

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Desjardins v. Dartmouth Handyman Services*, 2024 NSSM 15

Date: 20240319

Docket: 525417

Registry: Halifax

Between:

Marie Josee Desjardins & Chris Agaiby

v.

Dartmouth Handyman Services

Adjudicator: Dale Darling, KC

Heard: January 17 &18, 2024, in Halifax, Nova Scotia

Decision: March 19, 2024

Counsel: Ryan B. Christen, for the Claimant
Adam R. Downie for the Defendant

By the Court:

Introduction

[1] This case came before me for hearing via Teams video platform on January 17th and 18th, 2024. The Claim was initially filed including both Dartmouth Handyman Services and Home Depot of Canada Inc. as Defendants, but on January 16, 2024 counsel advised the Court that the claim was being discontinued against Home Depot. The Claimants were represented by Ryan Christen, and the Defendant by Adam Downie.

[2] I am allowing this claim. I find that the work performed by Dartmouth Handyman Services (“DHS”) was deficient, meriting compensation to the Claimants. My reasons follow.

Background

[3] In 2023, the Claimants (Desjardin and Agaiby) decided to commence a renovation project involving doors and windows in their home. They used a service provided through the Home Depot website to submit a request for installers.

[4] Home Depot matched the Claimants with DHS, whose principal is Mr. Dave Farrell. Mr. Farrell attended at the property in March of 2023 to make measurements, and later provided an estimate for the cost of the work in the amount of \$24,885.51.

[5] The Claimants paid \$143.75 for the site visit, and an additional \$11,091.28 in March of 2023 so that the windows and doors could be purchased by DHS from Home Depot. In June of 2023, an additional \$2,650.00 was paid to DHS for additional materials.

[6] During the period from June 9 to June 16, 2023 (although the evidence is unclear as to how many of those days DHW was on site), Mr. Farrell attended at the home for installation, at which time ten windows were installed, but none of the three doors.

[7] On June 16, 2023, an invoice for labour was issued from DHS for the amount of \$11,143.51.

[8] On or about June 15th, 2023, a neighbour of the Claimant's expressed concerns about the installation of the windows, which led to Mr. Agaiby attending at Home Depot on Saturday, June 17th, 2023. He took in pictures which he says he showed to a representative at Home Depot. That individual

expressed concern about the quality of the work and advised that no further payments be made to DHS.

[9] There followed an email from Mr. Agaiby to Mr. Farrell on June 17th, 2023, which read:

Hi, David. It's Chris from Sambro, regarding the windows and doors job. I had a friend over and he looked at the windows and said that they are not installed properly. I then went to Home Depot, and showed them pictures and they suggested the windows were not installed properly. The Manager at Home Depot is looking into it for us. We were instructed by Home Depot not to pay anything more until we hear from them. Drop by when you can to get your trailer and tools. We will ask you to leave the doors and other materials here and we will work with Home Depot to get our stuff installed.

[10] Mr. Farrell removed his equipment from the site on June 17, 2023, and on June 19, 2023 emailed the Claimants to say he was putting a “lien” on the property

[11] On June 21, 2021, Mr. John O’Toole, a retired building inspector, conducted an inspection of the property. I summarise his findings as follows:

1. He concluded that the window openings were not measured properly in the first instance, leaving an inadequate space to install the windows, and that the installer was trying to “cover up a mistake”.
None of the windows were weather tight.

2. Mr. O'Toole spoke to the General Manager of North-Air Windows and Doors, who confirmed that each window has an installation guide which installers are to follow.
3. A third 2" by 10" should be added to the existing lintel over the living room window. The window was not being held by straps but 4 deck screws.
4. J-channel had been replaced by vinyl strips secured by staples. He had concerns about water and drafts, as well as the look of the application.
5. Of the 10 windows, none were "shimmed" as required by the manufacturer.

[12] On June 22, 2023 Catch All Contracting attended at the property and provided a one-page "Window Report", which states:

1. Windows were done incorrectly I noticed most of the windows are missing 3M flashing tapes, some of them only are half done, which will cause leaks in the future.
2. A few windows are out of level. They could be shimmed up a bit to be brought to level, I noticed the front living room window was leaned out a touch at the top.
3. Most of the outside trim around the windows are done wrong and will leak in the future.

4. Should be J-trim around outside windows. Not PVC.

[13] Mr. Farrell threatened a lien on the property, the first time on or about June 19, 2023, and periodically thereafter. During June and July of 2023, unsuccessful mediation efforts were made by Home Depot, and the Claimants filed a complaint with the Better Business Bureau. The Claimants were informed by the window manufacturer via email that the warranty has been voided by the installation.

[14] The Claimants installed duct tape and weather stripping around the windows. No further repairs have been attempted, pending the outcome of these proceedings, and they now claim against DHS for the damages they say occurred as a result of deficiencies in the work by DHS.

[15] The Defendant denies these allegation, and says that the Claimant breached the contract with DHS by their email of June 17, 2023 in which they demanded his tools be removed. They say that the work was performed in a skillful and workmanlike manner, and that no breach of contract or negligence was committed by the Defendant.

[16] In the alternative, the Defendant says that the Claimants failed to mitigate any losses sustained, in that they would not permit DHS to return to effect repairs.

The Evidence at the Hearing:

Mr. Agaiby:

[17] Mr. Agaiby, with Ms. Desjardins, is the owner of the property. He testified as to the initial stages of the agreement, the retention of DHS, and the concerns that began on June 15, 2023.

[18] He testified that “he thought he had to work through Home Depot”. He spoke regarding his dealings with Home Depot after the events in question. As it turned out, Home Depot did not contract for these services with the Claimants, and their vouching for contractors under their Pro Installer services was limited to ensuring that they had criminal records checks and business insurance.

[19] In cross examination, he testified with respect to DHS, he “lost trust” when he learned all the windows had to be replaced, and that the response from Mr. Farrell that he would place a lien on the home, “felt like a threat”. In re-direct,

he said that was the only direct response ever received from Mr. Farrell, although it is clear that both parties were seeing emails generated by mediation attempts from Home Depot and the Better Business Bureau.

[20] Mr. Agaiby spoke of the attempts to address the issues with the windows in the short term with taping. He testified that the house is cold, and has gotten colder, and that there are heaters in his children's bedrooms. He says that the electric bill has increased, and that Nova Scotia Power has notified him of the increase.

Ms. Desjardin

[21] The evidence of Ms. Desjardin, the other home owner, echoes that of Mr. Agaiby. She spoke of the initiation of the project, the retention of DHS, and of her belief that she was dealing with Home Depot. She spoke of the ongoing issues in the home, relating to the windows not being complete, and cost being incurred as a result. She says that their power bill has increased by \$74.00 per month.

Mr. O'Toole

[22] Mr. O'Toole runs a home inspection consulting business, having retired after 31 years as a building inspector, first for the City of Dartmouth, and then for the Halifax Regional Municipality after amalgamation. He was qualified without objection to give his opinion as an expert in the field of residential home inspection.

[23] Mr. O'Toole testified that he attended at the property on June 21, 2023 to inspect the windows that had been installed. He says that in order for windows to be properly installed, they must be sized properly so that there is a proper rough opening. He observed a number of problems with the installation, including the absence of shims (thin pieces of wood used to ensure fit) in any of the windows, and he says the shims are required by the installation instruction. Otherwise, the window can shift, causing gaps which affect both energy efficiency and weather proofing.

[24] He expressed concern regarding gaps seen in the windows, and with the foam insulation that he saw, which was not consistent around the windows.

[25] On the exterior of the windows, he said that the vinyl stripping used interfered with the drain holes, and would mean it was impossible to get a weathertight seal. He says that the vinyl stripping was attached to staples, which

he said he had “never seen used before”. He explained that vinyl expands with changes to temperature, and the result could be damage to the drywall inside.

[26] Mr. O’Toole had specific concerns about the living room window, which he said was not secured properly, with four screws being the only thing holding it in place. His concern was that wind might push the window in as the window was not supported on all four sides. He noted that a portion of the lintel from above the living room window had been removed, which he said could have been done because the window had not been measured properly.

[27] His recommendation was the use of duct tape as a temporary solution to the gaps in the windows. His overall recommendation was that the windows would need to be replaced because they would have to be sized properly to fit the rough opening.

[28] Mr. O’Toole testified that he called North-Air, the manufacturer to see what was required to warranty the windows. He was advised that the manufacturer would not warrant the windows without metal brackets and shims, and that the installation guide had to be followed, which showed a step by step guide to providing shims and brackets.

[29] He says he was told there would be no warranty on these windows, and that as a result the owner would not have any recourse for any water damage that might occur.

[30] His conclusion was that some of the work done was covering an initial mistake, that is, that the windows openings were not measured correctly in the first instance.

[31] In cross examination Mr. O'Toole was asked if he was aware that when the work was done, it was incomplete. He agreed, saying "I wouldn't call the installation complete". He added that the issue was that the application itself was wrong from the outset.

Mr. Farrell

[32] Mr. Farrell testified that he has an engineering background in developing pharmaceutical equipment. He has a sheet metal trade certification. He worked on the Halifax shipyard project, and then worked at the Nova Centre fitting glass panels, and in structural design of the Roy and Maple towers.

[33] He started a sole proprietorship as Dartmouth Handyman Services in 2019, and has done floor replacements, door replacements, and "the odd window

replacement”. He later said he had done “150 to 200” window projects through DHS, installing vinyl doors and windows.

[34] Mr. Farrell explained his relationship with Home Depot’s “Local Pro” website. He explained that Air Miles points could be used to purchase “leads” on projects.

[35] After retention by the claimants, he says that with respect to the measurements, he took a tape measure and measured every window and door. He says he took notes so “I knew they would fit”.

[36] The work commenced June 9, 2023, and Mr. Ferrell testified that his partner (by which he meant his personal partner) was with him every day (that he attended) to give him a helping hand. He said at the time he was having personal issues with his relationship, and that the weather being a factor, June of 2023 being a very rainy month.

[37] He says that he got all the windows in by June 16, 2023, and that he informed the Claimants that he would be addressing all remaining issues “on Monday and that he would be expecting payment for his labour”.

[38] When asked if he had finished the work on the exterior, he said that he had only put temporary seal on the windows after conversations with the Claimant

Mr. Agaiby where he “brought up the issue of re-siding” so he only put a temporary seal on the windows.

[39] Mr. Farrell says he was “shocked and stunned” by the June 17th, 2023 email from Mr. Agaiby. He says “ I went out and removed my property and never heard from him again”, and wanted to lien the property because “I was using it as security for the work I was doing”. He believes this claim was commenced because the Claimants could not pay for his work.

[40] He says he saw the report of Mr. O’Toole four to five weeks later when it was sent to him by the Better Business Bureau and “he had to explain his side of the story”.

[41] In respect to the removal of the J-channel and replacement with vinyl strips, He said that “the customer was undecided regarding new siding and I said I would help”. With respect to the blocked window drains, he said “I would always make sure drains were unblocked”.

[42] At the hearing before me, he said it would take “Four more full days of labour to complete the work”. With respect to the size of the rough openings, he said that “sometimes windows can be a bit off, and that “he had noticed a few small problems”, but that “once they were in the hole, we would fit as best we

could.” He said that “some of the gaps were a little bit smaller than they normally would be”.

[43] With respect to the living room window, he says that “the lintel obstructed the install of the window and so we had to remove it, and that it would have been “in-filled on the final installation”.

[44] He says he wasn't given an opportunity to finish that window. Mr. Farrell says he was not given an opportunity to finish the project and he was “more or less blacklisted because they had gone to Home Depot screaming and shouting.”

[45] He says probably 60% of the work was done when he was told to stop. He says “I always said I would finish it if they wanted it”.

[46] When asked on cross examination if he had ordered the wrong windows, he replied “I don't think so”, but that “possibly the wrong windows were delivered”, and that would make them incorrect with the flange.

[47] He also agreed that by June 21st, 2023 he was engaged in another project.

Legal Issues:

The Responsibilities of the Contractor

[48] I find that the evidence confirms that the parties were in a contractual relationship and the requirements of the *Consumer Protection Act*, RSNS 1989, c. 92, section 26 (5) apply. That subsection states “There shall be implied in every consumer sale of services a condition on the part of the seller, that the services sold shall be performed in a skillful, efficient and competent manner”.

[49] I find that the work performed by Mr. Farrell did not meet the standard of being “skilful, efficient and competent”.

[50] In reaching this conclusion, I find that the best evidence comes from Mr. O’Toole. Although he himself is not a window installer, he contacted the manufacturer to confirm the methodology by which the windows should be installed.

[51] An explanation by way of the installation instructions, which were reviewed by Mr. O’Toole in his evidence, were attached to all of the windows, and the instructions show a step by step process including not only that shimming and stropping must take place, but in what order in the installation.

[52] Those instructions say at step three “Level sill, shim at corners, under each mullion, at horizontal and vertical mid points and at approximately 16-inch intervals. Ensure unit is level, plumb and square prior to anchoring through

door jambs, at shim locations”. Only after shimming is complete, does step 4 call for the cavity between the frame and the opening to be filled , with fiber insulation or low-expanding foam.

[53] The photos provided also show the progress that had been made as of Friday, June 16, 2023. They show the foam around the windows, making it clear that that step had been undertaken without the shims in place.

[54] I find that on the evidence before me, the installation that had been undertaken by Mr. Farrell had voided the warranty on windows by virtue of their incorrect installation. Put simply, these windows are at risk of leaking and subject to energy loss, because of how they were put in. The installation therefore does not meet the standard required under the *Consumer Protection Act*.

[55] In addition, I find that the evidence supports that it is more probable than not, that the windows ordered were the wrong size. There is no documentary evidence before me showing the measurements Mr. Farrell took in March of 2023. Mr. O’Toole’s opinion that windows of the wrong size would explain some of the deficiencies he saw.

[56] In his evidence, Mr. Farrell admitted that they could have been wrong, but there is no evidence to support that it caused him concern, or that he checked, even though he admitted having some issues in the installation. I find that the removal of the lintel on the living room window further confirms that Mr. Farrell was removing structural elements to make this window “fit”.

[57] In his defence, Mr. Farrell says that the work was only 60% complete on Friday June 16, 2023, and that it was his intention to return on the Monday June 19th to conduct a further four days of work to finish the job.

[58] There are different versions of Mr. Farrell’s account of how much work remained to be completed. In the immediate aftermath June 17th, 2023, there is correspondence between Mr. Farrell, the Claimants, and the mediator from Home Depot, followed by the contact person from the Better Business Bureau which indicates he planned to return on Monday June 19th, 2023.

[59] Although that is his argument now, I can find no record of him having told the Claimants that the work was only 60% complete. There is only evidence as regards the living room window, which he told a Home Depot representative June 22, 2023 was not yet “waterproofed”.

[60] In total, by June 16, 2023 Mr. Farrell had invoiced the Claimants for material and labour totalling \$22,306.54, on a job in which he quoted an initial estimate of \$24, 885.51, and that initial estimate included installing three doors, which had not yet been commenced. This does not support the conclusion that there remained days of work on the windows.

[61] Given my finding that the window installation was rendered deficient in the Defendant's failure to adhere to the manufacturer's installation from the outset, and that the only work remaining was to the outside of the window, his return for any amount of time would not have resolved the situation.

[62] Mr. Farrell's theory is that this action was commenced not because of deficiencies, but because the Claimants did not want to pay for the work done.

[63] I do not accept this theory of bad faith on the part of the Claimants, which is unsupported by the evidence. I find that throughout, the Claimants acted as prudent home owners. The Claimants are not experienced window installers. They did not simply accept the opinion of a neighbour, but it raised concerns for them regarding what would be, for anyone, an expensive renovation. They were told by Home Depot that the issues were so significant they should not pay. Unlike the Claimants in *Marineau v. Mader's Roofing & Masonry*

Limited, 2019 NSSM 20, they obtained objective and qualified evidence from Mr. O'Toole to help them understand whether and what problem existed.

[64] On the evidence before me, I find that the Claimants have proven on a balance of probabilities that the work performed by DHS was wholly deficient.

The Claimant's Duty to Mitigate

[65] The finding of deficiency does not end the analysis. Mr. Downey says that by refusing to allow Mr. Ferrell an opportunity to complete the work, the claimants have voided their entitlement to damages.

[66] Both parties provided authorities as to the duty of a claimant to allow a contractor to remediate. I will not reiterate all of those authorities here, but the best overview is found in *Connolly v. Greater Homes Inc.*, 2011 NSSC 291, a decision of Justice Wright, quoting Justice Saunders in *Stoddard v. Atwil Enterprises Ltd.* (1991) 105 N.S.R. (2d) 315, and *Halsbury's Laws of Canada*. While the Claimant must act reasonably, there is no requirement to allow a Defendant to return in circumstances where there is no clear evidence that mitigation will result:

[41] Unquestionably, the plaintiffs bear the burden of proving their damages. The defendant, on the other hand, bears the burden of

proving that the plaintiffs failed to mitigate their damages and that any unsuccessful expenditures intended to mitigate the damages were unreasonable. A plaintiff cannot recover damages which it could have avoided by reasonable conduct in the circumstances.

[42] These legal principles are nicely summarized in *Halsbury's Laws of Canada*, 1st ed., (2008 Construction Volume) at pages 217-219. It is unnecessary to quote at length from this authority other than to insert the following:

What is reasonable depends on all of the circumstances of the case. The innocent party is not held to a high standard. The innocent party is only required to act based on what it knows at the time, without the application of hindsight. It need not undertake anything risky. The wrongdoer is entitled to expect the aggrieved party to act reasonably, not perfectly.

[43] The foregoing principles have been illustrated and applied by our court in *Stoddard* in which Justice Saunders wrote as follows (at paras. 108-110):

108. I also find no merit to the defendant's second argument. The general principle which underlies the law of mitigation is that a plaintiff must act reasonably to avoid further damage or increased costs against the defendant. This duty to act reasonably is related to the date for assessment of damages, in that the plaintiffs' duty to mitigate does not arise until a reasonable time after the assessment date. Normally the date of assessment is the date the contract is breached. However, there are certain exceptions to the "breach date rule". One of these exceptions is found, as here, in the so-called "repair" cases. The shift began with *Dodd Properties v. Canterbury City Council*, [1980] 1 W.L.R. 433 (C.A.), where it was held that the plaintiff was justified in deferring repairs up to the time of trial. This principle was also applied in a case of defective construction, where:

"... the plaintiffs had felt unable to incur the considerable expenditure needed before they were assured of recovering this

amount from the defendants who had vigorously disclaimed liability right to the door of the court."

MacGregor on Damages, referring to *Cory & Son v. Wingate Investments* (1980), 17 Build. L.R. 104 (CA.))

109. This same approach was taken in *Costello v. Cormier Enterprises Ltd.* (1979), 1979 CanLII 2709 (NB CA), 28 N.B.R. (2d) 398 (C.A.), where the New Brunswick Court of Appeal held that the owner of the house was justified in waiting to establish the builder's liability before embarking on a full program of repair.

110. The Appeal Division of this court, in the case of *Canso Chemicals v. Canadian Westinghouse* (1974), 1974 CanLII 1336 (NS CA), 10 N.S.R. 306, referred to MacGregor on Damages (13th edition at p. 229) for eight rules with respect to mitigation including:

"1. a plaintiff need not risk his money too far ...

"8. a plaintiff will not be prejudiced by his financial inability to take steps in mitigation."

[44] Justice Saunders went on to find (at para. 111) that it was entirely sensible for the plaintiffs to have waited to ascertain their final legal position before deciding on the extent of the corrective measures they were willing to take. He added that there was no onus on them to incur further debt to effect these repairs and then await the outcome of trial and the determination of liability, noting that the defendant disclaimed any responsibility throughout.

[67] Based upon the evidence before me and the above authorities, I find that it was reasonable for the Claimants to have not allowed DHS to return to the site. I take note of the fact that the first, and last, communication Mr. Farrell had directly to the Claimants after June 17, 2023, was to threaten to lien their property (which was not done). The Claimants took this as "a threat", which is

an accurate description. Mr. Farrell in his direct dealings with Claimants never told them the work was unfinished to the extent he now claims.

[68] Mr. Farrell had by July of 2023 received a copy of the O'Toole report. He did not accept then, and does not accept, that the work was deficient, excepting that the living room window needed some final work. Given my finding that the windows were all installed improperly, there is no evidence that his return would have made any difference in the result.

[69] I find that the Claimants acted reasonably in doing their best to prevent further damage and deal with the window issues as best they could pending the outcome of litigation. Their evidence suggests that it has been an uncomfortable time for them, but they cannot be faulted, as noted in *Stoddard*, above, for remediating the issues with the windows and awaiting the outcome of this matter before embarking on repairs.

Quantification of the Claim

[70] The Claimant seeks:

1. Return of all monies paid to DHS (\$13,885.03)
2. General damages of \$100

3. \$6000.00 for further damages to the property, including heating costs, costs of taping windows, and damages to vinyl siding
4. \$1000 in expert's fees
5. Costs of this action

Return of all monies paid to DHS (\$13,855.03)

[71] I am allowing this portion of the claim in part. Although the doors were ordered and delivered by DHS, and paid for by the Claimants, they were not installed. The Claimants say the doors were left outside, but if that was the case, they had a duty to mitigate by bringing them in out of the elements.

[72] I have considered whether the windows have any residual value or contribute in any way to considerations of betterment. I have concluded that they do not, as there is no evidence to support that they are ever capable of being subject to warranty again. The Claimants paid for windows with warranties, and so I award the amount of \$8,098.65 (\$7042.31 plus 1056.34 HST).

[73] I also award the amount of \$143.75 and \$2,650.00, representing the monies paid for the initial visit, and the invoice for materials required in March of 2023.

General Damages

[74] This Court has jurisdiction to award up to \$100 in general damages to litigants. In this case, given the evidence from the Claimants of the inconvenience and discomfort that followed after the installation of these windows, I award the amount of \$100.00.

\$6000.00 for further damages to the property, including heating costs, costs of taping windows, and damages to vinyl siding.

[75] The evidence with respect to these various headings has not been quantified by way of invoices. It is clear from photos submitted that taping was required. The evidence of both Ms. Desjardin and Mr. Agaiby spoke to the increase in power bills, but without evidence of their “before and after” costs, I do not have sufficient evidence to make an award in this area. The same applies to the claim for the vinyl siding. The taping being clearly necessary and significant, I will award \$300.00 for this cost.

[76] There is in evidence an estimate provided by Kent Homes for \$28,692.00 replacing the vinyl siding on the outside of the home, and the Claimant asks for a small portion of this amount to be awarded due to the damages caused by the installation of the windows. I do not have a further breakdown within that

estimate of the repairs needed due to the window installation, and as a result I am unable to make an award under this heading.

\$1000 in expert's fees

[77] While expert fees have been awarded in this Court (see HCCC#116

Woodbridge Court Condominiums v. Carvery's Construction Ltd., 2014 NSSM 39), as I have no receipt submitted from Mr. O'Toole, I am unable to award costs in this area.

Costs of this Action:

[78] As the Claimants were largely successful, I award the filing fee (\$199.30) and service fee (\$218.50).

Request for a Declaration

[79] The Claimants have asked the Court for a Declaration that no further monies are owed to DHS. I take note of the fact that no Counterclaim was made by the Defendant in this proceeding for the invoice that was issued by the Defendant on June 16, 2023. As the content of this hearing was directly related to the quality of the work performed, and I have found that work to be wholly deficient, *res judicata*

should apply to any attempt by the Defendants to file an action for payment from the Claimants.

Conclusion

[80] I thank counsel for their helpful submissions. For all of the reasons, I award the Claimant the amount of \$11, 410.20 plus prejudgement interest at the rate of 4% (\$230.00), for a total of \$11,640.20. An order will issue accordingly.

Dale Darling, KC, Small Claims Court Adjudicator

