IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Ray Cox Construction v. Kasperson, 2007 NSSM 8

2006 Claim No. 269810
Date: 20070122

BETWEEN:

Name: **Ray Cox Construction - Ray Cox Jr.** **Claimant**

- and -

Name: **Deborah Kasperson and Paul E. Kasperson** **Defendants**

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 16, 2007. This decision replaces the previously distributed decision.

Appearances:
Claimant: Self Represented
Defendant: Lisanne M. Jacklin

D E C I S I O N

[1] This matter initially came before the Small Claims Court in Halifax, Nova Scotia, on November 7, 2006, at which time counsel for the Defendants made a motion to stay or dismiss the claim on the basis that there was a contemplated proceeding in the Supreme Court which involved the same parties and issues. In this regard the Defendants' counsel introduced a letter dated November 6, 2006, from Peter Landry of Landry McGillivray Law Firm, in which Mr. Landry confirms that he has commenced the drafting of a Statement of Claim against R. Cox Construction and against Halifax Regional Municipality. Mr. Landry further indicates that he is waiting on an engineer's report and as well he states that it will be necessary to give statutory notice to Halifax Regional Municipality. Ms. Jacklin echoed what is stated in Mr. Landry's letter - that it would be appropriate for all concerned if the matter was heard in the Supreme Court.

[2] The request to stay or dismiss the claim was rejected. In that regard, reference was made to Section 15 of the Nova Scotia *Small Claims Court Act* which reads:

> ***15*** *The court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19.*

[3] As I stated at the initial hearing on November 7th, it is my view that a **contemplated** proceeding does not constitute an existing proceeding which, in my view, is what is contemplated in Section 15 of the Nova Scotia *Small Claims Court Act*. Accordingly, Section 15 did not apply. Further, it is my view and I so indicated, that Small Claims Court does not have the general authority to stay or otherwise delay a proceeding in the circumstances such as the present. Rather, my view is that a Claimant has the right to have its, his, or her claim heard reasonably promptly, subject to possibly having a hearing adjourned to enable evidence to be presented including expert evidence which, in fact, is what has occurred here.

[4] There was also a request from Ms. Jacklin for an adjournment to obtain an expert's report which was in the process of being concluded. I allowed a four week adjournment to Tuesday, December 5, 2006, and the matter did proceed on December 5, 2006..

[5] The claim is for alleged unpaid services which the Claimant states were on the basis of an hourly rate of $15.00 per hour. The Claimant further alleges that there were some 837 hours which, at that rate and together with HST, equaled $14,438.25 for the period June - September 2004. In their defence, the Defendants state that there was no agreement, verbal or written, whereby the Defendants agreed to pay the Claimant an hourly wage and further signed no document with Revenue Canada indicating they were paying the Claimant an hourly rate.

[6] The Defendants' written defence further states that they advised the Claimant that they might be receiving a $10,000.00 - $15,000.00 bonus upon completion of the construction of their

home to be contingent on job performance. The Defendants agreed to pay this bonus directly to Revenue Canada if the bonus was justified.

[7] The Defendants further state that the Claimant's job performance was substandard resulting in many deficiencies and that these deficiencies or errors including but were not limited to substandard or incorrect installation of the dining room floor, locks, trim, doorways, front entrance, fireplace, basement, furnace, hot water tank, air ventilation system, oil tank, electrical, windows, door openings and plumbing. The Defendants counterclaim for the cost of repairing that work which is stated to exceed $25,000.00 and the Defendants therefore claims the amount of $25,000.00 as a counterclaim.

[8] Roy Cox gave evidence first. I note at this point that Ray Cox Construction does not appear to be a limited company but is simply a business name registration for Ray Cox, the Claimant herein. Therefore, there really is only one Claimant.

[9] Mr. Cox testified that he came to do business with the Defendants as he had an acquaintance who is their nephew. There was initial contact and a few meetings and apparently the Defendants asked and did see a number of previous jobs done by the Claimant.

[10] The Defendant, Deborah Kasperson, said she had done her homework but was interested in seeing one of his projects and as well there was a number of telephone calls between the parties.

[11] The Claimant stated that the Defendants were not looking for a project manager but did want someone to do some running around. They were interested in having an hourly rate paid for the carpentry work which would be done by Ray Cox and his men. And which, according to Mr. Cox, was at the rate of $100.00 plus taxes plus Wokers' Compensation.

[12] Mr. Cox testified that he did assist with the excavating and the septic work which was primarily done by T.D. Conrad. Mr. Cox and his workers also helped clear the lot as the tree person apparently did not ultimately show up.

[13] In the early part of March-April 2004 it was necessary to bring in gravel so a machine could come in to clear trees. McLellan Excavators were utilized for this purpose. An issue then arose with respect to the bench grades and the foundation and the distance from the lake. As a result of these constraints, according to Mr. Cox, it was necessary to have a four foot crawl space rather than a full basement. He testified that he talked on the telephone with the Defendants and the decision was made to go with the four foot crawl space.

[14] Mr. Cox testified that he assisted in the in-floor heating system and as was primarily part of his responsibility, installed the joists and the wall plates. When the project was roof tight the Kaspersons were back to Nova Scotia. The subtrades for electrical, plumbing, *et cetera* were hired by the Defendants but in most of the cases it was done on the recommendation of Ray Cox. At a point there was a third party demand issued by Revenue Canada to the Kaspersons as Ray Cox was apparently in arrears with respect to taxes.

[15] Mr. Cox testified that Ms. Kasperson had a bad feeling about the situation but felt that they could work around it. Apparently there were a number of discussions and in the result Ray Cox and his workers stayed on the site. Ms. Kasperson did require that a log book be kept with respect to the hours worked and every two weeks Ms. Kasperson arranged to pay the four men in Mr. Cox's crew. Mr. Cox emphasized that this was not a "turn key" operation. He testified that helped Atlantic Plumbing and helped the flooring guys and stated that his primary role was to frame it, make it roof tight and put the siding on. However, he and his crew did a number of other things and in many cased helped the other subtrades. He stated that when they left in the fall that there was some caulking left to be done as the right colour was not in stock. He states that they were dismissed off the job in October 2004. At that point there were two storage, shipping containers from British Columbia on the site.

[16] He stated that all the deficiencies came once he sued for payment and that he had never had heard about them up until then. He further states that he was only responsible for one year. He stated that some of the things raised as deficiencies were not even his business. The occupancy permit was issued October 31, 2005, but the framing inspection (basically what his business consisted of) was issued on July 19, 2004. With respect to the fireplace, he states that that is not his responsibility but was a company from Burnside. With respect to the furnace, hot water tank, that was Atlantic Plumbing, although he and his workers helped with some of the installation. Mr. Cox also stated that they did help with the hot water tank and they did help somewhat and pitched in here and there with respect to the electrical. Mr. Cox stated that his then common law wife, Lynn, had a number of conversations with Ms. Kasperson. Mr. Cox confirmed that he, himself, was not paid at all after May 2004.

[17] The $100.00 an hour rate for Ray Cox and his workers was taken off early on, in fact, according to Mr. Cox, after the Revenue Canada pressure came. He states that he gave Ms. Kasperson the option of having him walk away but after discussion she agreed that he would stay on the job and that he would receive $15.00 per hour. In his words, he stated that he sort of understood that he was “head honcho” because he was the most experienced.

[18] Mr. Cox stated that Ms. Kasperson was the one who ran the project. He stated that there was a discussion at one stage regarding a bonus of $2,500.00 but this was prior to the Revenue Canada involvement. He stated again that if there were deficiencies he was never made aware at the time and that Ms. Kasperson has never paid any of his wages. With respect to the other trades, he did not pay the other trades, the Defendants did. He stated that they chose the trades. Mr. Cox stated that Ms. Kasperson even brought in the other trades and suggested to Revenue Canada that he was dipping off them. This even had the effect of causing the termination of advertising that the Horne Company did with his race car.

[19] Mr. Cox stated that he was like an employee except he did not get paid. On cross-examination Mr. Cox was asked about subtrades and he said the original deal was that subtrades would give quotes and in some cases he did give quotes from the subtrades. He was not aware that

the insulation subcontractor overcharged by some $3,000.00, although he did agree that the price originally issued by the insulation contractor was somewhat steep. Mr. Cox stated that he recommended **some** of the trades. The only things that he paid but (actually his common law wife, Lynn Grady), was the johnny-on-the-spot, the gravel and the bill for David MacFarland. He stated that Lynn Grady was not an employee of Ray Cox Construction.

[20] Mr. Cox stated that he has constructed hundreds of homes. He acknowledged that at the start of the project he did have total responsibility and he acknowledged that the transfer of the money was accurate as at the beginning, the first two period Ms. Kasperson did pay Ray Cox for all employees. Then Revenue Canada issued the demand and things changed. On June 1, 2004, there was a notice to the Kaspersons and Ray Cox called the Kaspersons regarding his situation. Mr. Cox denied that he was the builder although the HRM building permits are in the name of R.C. Construction. Mr. Cox stated that you can put any name on a permit but you need a contact person. Also, he stated that when the permit was drawn the deal was $100.00 per hour, that was before Revenue Canada.

[21] Mr. Cox again stated that he basically did the floor, the framing, siding and deck.

[22] Mr. Cox stated that on October 9, 2004, (when they were dismissed) the roof was roof-tight, the gyproc was up and some of the finish work was in progress.

[23] The floor plans for the heating were submitted to Kent. Mr. Cox stated that it was he who requested this on behalf of the Defendants but it was the Kaspersons who opened the account at Kent. He stated that he did call in the orders if he needed framing materials. He acknowledges that he was the person that sort of "gelled" everything. Mr. Cox stated that in addition to $15.00 per hour which he understand the Defendants were remitting directly to Revenue Canada, he was being paid $3.00 an hour cash for the whole time in question. He did not think this was in violation of the request to pay. He says he thought that Ms. Kasperson was paying the $15.00 to Revenue Canada. Mr. Cox stated that he did not find out that Ms. Kasperson had not been remitting the $15.00 per hour until the end of 2004.

[24] Revenue Canada was not agreeable to Ms. Kasperson paying Mr. Cox and Mr. Cox paying the workers so this was the way the arrangement was structured.

[25] Mr. Cox stated that he obtained a number of the quotes and made recommendations about a number of the subcontractors. The time sheets were confirmation of the hours worked and Ms. Kasperson had asked him to keep a record of the hours worked. He denies that he took over the overall supervisory role. All he did was manage the book. He testified that he assisted Atlantic Plumbing and Heating doing some of the framing and stapling down some of the materials. While he built the box for the fireplace, it was not his responsibility to level the fireplace. He confirmed that he told Ms. Kasperson it would take six months to complete the project and that he was there from May to October.

[26] All of the bills were paid by the Kaspersons. Mr. Cox acknowledges that he was the person who told the foundation contractor to use a four foot and not an eight foot height. He had a set of plans as everyone who does framing gets a copy. He was not the builder just because he had the plans and all the other subs would have had copies of the plans. He acknowledges that the Kaspersons paid for the plans. They gave him a set. He does not agree that as a framer it is his responsibility that the house is structurally sound. He does accept that he has to meet the standards of the National Building Code.

[27] Steve MacFarland who was the plumber from Atlantic Plumbing and Heating gave evidence on behalf of the Defendants. He stated that he did the plumbing and heating. He stated that Ray Cox hired him. He says that Exhibit D13 appears to accurately outline his involvement in the project. A “header” supplies the loops in the zone for the in-floor heating. In the original plan the pipes were moved and this was related to the placement of an entertainment unit. He said that Ray Cox told him that they would have to be moved. Mr. MacFarland could not remember that there were any changes that Ray Cox did not consult him on. The Defendants are presently having problems balancing the heat. There were changes to the walls as well. The original plumbing design was done by Don Boutilier, his design was not complied with. Ray Cox was the one who told him that the headers could not go where they were originally designed to be placed. His guys and Ray Cox moved them. The biggest

problem with the heat is between the master bathroom and bedroom, there are warm spots and cold spots in the hallway. The problems are because of the changes did not comply with the original plumbing plan. Mr. MacFarland states he has had disagreements with Ray on several jobs including this one, although he does not recall exactly what the disagreements were. He states that the only way to fix the plumbing/heating issues would be to tear up the whole concrete floor. The original cost of the plumbing was $26,000.00 and to fix it would probably be over $100,000.00 including tearing up and replacing concrete based on the $597.00 per square yard.

[28] On cross-examination Mr. MacFarland stated that he had 16 years experience in plumbing and six years with his own business. Regarding moving the headers, the proper thing would have been to go back to the designer. When Mr. MacFarland was asked by Mr. Cox whether at any point in time did he feel the system would not work he responded, no, he thought it would and then said "I guess I was wrong". He agrees that he is to meet the industry standards. He acknowledged that he could have said that he was not going to do it in the revised design if he thought it was not going to work. He recalls that there were lots of taps and tubs which were picked out by the Defendants and that they paid the bill. He said that he was not pointing fingers at anyone. He acknowledged that if he thought the changes would not work he should have stopped the project. In response to a question from the court, Mr. MacFarland stated he had done 50 odd jobs involving in-floor heating. He also stated that the letter which was entered as Exhibit D13 was actually drafted by Deborah Kesperson and he signed it. He stated that Ray Cox was there when the changes were made and that he was directing the work.

[29] Deborah Kesperson gave evidence for the Defendants. She stated that in February 2004 she arranged for Ray Cox to clear the lot. At that stage they had already had discussions with building the house. He had a crew of four or five and the time frame was summer 2004 for the job to be done. He represented himself as R.C. Construction.

[30] The understanding was that he would handle the deductions for his work crew and a lump sum payment would be made every two weeks. She stated that she was not sure what the arrangements were with respect to the amount of the payment.

[31] She testified that a payment of $2,500.00 was made on April 1st, $3,500.00 on April 13th, $3,200.00 on May 13th and $2,300.00 on May 3rd. She stated that all these were made to Lynn Grady, common law wife of Ray Cox. She stated in the response to the question of what did she hire Ray Cox to do - "to build our house". He would oversee it, he would do what was necessary.

[32] Because of his cash flow the Defendants paid the subcontractors directly. Ms. Kasperson stated that Ray Cox hired nearly all of the trades but Ray Cox was supposed to obtain more than one quote but the Defendants were not consulted. Ray Cox went ahead without the Defendants' approval. At a point the Defendants came from British Columbia because they were starting to get concerned.

[33] There was no written contract. When they asked for quotes she stated that they were told a written contract would be provided but it was not.

[34] They paid for the plans and they understood that they had all of the extra plans. They did not give the plans to Ray Cox for him to keep. Ray Cox Construction did apply for the building permits from HRM. Ray Cox went to Kent. Ray Cox ordered all the supplies.

[35] Over $600,000.00 has been paid on the house so far. Some of that is redundant.

[36] The Defendants were served by Revenue Canada on or about June 1, 2004. Ms. Kasperson does not think that they were contacted before that from Revenue Canada.

[37] When they were served they discussed whether it was necessary to hire a new builder. They were concerned that they would be remitting every week. They came to an agreement to pay cash for the casual labour. Ms. Kasperson said that Ray Cox gave her a figure that would be owed at the end of the job and on the basis of that she told Revenue Canada $10,000.00 -

$15,000.00. She told Revenue Canada that there would be money coming but then she told them there were deficiencies. In February 2005 she wrote Revenue Canada telling them there would not be anything further paid.

[38] Recently they were served again by Revenue Canada. She stated that they have held the money that they would have been paying. $15,000.00 was the figure. It was not broken down in any manner.

[39] There was no hourly rate. In the beginning it was $2,500.00 - $3,500.00 every two weeks and as to how those lump sum payments were calculated that was the figure that she settled on with Ray Cox originally to pay for him and his staff (with the exception of the trades).

[40] To the question of whether there ever was an hourly rate she stated that only for the employees, not Ray Cox, after Revenue Canada made its demand. At a point she requested that Ray Cox provide time sheets so that she would have a receipt.

[41] They slept on the site for awhile to make sure that the workers did show up. Ray Cox and his crew were on site until the end of September or early October 2004. Most of the house was completed when Ray Cox left. One half of the back deck was done. There is still work to be done on the house.

[42] Ms. Kasperson testified to a number of difficulties and deficiencies with the work. I do not intend to review those in detail because at the end of this hearing counsel for the Defendant indicated that they were withdrawing and amending the counterclaim so that it only related to heating and plumbing issues. Based on the Defendants' motion, those matters are no longer part of this present proceeding and I will not comment on that evidence.

Findings

[43] In closing comments, Mr. Cox said that he did not design the floor system, he only installed it. Counsel for the Defendants submit that Ray Cox had an obligation to perform the job properly as he was the "builder". She asserts that he had the responsibility to ensure that

everything was done according to code and that as builder he had overall responsibility for all facets of the building. This would, necessarily including the heating and plumbing aspects.

[44] I am not convinced that on the facts of this case Ray Cox Construction is the overall builder. Much of the evidence in fact militates against such a finding. For example, there was no written contract in this whereby Ray Cox Construction undertook to build a home according to certain specifications. The evidence in fact indicated that the plans were obtained by the owners and a number of copies produced. All of the trades received copies of the plans. Ray Cox Construction did not enter into contracts with any of the trades. Rather, the overall thrust of the evidence is that Ray Cox Construction acted as agent for the owners in securing trades.

[45] The evidence makes it clear that right from the start the agreement was that the owners would pay the trades directly. According to Ms. Kasperson, there was to be more than one quote on each of the trades. While it appears that that did not always happen, that does not change the fact that the contractual relationship was intended to be between her and her husband on the one hand and the trades on the other.

[46] If Ray Cox is the builder, one would expect to see either a fixed place contract or possibly a cost plus contract. The evidence disclosed no such contractual arrangement. The evidence here was, was that an amount was paid every several weeks for Ray Cox and his crew and then after the Revenue Canada third party demand was filed, Ray Cox's crew were paid directly by the Defendants.

[47] It is not clear from Ms. Kasperson's evidence of what the arrangement was between her and Ray Cox after the service of the demand. She denies that there was any agreement for an hourly rate to be paid to Ray Cox although she acknowledges that that was the arrangement *vis-a-vis* his workers. She testified that Ray gave her a figure that they would owe at the end of the job and based on that she told Revenue the figure was $10,000.00 to $15,000.00. It is noteworthy that that is not a dissimilar figure from what Mr. Cox calculates at the rate of $15.00 per hour according to the hours he claims to have worked. I also note that there is no

objection in the evidence of the Defendants or their submission to the number of claimed hours.

[48] It is an untenable proposition if that is what the defence alleges, that there was no agreement between Ray Cox and the Defendants for payment to him. It is also, in my view, an untenable proposition that he was only agreeing to a bonus as alleged in the pleadings. On the other hand, it is a reasonable position that Ray Cox advances that he was to be paid on the basis of an hourly rate. I note in this regard that the hourly rate he claims is not very different from that which one of his workers, Steve Harpell, was being paid which was $14.00. I also repeat the above observation that the figure he is claiming herein of $13,438.25 is within the range that Ms. Kasperson suggests herself that he told her and which she passed on to Revenue Canada.

[49] Based on this, I accept the claim amount as set out in Mr. Cox's calculations. That is the 837 hours times $15.00 per hour times 15% HST for a total of $14,438.25.

[50] That is not the end of the story because there is the counterclaim in respect of the heating and plumbing issue, primarily the problem with the in-floor heating system. I have already eluded above to my view that Ray Cox Construction did not hold the position of general contractor or builder on this project. However, that does not mean that he is wholly without liability for the work that was done under his supervision or with his input. I accept the evidence that the design for the in-floor heating was not followed. And I also accept Mr. MacFarland's evidence that the change in the design was done at the direction of Mr. Cox. Neither Mr. MacFarland nor Mr. Cox checked with the designer, Mr. Boutilier, to see whether the change in the design would affect the functionality of the system. In retrospect, it appears that they ought to have.

[51] Mr. MacFarland testified that it was the changes that has lead to the problems. In the absence of evidence to the contrary, I accept that evidence.

[52] I am also swayed by the fact that Mr. MacFarland clearly testified that he did not think the changes would affect the operation of the system. In this regard I am also mindful of the fact that Mr. MacFarland has the greater experience in this area and testified that he has worked on perhaps 50 in-floor heating jobs. However, he does not design the system, he is the installer. It seems to me that in this case where the installer for all practical purposes was Mr. MacFarland and Mr. Cox, and the installers, did not follow the designs, they both hold responsibility for problems that result in not following the design.

[53] The result of the foregoing is that Mr. Cox does have responsibility to the owners in respect of the heating system. The evidence led by counsel for the Defendants through Mr. MacFarland was that it would cost over $10,000.00 to fix the part of the system relating to the flooring and that to tear up and replace the concrete floor would be over $100,000.00. With respect, I consider these figures to be grossly disproportionate to the actual damage.

[54] Mr. MacFarland himself stated in his evidence that the rate per square yard for the calculation of removal of concrete would only be applied for spot work.

[55] As stated, I find the calculation of the damages to be significantly disproportionate. I am aware of no authority which compels a decision maker in such circumstances to accept without question exaggerated figures.

[56] In fact, on this point I find the evidence to be so disproportionate that I find it to be effectively of no use and that leaves me with no evidence on the issue. In such cases, the court still has a duty to do justice between the parties and to apply some damage figure. In this regard I refer to the comments of Justice Hood in the case of ***Hardman et al v. Alexander et al*** (2003), 215 N.S.R. (2d) 280 (para 27):

> *[27] Where there is difficulty in determining damages, the Supreme Court of Canada has given guidance in **Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.**, [1976] 1 S.C.R. 267. In that decision, Spence, J. said at p. 279-80:*

The difficulty in fixing an amount of damages was dealt with in the well known English case of ***Chaplin v. Hicks****, which had been adopted in the appellate Decision of the Supreme Court of Ontario in* ***Wood v. Grand Valley Railway Company****, where at pp. 49-50, Meredith C.J.O. said:*

> *There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in* ***Chaplin v. Hicks****, [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at £100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that 'where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case': per Fletcher Moulton, L.J. at p. 795.*

When ***Wood v. Grand Valley Railway Company****, supra, reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 51 S.C.R. 283, where the learned justice said at p. 289:*

> *It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot 'relieve the wrongdoer of the necessity of paying damages for his breach of contract' and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do 'the best it can' and its*

> *conclusion will not be set aside if the **amount of the verdict is a matter of guess work**. (emphasis in original)*

[57] In all the circumstances here, I will provide for an allowance of $7,000.00 to be deducted against the outstanding amount. Accordingly, an order will issue for $7,438.25.

[58] As both parties have had success in this matter, I am not allowing for costs for either party.

[59] There is also the issue of the possession of the plans. I do not think the property in the plans was intended to or did transfer to Ray Cox. Therefore I will order that he deliver possession of the plans to the Defendants.

Order

[60] IT IS HEREBY ORDERED that the Defendants pay to the Claimant the sum of $7,438.25.

[61] IT IS FURTHER ORDERED that the Claimant, Ray Cox, deliver possession of any and all plans and copies thereof relating to the property at 26 Mannette Court, Porter's Lake, Nova Scotia, to the Defendants.

DATED at Halifax, Nova Scotia, this 22nd day of January, 2007

Michael J. O'Hara
Adjudicator

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