only the air-needling was done and that he gave Mr. Widmer back approximately $300 for sand.

[32] Mr. Jesso acknowledged that he had received a request from Mr. Widmer via text message to deal with Mr. Handspiker and that Mr. Widmer had given him permission to deal with him, but he stated that after Mr. Widmer backed out of the job he didn't want to "deal with" someone who was not involved in the first place.

[33] Regardless of what percentage of work was complete, there is simply not enough evidence for the court to make an assessment of the value of the work completed or of the value of the performance of the contract up to the time of termination. In the absence of contractual terms specifying the value of the work at various stages of completion or an appraisal of some kind of the worth of the work, it is not possible to say whether the defendant has unduly profited by the full claim amount.

Conclusion

[34] The claimant is required to prove his case to the civil standard of a balance of probabilities. The court finds that the daily estimate provided by the claimant and the letter from Mr. Buxton are not sufficient to show that Mr. Jesso has been unjustly enriched by the claimed amount of $9,068.36.

[35] However, the claimant did file text messages indicating Mr. Jesso had offered to return $4,800 in reply to a request for reimbursement of the money prepaid less time and expenses and during the hearing Mr. Jesso expressly acknowledged that $4,800 was owed to Mr. Widmer. Mr. Jesso apparently arrived at this figure by his own calculation (as described above) and he has filed no counterclaim for damages for lost profits or otherwise in relation to the project.

[36] Accordingly, this court finds in favour of the claimant for the amount of $4,800.

[37] In accordance with the Small Claims Court Act Regulations, costs will be awarded in the amount of $199.35 (filing fee) and $321.05 (service).

[38] The court orders that the total sum due to Mr. Widmer is **$5,320.40**

Sarah A. Shiels, Small Claims Court Adjudicator