

DECISION AND ORDER

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: MacInnis v. Arsenault, 2004 NSSM 16

BETWEEN:

Name: JAMES MacINNIS

- CLAIMANT

Name: WILLIAM ARSENAULT

- DEFENDANT

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 7, 2007.

DATE OF HEARING: April 29 and May 13, 2004

DECISION

Appearances: G. Michael Owen on behalf of the Claimant
Paul B. Miller on behalf of the Defendant

[1] James MacInnis contracted with the Defendant, William Arsenault, for work at his home in Sackville. There are a number of secondary claims, but the source of the main dispute arises out of the choice of the system for leading water away from Mr. MacInnis' home. The home site is inherently subject to significant water flows and has a special need for good drainage. I am satisfied that the system of two drains installed by Mr. Arsenault, after consultation with an engineer, did not work. The drains filled on a heavy rain and water backed up into Mr. MacInnis's basement. Mr. MacInnis retained Advance Landscaping and Excavations who, at a cost of \$1,500.00, installed a drain leading to a municipal "catch basin". Two and a half years later this system is working well and Mr. MacInnis has had no more trouble. Mr. MacInnis claims the amount he paid Advance.

- [2] This matter proceeded over two evenings. During the first, the engineer, Mr. Scott Simms, testified that he had been told by Mr. Arsenault that Mr. Arsenault could not obtain a permit to access the main municipal sewer system. Mr. Simms said that accessing the sewer system would have been the preferred option. Instead, he and Mr. Arsenault decided on a system of two dry wells to serve as drains away from this wet site.
- [3] A collateral dispute had arisen during the first evening over whether Advance needed a permit to access the storm sewer. Mr. Arsenault called Mr. Charles Lloyd, an engineer with the Municipality. Mr. Lloyd made it clear that the law required a permit, but I attach no particular importance to that. What I did find more interesting was the apparent openness of the Municipality to work with contractors, owners and engineers in finding solutions to problems. Mr. Lloyd impressed me as being an open and constructive civil servant. He said that while a permit was needed if it was proposed to access a storm sewer main or “man hole” in it, the permit could be issued on application. He said special cases require special consideration. He said if access to the storm sewer main is not possible, and there are no other alternatives, the Municipality will entertain an application to access a catch basin. He said it may take a few days, and no doubt an inspection would be required, but there was no prohibition against giving a permit to access a catch basin if circumstances required it.
- [4] Mr. Blair Walker, an experienced contractor, but with more local knowledge than Mr. Arsenault or Mr. Simms, testified he would not have tried dry wells. He talked about “Sackville clay” and said dry wells would not work in that soil type. He and Mr. Simms differ somewhat in their analysis of the soils, but in any event Mr. Walker’s solution of going straight to the catch basin worked and Mr. Simms’ and Mr. Arsenault’s did not.
- [5] The catch basin is located at the corner of Mr. MacInnis’ property. Mr. Walker simply ran a new trench and pipe through Mr. MacInnis’ land from Mr. Arsenault’s own drainage to the catch basin.
- [6] Mr. Arsenault testified, and I accept, that the storm sewer in the street was not accessible. He described it as a “shallow” sewer, and said that a drain from the MacInnis property would have been lower than the sewer. As he said, water does not flow uphill.
- [7] I am satisfied that this is a special case where access to the catch basin would probably have been permitted. There was much evidence about how much water comes on to Mr. MacInnis’ land. It flowed even in July. The

water has to go somewhere. Access to the storm sewer was not possible. Using the catch basin, as in fact was done by Advance, seems to have been the solution. Mr. MacInnis testified that the work has been tolerated. Municipal employees have worked on the site since, without objection to it.

- [8] I am not satisfied that Mr. Arsenault canvassed the catch basin alternative with Mr. Simms. I find that Mr. Arsenault told Mr. Simms that access could not be had to the municipal sewers. Mr. Simms himself said that accessing the municipal system was the first option, but he understood from Mr. Arsenault that this was not possible.
- [9] Mr. Arsenault struck me generally as a careful, experienced and competent contractor. I do, however, have trouble with how he handled the drainage options. He says that he told Mr. MacInnis about the option of approaching the Municipality for a permit, and Mr. MacInnis rejected it. Mr. MacInnis says he did not. I prefer Mr. MacInnis' evidence. I am satisfied, at the least, that he did not bring home to Mr. MacInnis the idea of making an application to the Municipality.
- [10] Mr. Arsenault was the contractor. While the home owner may nominally be the applicant for a permit, the contractor would be responsible for putting everything together advocating the application. Mr. Arsenault, even if I accept his evidence on the point, seemed to want to delegate the responsibility to Mr. MacInnis. Mr. MacInnis did not strike me as a man who would have much, if any, idea of such things. Secondly, and more significantly, I find that Mr. Arsenault did not bring home the idea to Mr. Simms. It only makes sense to me that Mr. Simms and Mr. MacInnis were told the same thing. He did not explain the idea to Mr. Simms. He did not explain the idea to Mr. MacInnis.
- [11] It may have been that Mr. Arsenault simply talked to the wrong people at the Municipality. I do not say that everybody at the Municipality would have been as open as Mr. Lloyd or indeed as open as the people that Mr. Walker says he talked to. But that is not really Mr. Arsenault's position. He says he offered Mr. MacInnis the option. I am satisfied, more on the basis of what Mr. Simms says, that he did not.
- [12] Mr. Arsenault says he also suggested to Mr. MacInnis that Mr. MacInnis install a semi-submersible pump in his basement as a back-up. He says that Mr. MacInnis rejected that option. The pump would have cost less than \$100.00 and could easily have been installed. Again, I prefer Mr. MacInnis's evidence. It does not make sense to me that a man would reject the advice of a contractor to spend \$100.00 to prevent water in his

basement when he is already spending thousands of dollars for the purpose.

- [13] The question becomes then whether Mr. Arsenault failed in his duty as a reasonably competent contractor, in tort and contract, to properly advise his client of the options and to pursue the best one. On balance, and after much reflection, I am satisfied that he did fail in his duty to Mr. MacInnis. I do not say at all that Mr. Arsenault guaranteed his solution or that he is expected to have warranted the basement to be dry. What I do say is that Mr. Arsenault failed because he did not understand that he could obtain a permit to attach to the catch basin and did not address that best alternative with his engineer or his client.
- [14] I was impressed, in other respects, with Mr. Arsenault and his work. I am satisfied he competently fulfilled his other contractual obligations. I dismiss the other claims including specifically the claim for the wet-vac and for landscaping. The wet-vac was old and has not been replaced even after a number of years. No landscaping has been done. I conclude it is not a pressing problem. I doubt the money would be spent on landscaping even if it was recovered. Landscaping is a responsibility of Mr. MacInnis under the contract.

ORDER

- [15] Mr. MacInnis is entitled to his filing fee. I order William Arsenault to pay to James MacInnis the sum of \$1,575.00.

Dated at Halifax, Nova Scotia
this 18th day of May, 2004.

J. WALTER THOMPSON, Q.C.
ADJUDICATOR

Original	Court File
Copy	Claimants(s)
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