

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Lowe v. Shanmaura Developments Inc., 2013 NSSM 46

Claim No: SCK 414149

BETWEEN:

Name Jerry Lowe **Claimant**
Address [removed]
Phone [removed]

Name Shanmaura Developments Inc. **Defendant**
Address [removed]
Phone [removed]

Date of Hearing: June 12 and 24, 2013

Date of Decision: September 16, 2013.

Jerry Lowe was self-represented.

Laurie C. Laviolette represented the Defendant, Shanmaura Developments Inc.

DECISION

The Defendant, Shanmaura Developments Inc., hired the Claimant, Jerry Lowe, a drywall and painting contractor, to perform various jobs at 177 Etter Road, Mount Uniacke, Nova Scotia (“the subject property”) between January 2013 to April 3, 2013. The Defendant is a corporation whose primary shareholder and director is Maureen Ryan, a barrister and solicitor in this province. She was named in her personal capacity in the main claim. After hearing all of the evidence, it was clear that Ms. Ryan was acting at all times as a representative or agent for the Defendant company. Therefore, on Ms. Laviolette’s motion, I dismissed the claim against Ms. Ryan in her personal capacity without costs, and ordered the style of cause amended accordingly.

Some of the facts of this matter are not seriously in dispute. The Defendant hired the Claimant, Jerry Lowe, to perform drywall and other contract work at the subject property. The property is the first of a subdivision known as “The Orchards of Mount Uniacke”. It is being developed on land owned by the Defendant. This is Ms. Ryan’s first experience at property development and

sales. The initial contract was entered into on January 16, 2013. The total contract price was for \$13,711. In addition to the work set out in this contract, it was common practice for Ms. Ryan to request additional work to be completed on behalf of Shanmaura. The initial work and several extras were performed from that day forward until March 12, 2013.

The Defendant then hired Mr. Lowe and his crew to paint various trim items such as crown molding, baseboard and other trim. This work commenced after March 13 and continued until April 3, 2013 when the work was ordered stopped by Ms. Ryan. The Claimant prepared an invoice for Shanmaura for \$2573.12 which was delivered to Ms. Ryan's business address in Bedford. Ms. Ryan refused to pay citing poor quality work. It is this work and invoice which is the subject of the claim. The Defendant argues that the work was not of good quality and the amount charged excessive. She also alleges poor quality of work and deficiencies in painting the drywall work performed between January and March, 2013. The Defendant denies owing anything to the Claimant for this work. In addition, they have filed a counterclaim seeking compensation for a painting contractor to remedy any deficiencies and complete the work, a claim for ruined materials and a claim for spilled paint and gyproc on the basement floor, which has the benefit of in-floor heating and \$1000 plus HST not accounted for in their original claim.

The Issues

- Is the Claimant entitled to compensation for any of the work performed between March 13 and April 3, 2013? Was the work performed by the Claimant for the Defendant of any value and in a proper and workmanlike manner?
- Is the Claimant liable to the Defendant in negligence or breach of contract for any of the work he performed?

The Evidence

There was considerable evidence tendered by each party which I reviewed when preparing this decision. I have not referenced each document, but rather I have noted those germane to these written reasons. However, both parties should be assured I have considered the evidence in its entirety.

Trevor Whitman

Trevor Whitman is employed by Mr. Lowe. He testified that he is a journeyman carpenter with 20 years experience. He has worked building furniture, making signs for Kings Edgehill School and the Radisson hotel. He testified that he and Mr. Lowe were hired to paint trim throughout the subject property. The trim was painted by hand using a brush. He estimated that it would take five workers a total of 10 days at approximately \$20 per hour to perform the trim work. Only three men ever worked for the Claimant on this job, including Mr. Lowe. The amount billed to

the Defendant was half of their original estimate. He described the work when they left the job site as "95% done."

The job consisted of painting and readying the trim around frames and crown molding in three rooms. The evidence is clear throughout the hearing that they did not install it. He described the process of painting all of the trim as follows: the first employee, Mr. Whitman, caulked the trim. His coworker, Keith, followed-up by taping and Mr. Lowe painted. On several occasion, he spoke to Peter Barkhouse, the on-site property manager, who advised them they were "doing a great job".

He gave Mr. Barkhouse and Ms. Ryan what he described as a "verbal invoice" for the amount to be paid, meaning he gave him the figure verbally, in the initial stages of the work. It became clear that this was not sufficient for their purposes.

Under cross examination by Ms. Laviolette, Mr. Whitman testified that the hours worked by the crew were marked in a notebook which he maintained as part of his recording efforts. He indicated that it is a process that every contractor performs. His notes were admitted into evidence. He testified to working on March 31 and April 2. He recalls being asked by Ms. Ryan for a quote for the job, which he estimated at \$4000. Turning to their process, Ms. Laviolette asked Mr. Whitman if it was easier to paint the trim prior to its installation, he indicated that he could not do so, once the walls were painted and the trim and flooring installed. He declined an opportunity to spray the trim on the walls because "you cannot do that there", because he feared overspray on the walls. Even when Ms. Ryan told him she wanted the room painted that way, he did not consider doing the trim until after the drywall was done as he and Mr. Lowe were initially hired to install the gyproc. It is his position that when hired, contractors perform the work on their own without continuous instructions as he alleged she had done in this instance. When asked about a conversation with an electrician, Mr. McKay, he does not recall with him or being argumentative. I infer nothing from that as Mr. McKay was not called to give evidence.

He was then cross examined with respect to the dates in his notebook. They can be summarized as follows:

March 13/13 - Three people were on site and worked 7 hours each. In addition, three people were on-site at a different time and worked 6 1/2 hours each. He described the work that day. As spending two hours patching holes in the kitchen from where the electrician sent the wiring. He was also asked to test the water flow in the house and clean garbage. The rest of the time he spent filling holes and caulking for trim.

March 15/13 - Three men were on-site and \$15 an hour was billed. They spent their time filling nail holes, caulking and painting trim.

March 18/13 - Two men were on-site and expended 11hours filling holes, caulking and painting trim.

March 25/13 – 17 hours were spent involving two men filling holes, caulking and painting trim.

March 27/13 – Three men spent six hours each – filling holes, caulking and painting trim.

March 28/13 – Three men were on-site from 7:45 am to 4 pm - filling, caulking and painting trim.

Mr. Whitman testified that on April 5, they were unable to get into the house to complete the work. He indicated that it is common practice to paint trim after its installation. He described the work as 95% done, requiring only final touchups.

Jerry Lowe

Jerry Morris Lowe is a sole proprietor who is in the business of installing drywall which includes taping and painting. He has been doing this type of work for 15 years and has owned his own business for the last two years. He was a contractor prior to that and he is currently a member of two trade unions in the construction field. He agrees with Mr. Whitman's testimony.

He testified that he contacted Maureen Ryan on April 3, 2013 regarding the bill for services rendered up to that date. He indicated there are three employees, himself, Mr. Whitman and Keith. He described the work done for Ms. Ryan by his crew between March 15 and April 3, namely, 40 hours performed by him, 43 hours by Trevor Whitman and approximately 30 hours by Keith. She was very upset with the bill and indicated that she would speak with her husband, Dr. Shannon Ryan. No further communication ensued between Ms. Ryan and Mr. Lowe. On April 5, Mr. Lowe and his crew showed up for work at the subject property and the house key was not there. He attempted to contact Ms. Ryan by phone and she could not be reached. He called Peter Barkhouse who advised him that his involvement with the job had been terminated and Ms. Ryan refused to see them. She told them through Mr. Barkhouse to leave and advised they were trespassing. He observed through the window other men working performing caulking work and using his staging. Mr. Lowe was advised by Mr. Barkhouse to come by and get the tools the following day. He eventually heard from Ms. Ryan.

On April 7, Mr. Lowe spoke with Ms, Ryan and she indicated she had hardships and no money. No payment arrangements were made. He also indicated that "she might have him back to complete the decks". Under cross examination by Ms. Laviolette, he acknowledged that the bathroom was not finished. The chair rails were in the wrong spot. He finished the master bathroom last because it required extra work and extra shelves. Ms. Ryan advised she wanted the bathroom done last because the other contractors were in the process of installing a toilet. He testified to speaking with Mr. Barkhouse who indicated that most trim men paint the trim afterwards. Once the trim has been installed, it is common to paint a pre-coat. He indicated that when painting the trim, sometimes one can "bang and scratch it" by accident. As a result, he decided to leave "touchups" to the end. He indicated that he normally prepaints trim first but in

this case the initial contract was to install the drywall and paint the wall. Ms. Ryan asked him to install the gyproc first with the request to paint trim after the fact. Usually the trim is prepainted and then installed. She had asked the trim contractor, Andrew Fisher, to spray paint the trim in the garage, which he did. He described the job as improper. He repainted the walls as there was a great deal of overspray around the trim. He was very disappointed. Ms. Ryan had asked him to spray paint the trim in the closets but he declined due to overspray.

Under cross examination, he testified that he had been painting for about a year. He has done a lot of work for insurance companies, mostly drywall as well as work for Systems Canada. He does not have journeyman's papers for the type of taping and drywall work that he does. When asked if he was present at the subject property on March 13, deferred to Mr. Whitman as he is responsible for maintaining the log. Ms. Laviolette reviewed several calculations with him. Mr. Lowe testified that the estimate for touchup was approximately \$.12 per square foot. He testified that he owns his own tools to do drywall work, but customers typically purchase supplies, such as brushes and drop cloths, for painting work. He acknowledged that the chair rails were in the wrong place. He painted the rails but not the crown molding. He was asked to do so on several occasions but he did not.

With respect to the painting work in the initial contract, the quote was for \$4100 for two coats of paint on the ceiling in three different colors. In total, the estimate \$.38 per square foot for 15,770 ft.² of drywall. The estimated cost was \$5992.60.

He acknowledged signing the itemized list on March 15, 2013 in Ms. Ryan's office along with Mr. Whitman (Exhibit 2, Tab 4). Ms. Laviolette reviewed the list of items and noted the following:

- \$2209.44 – he testified to spending time working on the decks and installing them. He cleaned the house several times for his own work and charged for that.
- \$2237.50 – this work was for filling holes caulking trim, lugging the vanities and assisting with the water test as requested by Ms. Ryan. The quote was largely for work other than painting.

He indicated that 119.5 hours is the correct amount of time spent by him and his crew. He acknowledged the crown molding was not finished upstairs or in the bathrooms as he was not given a chance to do so. He testified that the supervisor watched the trim getting done. He did not paint the French doors, or other doors. He did not paint the closet. It was only the bathroom upstairs that was finished; the rest of the work was 95% done.

Ms. Laviolette tendered a book of photographs into evidence. I shall have more to say about the quality and content of that booklet later in this decision. Mr. Lowe pointed out that there was drywall mud on the wall which could have been washed off with a mop. He did not sand the

trim as it is MDF, medium density fibreboard, a pressed wood material used for constructing certain wood projects.

In his redirect evidence, he testified that he did not scrape up the concrete floor and it was not cleaned. It was a constant mess but the room would have been cleaned if he had been given the opportunity. He had yet to complete the crown molding in the bathroom upstairs as it was the largest bathroom.

Dr. Shannon Ryan

Dr. Shannon Ryan was called by the Claimant. He is a psychologist and married to Maureen Ryan. He testified that he is a shareholder of the corporate Defendant, but is not an officer of the company. He acknowledged that Mr. Lowe and Mr. Whitman did work on site between March 13 and April 3 painting the trim. He confirmed that both Peter Barkhouse and Ms. Ryan expressed satisfaction with the living room, but also acknowledged seeing paint streaks in the trim in the living room. He and Ms. Ryan discussed the costs of the work. He testified to discussions he and Ms. Ryan had concerning hiring Mr. Lowe to see if they can paint the premises. However, he had little else to offer with respect to evidence in this matter.

Evidence for Shanmaura Developments Inc.

Photographs

The Defendant's counsel tendered into evidence a book of photographs marked as Exhibit 3. These photographs were taken by Ms. Ryan in April 2013. Ms. Ryan also compiled the book and organized it for the hearing. This booklet is divided into nine separate sections. Unfortunately, the booklet does not contain tabs or an index or other type of identifiable organizational summary, like the booklet of documentary evidence prepared and tendered by her counsel as Exhibit 2. In addition, the booklet of photographs contain self-serving comments at the start of each section which would have been more suitable for the Defendants' submissions, if at all.

Typically, when photographs are tendered into evidence, any narrative should contain brief but relevant details such as who took them, the date and time taken, the type of camera used and what factually the picture represents. An example of the latter might be "Crown molding in upstairs bathroom on wall adjacent to master bedroom taken from a difference of 5 feet." Comments designed to persuade are not helpful and one risks leading or intimidating witnesses.

Where the comments appear near only a few of the photos, I instructed the witnesses to ignore the comments when giving testimony.

Quite properly, Ms. Ryan acknowledged the comments ought not to have been included and apologized. On reflection, I doubt she intended those comments to be used in court.

Peter Kenneth Barkhouse

Peter Kenneth Barkhouse testified for the Defendant. He described his experience in the construction industry. From 1996 to 2010, he was the construction superintendent and project manager for a company in Florida. This was followed by employment with Grey Top Construction in Dartmouth. He is now employed by the Province of Nova Scotia. He began work for Shanmaura on March 25, 2013. On that date, he met with Mr. Lowe and Mr. Whitman. He

inspected the drywall work they had completed and indicated it was a fine job. He also testified that there was caulking and putty on the crown molding and there was plenty of work left to be done. He cited as examples that certain trim was not installed and some of the painting looked like a primer coat only. He noted that it was unusual to perform the tasks in the order they did, namely painting the walls, installing the trim and then painting the trim. He inquired why it was done in this order and was advised by Mr. Whitman, "that's how it's done." He attended the premises on March 26 and saw neither the claimant nor his workers. He returned on March 27 around 8:30 and found Jerry, Trevor and Keith all on-site. The trim carpenters had finished the trim. Mr. Barkhouse left around 10:30 to 11:00 a.m. that day. He suggested to Mr. Whitman that plastic be put on the French doors when they are being painted. They discussed the painting in the basement. Mr. Whitman testified that he did not do it. He had suggested to Mr. Lowe and Mr. Whitman that they use a small roller instead of brushstrokes on the trim. He also noted there was no sanding done. In his experience, it is possible to sand MBF products, particularly after a primer coat has been applied. He prefers spraying as a method of painting. He testified to having discussions with Mr. Lowe about the other contractors and was told in effect, that everything was wrong. On March 28, Mr. Barkhouse attended to the property and found that for the third straight day Mr. Lowe and his crew were still working on the same level. His crew had taken a four-day weekend as well. The closets were not yet painted, the doors were not sprayed and the bathroom was not complete.

He returned to the property on April 2 and found there was nobody there. He left a message on Mr. Lowe's phone requesting an update on his progress. He returned again on April 3 at 9 a.m. He was advised that things were great and the crew were there until 4:00.

In his experience, he has observed that it takes two to three workers about one and one half weeks to do the trim. Some painters used tape on the trim. He testified that some of the tape had come off on the wall and it had to be touched up. In his opinion, the trimming and painting was not "professionally done", in that it was not finished and ought to have been rolled or sprayed rather than hand painted. He testified that Scott Phillips' work rectified the problem and finished the job. He provided little details of the work that Mr. Phillips had done other than he fixed some of the drywall bumps and painted over them with a patch.

Under cross examination, he confirmed that on April 2 at 2:45, he was not at the subject property. He testified to caulking a crack in the corner. Certain work was refused by them as it would void the five-year guarantee. There was no written guarantee tendered into evidence by any of the witnesses. He testified to speaking with Maureen Ryan on March 25 and 26 and went back on April 2. He confirmed his position as a property manager is a paid position.

Alexander Scott Phillips

Alexander Scott Phillips has been a painting contractor for 27 years. He performs both new construction, and finish work. New construction includes painting after drywall is installed, the trim painted and painters come in and finish it up. He describes the painting process as filling

holes with putty, masking off (meaning the process of applying tape to prevent spillage), primer paint on the bare wall applied by spray painting, sanding the ceilings which are then painted, caulked and finally sprayed with semi-gloss paint. It is common to cut in and then roll the walls, followed by painting the floors and the trim. For baseboard, it is filled and then painted. He describes the procedure as always being a double coat, namely first one of primer followed by paint. The house is then cleaned to ensure there is no dust and then a third coat of paint is applied. He testified that it is always necessary to sand the primer before applying the semi-gloss paint as it leaves a smoother finish.

He described the work that he did for Ms. Ryan. He testified that he repainted the whole house except the garage. His billing rate was approximately \$.38 per square foot, which included material, paint and caulking. The payment terms were such that 80% was payable immediately and 20% held back until the work is approved as satisfactory and then the funds are released. He described his approach as typical for painting new construction. He charged the Defendant \$5992.60, which included labour and all materials.

When he started work at the subject property on April 5, he observed damage to the walls. The painting on the trim was not painted to the floor. Some of the trim which went to the hard wood floor had no paint on it. The painting had been done with a brush and several parts of the trim in the closets had not been sanded. The crown molding had also not been done. The trim that ran to the ceiling was not straight. He referred to the book of photos (Exhibit 3). Like several of the witnesses, he had difficulty discerning what several of the photographs depicted. In Part 1, photograph B and C shows where lines on the wall do not run to the ceiling. Repairs were performed to the drywall but were allowed to dry out before painting (photographs E, F and G). The trim had been painted and paint splattered onto the wall (H, I and J). Photographs K, L and M depict green marks which Mr. Phillips attributes to tape having been left on the wall. He showed other examples indicating that the primer was not painted far enough down the baseboard (Part 2, photograph A). Section 3 shows where molding was sprayed but, in his opinion, it should have been painted the same color as the trim. They also show gaps around the trim on the door and where the molding was not caulked properly. In his opinion, it should resemble one solid piece. Photographs C and D reveal brushstrokes. He also identified what he purports to be brushstrokes in section 4. It showed paint all over the glass panes of the French doors, Photographs 5 and 6 show the trim was not caulked or completed, the trim was not caulked or painted and there was paint on the closet door. He testified that usually the hinges are taped off for painting.

Part eight of the booklet shows damages to the basement floor resulting from spilled paint. He described having to purchase extra paint to complete some of the jobs. There was paint in every room he could not figure out where it all went. He also found a bag of 20 or more rolling sleeves wrapped up in bags. However, he elected simply to use his own.

Under cross examination, he testified that if the trim had not been installed and he could not paint, it would be reasonable to expect painters to work elsewhere. He compared the time

required to spray versus painting with a brush. Mr. Whitman put to him that the spraying process with four guys would take approximately one week but painting with a brush with two guys could take 2 ½ weeks. He did not agree with the statement.

Maureen Ryan

Maureen Ryan testified on behalf of the Defendant, Shanmaura Developments Inc. The company has been in business since its incorporation in 2002. It owns a subdivision it is developing known as "The Orchards of Mount Uniacke". She confirmed the subject property is located at 177 Etter Road, Mount Uniacke, Nova Scotia. The property was purchased in 2007.

She testified that Mr. Lowe called her office about hiring him to do drywall and painting for some of the properties. She had not heard of Mr. Lowe previously. Following their discussions, he attended to the subject property to determine the extent of the job and prepare a quote. He provided her with a detailed quote over the phone and Ms. Ryan explained that she needed a written contract, which she prepared herself. (Exhibit 2, Tab 3). After some discussions and negotiations, the price was increased in certain aspects resulting in a total estimate of \$13,711. Based on her discussions with Mr. Lowe, she prepared a separate list of materials she was expected to provide, which was tendered as Exhibit D8. The original builder declined to complete the ceiling in the basement. Mr. Lowe offered to complete the work and installed gyproc around the steel posts. He estimated the cost to be \$600 extra and quoted a further \$150 to put gyproc around the window. Ms. Ryan testified that this was her first experience in building a home and hiring contractors, which meant she was required to rely on Mr. Lowe's expertise. She described the basement as having in-floor heating.

In addition to the work listed in the contract, Ms. Ryan compiled a log showing payments that were made to Mr. Lowe for labour only (Exhibit 2, Tab 4) with supporting invoices received from Mr. Lowe. While some of the costs exceeded that which was stated in the initial contract, Ms. Ryan paid him. She described certain discussions with respect to the bill sometime in early March. There were disagreements with respect to certain costs and services incurred prior to the contract for the trim work. For example, the Claimants were asked to install a doorway in the office and paint trim since the builder was very ill. He completed the work and Ms. Ryan received an invoice which exceeded the amount by \$1000. She confronted Mr. Lowe and Mr. Whitman indicating she did not feel it should have been that much. She paid them \$4715 for taping gyproc and expected a bill for that which she did not receive. There was a bill for \$2209.44 for which she claims to have no details until she had them sign an acknowledgement. Another discussion ensued on March 11 when Lowe and Whitman arrived at her place unannounced to discuss the \$1000 difference in the invoice. After meeting with them, she prepared a breakdown of the costs which they signed after being paid the \$1150. (Exhibit 2, Tab 5). The document contains the following acknowledgment:

" I confirm that Shanmaura Developments Inc. does not owe any other money for services rendered or materials supplied prior to March 12, 2013.

The work itemized above and all other work done prior to March 12, 2013 has been paid in full."

The document is signed per "Jerry Lowe" and "Trevor", above the lines are signatures of Mr. Lowe and Mr. Whitman.

Ms. Ryan had paid Mr. Lowe to that point. After paying them, she had discussions with them about patching damage to gyproc and a leak in the kitchen. They did not complete this work. She testified that other work was requested to be done. For example, the original builder was supposed to have completed the railing and front deck. They spent 7 ½ hours to complete the deck, and indicated it was completed, but it was not.

She testified seeing Keith on those days but she only saw him painting the three French doors and some of the trim boards. She testified that either Mr. Lowe or his crew ordered five sheets of wainscot which were painted, but yet he used only one, they could not be returned. She testified that they demanded payment for the service even though there was no notice when a bill was forthcoming.

She testified to receiving a bill for \$4100 plus tax following the roughing in. She had specifically directed Lowe and Whitman not to apply the topcoat until it was all done. Mr. Lowe indicated to them that was not the way he did business. His plan was to hand roll the paint on the trim after it was installed. He indicated to her that he felt that everything will look great and all the problems will be fixed when he did the painting. The cost was \$4715.

Ms. Ryan maintained a calendar in her computer for March and April, 2013 which are entered into evidence (Exhibit 2, Tabs 16 and 17). Specifically, she maintained a record of what she observed at the subject property following her vacation from March 26 to April 2. She testified that Mr. Lowe and Whitman would visit her seeking payment without invoices. She was charged for certain items, however she indicated that cleaning was not done, although it was not indicated in the contract. She testified that on March 20, the builder, the trim contractor and Terry Porter were present at the property. Mr. Lowe had installed the door, painted crown molding, as well as the closets and shelving. Ms. Ryan's records indicate that the work was actually done by her painters. She showed an invoice for white caulking compound for \$32.52, dated March 15. Her calendar entries indicate they worked only half of the day and they did not show up again until March 25. On March 27, she directed them to paint the bathrooms but they did not do so. On March 23, she was advised by Terry Porter that Lowe and Whitman were not painters, as they had not made much progress and were not doing a very good job. He recommended Scott Phillips, who attended to her house on March 23. He provided her with a quote to finish the job.

Ms. Ryan took a call from Mr. Lowe on March 25. He had been locked out of the house and did not have the keys. In that conversation, Ms. Ryan talked to Mr. Lowe about spraying the trim. She indicated she was concerned about some of the brush marks and showed them to him. Specifically, she stressed that she wanted the trim sprayed, especially the closet shelves. Mr.

Lowe was said to have responded that he would do as good of a job with brushes as one would do with spray. When she looked at the trim work around the windows, she found it had been brushed and she was not pleased with the work. She observed that the crown molding had been hand-painted rather than sprayed except for that which had not been painted at all. She was advised by her plumbers and electricians that they needed to install vanities and lights and the bathrooms had no paint on either the vanity lights or the fixtures. In her testimony and exhibits, Ms. Ryan gave numerous examples of where she stressed that she wanted the trim painted by spraying rather than with brushes. Ms. Ryan and her husband took vacation in March 2013 and the work was supervised by Mr. Barkhouse. When Ms. Ryan spoke to Mr. Barkhouse, he indicated that the job was "not going well". Ms. Ryan indicated that it was her decision to hire Mr. Barkhouse, not Mr. Whitman's. He indicated that he had been out to the house on the 27th and advised that nobody was there working.

On March 27, Terry Porter was due to return and finish the baseboards and door trim. Ms. Ryan did not want Porter's work impeded and wanted the crown molding completed. The plumber showed up and the fixtures were installed. Nobody worked at the house from late March 28 until March 31. On April 2, Mr. Barkhouse advised that Mr. Lowe and his crew had left by 3 p.m.

The next significant conversation took place on April 3. Mr. Lowe wanted to paint the master bedroom closet shelves the same color as the wall. Ms. Ryan suggested to him that spray gun was needed for the shelving which should be sprayed. She insisted that he spray the closet and the doors. Mr. Lowe advised that he should not paint the closets or the doors using the spray. He also wanted to be paid \$2100 and advised Ms. Ryan "Trevor Whitman has to pay rent". She refused and indicated she would not pay him as the work had not been completed according to her specifications. She asked him to stop working and she will call if she wanted him to come back. She indicated that he sent her an invoice dated April 3 showing 119.5 total hours worked was inaccurate.

Ms. Ryan reviewed the book of photographs. She took the photographs in April 2013. Rather than reviewing her comments about each picture, it is sufficient to say that throughout she indicated several patches where the paint was not finished. She also pointed to several portions of the wall which she alleges were not painted adequately. I note that items Part 1, photos K, L and M show green tape on the wall. It is also difficult at times to see certain of the deficiencies alleged in each of the photographs (e.g. section 2) due to the quality of the photographs.

Ms. Ryan was cross examined by Mr. Whitman. Much of the cross examination consisted of an attempt by Mr. Whitman to argue or excuse certain of the deficiencies which Ms. Ryan noted in her evidence. He was instructed to save the comments for rebuttal and closing argument rather than arguing with the witness. However, certain salient points were brought into evidence. Ms. Ryan acknowledged near the doorstop on the door jamb, there is hardwood underneath the trim where painting would stop. Certain jobs required quarter round trim (a piece of wood and doweling or strap with is shaped like a quarter of a circle).

She testified that she did pay for the work noted in Tab 3 and that everything appeared to be satisfactory. She acknowledged there was no lien hold back. She did not prepare a deficiency list because she was “lenient” and trusted that the work would be done. She did not trust the work that they did. While Mr. Barkhouse was responsible for overseeing the job, he had no authority to hire or fire the contractors. She did not instruct Mr. Barkhouse to fire Mr. Lowe but did instruct him to allow Jerry to get his tools. The reasons she gave were the quality of the work, the exorbitant bill and surprise billing practices. He acknowledged that the contract was for labour only and she did have a succession of contractors on the site.

The Law

When dealing with construction contracts, the law requires that work be completed in a good and workmanlike manner. This has been interpreted by the Nova Scotia Supreme Court in *Flynn v. Halifax Regional Municipality* (2003), 219 N.S.R. (2d) 345 per Justice Arthur LeBlanc:

“Certain terms are implied in every building contract: materials must be of proper quality, the work must be performed in a good and workmanlike manner, the materials and work, when completed, must be fit for their intended purposes, and the work must be completed without undue delay (*Markland Associated Ltd. v. Lohnes* (1973), 11 N.S.R. (2d) 181 (S.C.T.D.); *Girroir v. Cameron* 1999 CanLII 2401 (NS SC), (1999), 176 N.S.R. (2d) 275 (S.C.)”.

While this case was varied by the Court of Appeal at 2005 NSCA 81, the principle was cited and not overturned. Justice LeBlanc recently applied this principle in the case of *Pavestone Creations Limited v. Kuentzel*, 2013 NSSC 199, where he added the following:

In the *Manual of Construction Law* (Toronto: Carswell, looseleaf), Howard M. Wise comments, at §3.5(b)(ii), that courts will imply a term in a construction contract that the work contracted for will be completed in accordance with a certain standard. What the comparative standard is will depend on the nature of the work and the parties’ expectations and may include the industry standard, a regulatory body’s standards, or other acceptable standards.

[46] Another term which has been implied in construction contracts is that the contractor’s work be completed in a proper and workmanlike manner. What constitutes a “proper and workmanlike manner” will seemingly depend upon the particular facts of each case.

[47] A similar phrase that is often used as an implied term in a construction contract is that the work must be of quality or suitable workmanship. If the workmanship is not of the quality that an owner could reasonably expect, the contract is in breach.

[48] There is authority to the effect that in determining the appropriate standard, the court should consider “all the circumstances of the contract including the degree of skill expressly or impliedly professed by the contractor”: Donald Keating, *Building Contracts*, 4th edn. (1978), at 37, cited in *Stavelly Community Centre v. L.&D. Masonry Enterprises Ltd.* [reflex](#), (1983), 45 A.R. 375, [1983] A.J. No. 813 (Alta. Q.B.), at para. 14.

Findings

In reviewing the evidence, I make the following findings with respect to the main claim, the alleged contract for painting trim, along with the various elements of the counterclaim. I shall begin with findings pertaining to the main claim by Mr. Lowe against Shanmaura.

Jerry Lowe's Claim

Following the completion of the drywall contract and the payment for all services rendered, the contract which is the crux of this action was entered into on or about March 15, 2013. Like the other contracts for services, it was for labour only. The materials were not included as part of the contract and were paid by the Defendant. The rate continued to be at \$20 per hour, although there was nothing in writing to that effect.

The work took longer than Ms. Ryan anticipated. I find that several factors contributed to this, including Mr. Lowe's relative inexperience at painting trim and Ms. Ryan's inexperience in home construction. While I agree with Mr. Barkhouse and Mr. Phillips that certain tasks such as paint and installation of trim should occur before installation, for this to be successful, there remains the need to coordinate the efforts and timing of the contractors. She did not do that. All witnesses testified to several contractors on-site with each impeding one of the other's progress. There were many unforeseen and unfortunate logistical issues which arose for which she had no control. With justification, she felt her wishes were not being considered by Mr. Lowe and his crew as well as the other contractors. Further, his work was taking a long time. All of this fuelled her frustration and had a negative impact on the relationship between the parties. By April 3, the relationship between the parties had broken down to the point that in Ms. Ryan's opinion, it was necessary to hire new contractors to finish the work.

I find that most of the trim was already on the wall when Mr. Lowe and his crew were brought in to paint some of the trim, such as the crown molding. Further, they were not given an opportunity to paint them before their installation. Mr. Lowe was correct in refusing to use spray paint on some of the trim. Numerous parties appear in Small Claims Court where the painting contractor rolled and brushed the paint and spraying apparatus was not used. That said, the Claimant was instructed not to use brushes when possible and complete rooms in a certain order and they did not comply. I accept the photographic evidence produced which shows paint streaks, gaps without caulking, shelves not painted and other deficiencies noted earlier in the decision.

I do not accept the Claimant's position that the work was 95% complete. The evidence is clear that there were many items, small and large, which remained outstanding before Mr. Phillips' attendance. For example, there were streak marks and brush strokes all throughout the trim, there were holes and missed spots on the walls, dripped paint on the panes in the French doors and on the hinges. The paint jobs needed at least some sanding and in many cases, another coat of paint. I also find that the amount of work that had been completed was less than one would expect from qualified contractors spending a total of 119.5 hours.

In support of their position, the Defendant called Scott Phillips and Peter Barkhouse, the new painting contractor and project manager. They testified as to the order the work should have been done and testified to the several deficiencies they would have remedied. Yet no photographic evidence was shown of the remedial work that Mr. Phillips alleged to have made to the work performed before March 12. In essence he was defending the work he was paid to do for the Defendant without proving how it improved the painting performed by Mr. Lowe. It is not sufficient to satisfy this court that it was effective in remedying the defects and incomplete work which I have found to exist. I find his evidence self serving. While it was corroborated by Mr. Barkhouse, he too was a paid employee of either Shanmaura or the Ryans. I do not accept their evidence in that respect.

Photographic evidence of the completed work or the testimony of an independent third party would have gone a long way in establishing that Mr. Phillips' work addressed any damage or losses alleged to be suffered by the Defendant. Thus, I do not find the Defendant has proven on a balance of probabilities that the initial contract was deficient, namely, the drywall work and other duties completed up to March 12, 2013. Furthermore, I do not find Mr. Phillips' work remedied any deficiencies with the painting of the trim. In summary, I do not accept the Defendant's position that the work performed by Mr. Phillips was remedial in nature. Rather, I find it was necessary to continue the work not yet finished by Mr. Lowe.

Furthermore, given the above, I find the work that was done by Mr. Lowe and his crew was not of quality or suitable workmanship for a job purporting to be 95% complete. They did add value to the property and with appropriate efforts, the work could have been completed. Unfortunately, I have no evidence which I accept as to the amount of time required to complete the work or as I have noted, any evidence of its current state.

I am left to make a reasonable estimate of the value of the work. There were many deficiencies and mistakes that would have needed be fixed or cleaned. I have also found the amount of work not consistent with that of 119.5 total hours.

The Claimant's estimates of the cost of a completed job are of no assistance as they are inconsistent. In his discussions with Ms. Ryan, Mr. Whitman estimated that it would have taken a crew of five to do the work and cost \$8000 plus HST. Mr. Lowe's quote to Ms. Ryan before accepting the job was \$4200. The final invoice of \$2390.00 plus HST according to Whitman and Lowe represents work that is "95% done". In many cases, a court estimates the cost of the completed work and deducts to amount needed to remedy any defects. As indicated, I reject both Mr. Phillips' evidence in that respect as well as the inconsistent quotes and invoice provided by the Claimant. Thus, where I find only a portion of the job complete, a different approach is necessary.

In considering all of the circumstances of the contract, I find the work was closer to 60% complete using Mr. Lowe's most recent invoice. I allow 72 hours at \$20 per hour plus HST for a

total claim of \$1656.00. One exception to this amount is the cost for cleaning the basement floor which I have noted below.

Counterclaim

At the start of the hearing, Ms. Laviolette filed an amended counterclaim on behalf of the Defendant. I shall deal with each item in order.

1. *Costs for completing gyproc repairs, completing painting of the doors, closets and trim and for repairing and repainting their work - Scott Phillips - \$2325.00*

As noted above, I find the work performed by Mr. Phillips was consistent with completing the job from where Jerry Lowe stopped rather than fixing the work he and his crew performed. I have reduced the amount payable under the original contract in recognition of this. I decline to award anything under this heading.

2. *Costs to Clean Basement floor - \$569.25*

I am satisfied that the Claimant spilled drywall putty in the basement and allowed it to dry. This amounts to negligence. Special cleaning is required to rectify it, for which the Defendant is entitled to compensation. The Defendant has produced a quote from A+ Quality Cleaners for \$495 plus HST for a total of \$569.25. In the absence of any evidence to the contrary, this appears to be reasonable and representative of the cost to clean a basement floor with in-ground heating. I allow \$569.25 claimed for this head of damages.

3. *Additional Paint needed to repaint the top coats - \$250.80*

For the same reasoning I rejected the claim for Mr. Phillips' service, I dismiss the claim for materials. I note also that Mr. Phillips testified that his pricing includes the cost of materials. For both of these reasons, this portion of the counterclaim is disallowed.

4. *Frog Tape - \$73.51*

For the same reasoning as item #3, this portion is disallowed.

5. *Costs of supplies they ruined - \$779.89*

In Exhibit 2, Tab 11, the Defendant has tendered receipts from Sherwin Williams representing various painting supplies including paint brushes, rollers, tape, foam pads and plastic trays. The total claimed should have been \$776.76. There was evidence from Mr. Phillips that a bag of used roller sleeves was found at the premises when he began his work. Mr. Lowe testified to purchasing plastic trays and other disposable materials to limit clean up.

In reviewing the receipts, it is clear that certain items would have been useless after one usage and not recyclable, such as tape, foam and caulking. Certain items such as plastic trays, roller sleeves and brushes would have been left on-site by Mr. Lowe and his crew as they anticipated returning to work on April 5 when the house was locked. The evidence is not sufficient to establish the extent of the items that were reusable and if any of those were ruined. I disallow this portion of the claim.

6. *Unexplained overcharges on February 15 invoice - \$1150.00*

This item refers to the invoice of \$4188 discussed in Ms. Ryan's testimony. The issue results from the charges for gyproc, strap and painting the basement. There was evidence from Ms. Ryan concerning the initial quote of \$750 + HST. None of Mr. Whitman's notes that were supplied in evidence addresses those times or charges.

Mr. Lowe described these charges as "carpentry work". He testified to performing additional work for Ms. Ryan, such as lugging vanities and other items besides the work on the ceiling for \$750 plus HST. I find there were discussions where this item was discussed, Ms. Ryan paid them and had them acknowledge being paid in full. In some cases, the act of paying for a bill is not a bar to a claim, such as when a mistake was noticed after the fact. This was a negotiated settlement. She is estopped from asserting any further entitlement to those funds. I disallow this portion of the claim.

I find the Defendant has been successful in her counterclaim for \$569.25 which sum shall be set-off against the main claim.

The Claimant is entitled to \$1656.00 inclusive of HST for the work he has performed. The Defendant is entitled to be compensated for the cost of cleaning the basement floor, \$569.25. In summary, I find the Defendant, Shanmaura Developments Inc. liable to the Claimant, Jerry Lowe, for \$1086.25. As success was equally divided in this matter, this is an appropriate case for each party to bear their own costs.

Disposition

In summary, the Claimant, Jerry Lowe, shall have judgment against the Defendant, Shanmaura Developments Inc. for \$1086.25, with each party bearing their own costs.

An order shall issue accordingly.

Dated at Dartmouth, NS,
on September 16, 2013;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)