

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Tilley v. Forbes & Sons Renovations, 2004 NSSM 6

Claim No.: SCCH 224147

BETWEEN:

Name: **Chris/Mary Jayne Tilley** Claimants

- and -

Name: **Forbes & Sons Renovations/Ken Forbes** Defendants

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on October 3, 2006. This decision replaces the previously distributed decision

Counsel:

Claimant: Self Represented

Defendant: Self Represented

D E C I S I O N

[1] The Claimants are asserting a claim in respect of a roof that was replaced to their home at 69 Arlington Avenue, Halifax, by the Defendant in December 2003. Apparently the roof was substantially damaged by Hurricane Juan and this replacement job was done through the Claimants' insurance policy.

[2] In the Notice of Claim, the Claimants state:

“Defective workmanship/no warranty... roof was replaced in December 2003, began to leak within two months, shingles blown off. Mr. Forbes was talked to three times and did not show up.”

[3] The matter was initially heard on July 22, 2004, at which time the Claimants testified that leaking occurred within a couple of months of the job being done, at a skylight or light

fixture in the attic area of the home. They testified that there were shingles on the ground. They said that they called the Defendant six or seven times but he would not return their calls.

[4] They further testified that other roofers they contacted said that they needed a new roof and that it could not simply be repaired.

[5] The Claimants entered as Exhibit C1 a report from Harvey Freeman of Fowler Bauld & Mitchell Architects. Mr. Freeman's report of April 26, 2004, outlines some ten defects of which further comment will be made later in these reasons.

[6] At the end of Mr. Freeman's two page report he states:

"In our opinion the defects in this shingle job are of such a nature that they can not be successfully corrected unless the whole roof is redone."

[7] Mr. Freeman did not attend at the hearing and did not otherwise give *viva voce* evidence.

[8] Mr. Forbes, the Defendant, gave evidence and stated that he had yet to be paid in full for the job. He did not accept the statements in the expert's report and certainly did not agree that the entire roof had to be replaced.

[9] Due to the significance of the "expert's" report, I adjourned the matter to allow Mr. Forbes an opportunity, if he wished, to obtain his own expert's report. I rescheduled the hearing to August 30, 2004, at which time both parties did re-attend.

[10] At the hearing on August 30th the Claimants gave further evidence. They stated that the invoice was marked "paid" and they considered that there was nothing outstanding on the bill. They testified that they had contacted other roofers who apparently indicated that they could not do anything but replace the roof. One of these roofers had recommended Mr.

Harvey Freeman. Mr. Freeman's report outlines various defects in the workmanship. Particularly, the Claimants pointed out, that no tar paper was used in one area and that Mr. Freeman's opinion was that the whole job needed to be replaced.

- [11] Quotes had apparently been sought from another roofer by the name of "MacDonald" who had quoted \$4,500.00 to do the roofing job.
- [12] Mr. Forbes gave further evidence. He had not obtained his own expert to do a report. He, in effect, was going to give his own "opinion evidence". Mr. Forbes entered as exhibits materials from the "Canadian Asphalt Shingle Manufacturers's Association" as well as a contracting textbook which contained excerpts from the sections in the text on roof coverings and shingling methodology and techniques.
- [13] The report of Harvey Freeman dated April 26, 2004, contains six areas of concern. Mr. Forbes dealt with each of these in his evidence and I comment as follows.

Nailing Issues

- [14] This covers items 1, 2 and 3 in the April 26th report as well as photos 1 and 9, photo 4 and photo 3 in the report. These comments in Mr. Freeman's report related to the placement of shingle nails in relation to the self-seal glue line, some nails being over driven, and some nails being under driven.
- [15] Mr. Forbes indicated that it is recommended that the nailing be done in the tar line. Mr. Freeman indicates that it should be below the tar line. I note that in the document entitled "Shingle Fastener Placement" issued by IKO and attached to Mr. Freeman's report it states that where there is not sufficient to nail above the cutout and below the sealant, IKO "recommends that the fastener be nailed in the sealant spot line, in a location as close to the cut out as possible, and in between sealer spots wherever practical".

[16] This suggests to me that nailing into the sealer (tar line) is not significantly contrary to acceptable practice. There is evidence of two or perhaps three nails being driven above the sealer line and I refer to photograph 1 and possibly 2 and 3.

[17] There is no other evidence of nailing being done in the “wrong” positioning. Accordingly, I am unable to conclude that this is anything more than a very minor issue.

Flashing

[18] Mr. Freeman’s report suggests in items 4 and 5 that the flashing is improperly installed as it is showing above the shingles. Mr. Forbes counters with his opinion that some contractors put the flashing under and some don’t. It is a practice issue in his view. He does confirm that the flashing, by virtue of items 6 and 7 in the contract proposal of November 21 was to be reused. He also refers to the textbook material that was entered as Exhibit D9 which shows flashing above the shingles.

[19] Based on this evidence I can only conclude that either method is acceptable.

Alignment of Shingles

[20] This relates to items 6 and 7 in Mr. Freeman’s report and evidence is contained in photographs 8 and 11 attached to the report. Mr. Forbes freely acknowledges the issue regarding the alignment and indicates that an allowance of \$350.00 was given in this regard. I note that this is an aesthetic issue and not a functional issue.

Roofing Felt

[21] Photograph 10 clearly indicates that roofing felt is not present in the particular area shown therein.

[22] Mr. Forbes acknowledged what is obvious from photo 10 but insists that roofing felt was used. He tendered on September 1st a copy of the invoice from Kent dated November 22, 2003, which clearly shows three rolls of felt/plain #15 C6. This was part of a larger order to “Forbes & Sons Construction, 69 Arlington Avenue”, from which I infer that while the invoice was issued to Forbes & Sons Construction it was delivered to 69 Arlington Avenue, the address of the Claimants herein.

[23] I accept Mr. Forbes’ evidence overall but that does leave unexplained the absence of the felt in that one area as shown in photograph 10. As noted above, Mr. Freeman did not give evidence and thus there was no ability to cross-examine him and, specifically on this issue, to ask him whether he examined other areas to see whether felt was present.

[24] Mr. Forbes indicates that anyone could rip off the felt, although I would find that difficult to accept.

[25] I understood from the evidence overall that it is a fairly standard practice to apply the roofing felt. It would seem difficult to understand why a contractor would deliberately or even carelessly, fail to install the roofing felt. Clearly, that material was ordered and delivered to the job site. It is not a particularly expensive material and thus, as far as the motivation to a contractor to not install it, that does not supply the answer.

[26] In light of these considerations, I am not prepared to conclude that the contractor did not apply felt to the entire roof.

Ice and Water Shield

[27] The Freeman report indicates that ice and water shield was visible at eaves but not on gable ends. Mr. Forbes response was that he has never heard of installing ice and shield (membranes) on gable ends. I took it from this comment that he considered this to be an

absolutely futile proposition. Again, not having Mr. Freeman present, meant that he was not able to be questioned on this statement.

Tabbing of Shingles

[28] Mr. Harvey indicates in his report that because the roof was installed in December, the contractor should have tabbed each shingle with cement due to the self sealing feature not being activated by the heat that would normally be the case in the warmer seasons. To this Mr. Forbes said that he raised this issue with the Claimants and that it would have been an extra. Mr. Forbes indicated that the Claimants declined this.

[29] I would note that there is no mention of this in the contract itself.

[30] In addition to the report of Mr. Freeman, the Claimants also entered some photographs which in Exhibit C3 show where one or two shingles have come off. Exhibit C4 appears to show a shingle on the ground in the backyard area.

Findings and Disposition

[31] It was my distinct impression from the evidence and the comments made on both sides, that sometime during December 2003 the relationship between these parties became tense and even emotional. For one reason or another, which was not entirely clear to me, final payment was withheld and as a result the contractor did not return to remedy the problems that occurred.

[32] It is a fair conclusion that had the relationship ended on a positive note in December 2003, any problems that the homeowners experienced, i.e. leaks or blown off shingles, would have been remedied by the contractor in a reasonable manner. That is to say the contractor would likely have been responsive to those inquiries. The Defendant feels that \$768.00 is still outstanding. The Claimants deny this and consider that the contractor has been paid in full.

In order to make a determination on that would require making a determination of whether there was some type of compromise agreed to in December of 2003. In light of the overall conclusion that I have come to, I do not feel it necessary to deal with that particular issue.

- [33] The Claimants have indicated that they are experiencing leaks. There was no evidence to attribute the leaks to the work performed by the Defendants. I also observe, and this is somewhat significant, there is nothing in the Harvey Freeman report whatsoever which refers to leaks. While the normal inference might be that leaks are attributable to the work done (or not done) by the roofing job, I have no evidence before me to indicate that.
- [34] The Harvey Freeman report does establish that the job was not done totally in accordance with industry standards. It would appear that there may be some issue with respect to what the industry standards are.
- [35] I have dealt with the Harvey Freeman report in my comments above. Mr. Freeman has significant credentials as a roofing engineer. However, he did not attend and, as has already been stated, was not able to be questioned on his report.
- [36] His report comes to a significant conclusion, i.e. that the whole roof should be redone. While an expert's report is normally given a fair degree of weight by a Court, I am not prepared to accept this finding of Mr. Freeman without some further evidence or questioning of Mr. Freeman. Certainly the *Small Claims Act* and in particular Section 28 authorizes an adjudicator to accept evidence not given under oath or in open court. However, that does not mean that I am obliged to accept the recommendation or suggestion contained in an expert's report to replace an entire roofing job.
- [37] In my view the most significant concern is the lack of tar paper in the spot shown in photograph 10. (I would note at this point that the area in Exhibit C3 where a shingle has blown off also appears to have no tar paper but I would conclude in that case and do find as a fact that the tar paper under that would have been blown off once the shingle came off.)

[38] I find the issue of the missing tar paper as shown in photograph 10 to be the most concerning. If there was no tar paper over the entire roof area it would seem to me that the entire job would have to be redone as that absence would affect the integrity of the job. It was a contracted-for-item and ought to have been supplied. The question then is whether the evidence to indicate that tar paper was not used over the entire roof.

[39] Mr. Forbes insists in strong terms that tar paper was used. I consider Mr. Forbes to be a credible witness and I believe him on this point. He candidly admits that he has no explanation why the tar paper is not in photograph 10.

[40] In the caption to photograph 10 the author, Mr. Freeman, states:

“The quotation included ‘tar’ paper over the entire roof. This location on the back of the house, above the rear deck has no paper.”

[41] The photograph shows one shingle which has been pried open and plainly shows bare wood underneath in an area of approximately 3 - 4 inches wide at one end to approximately an inch wide at the other (it is to be emphasized that these are estimates only based on the photograph).

[42] In the text of Mr. Freeman’s report he states:

“The contract indicates that #15 roofing felt was to be installed as an underlayment under all the shingles. Photo 10 shows where this did not occur.”

[43] I think it is notable that Mr. Freeman carefully chooses his wording to say that the photo shows where this did not occur and at the photo caption that “this location... has no paper” [emphasis added].

- [44] If Mr. Freeman had attended, the question that would have begged for an answer would be whether he looked under other areas in the same way in which he looked under the area which is shown in the photograph. If he did, then the question would be whether or not there was tar paper in those other areas. If I knew he had looked under other areas, the fact that he does not refer to it would make me conclude that there was tar paper in the other areas that were inspected - otherwise, I am sure he would have commented on it in the report.
- [45] If he did not look under any other areas, then the obvious question would be, why not? Unfortunately, these questions go unanswered. However, my job is to make a decision based on the evidence presented to me. The evidence presented to me indicates that one small location did not have tar paper. The Claimants have the burden of proof to show on a balance of probabilities that evidence that supports their case. I do not accept that based on this one area that the entire roof was not tar papered. I come to that conclusion in light of Mr. Forbes' evidence given at the hearing under oath, the submission of the receipt showing the purchase of three rolls of tar paper, and the unanswered questions referred to above which, in my opinion, ought to have been canvassed in Mr. Freeman's report.
- [46] I have referred to the other specific complaints or items referred to Mr. Freeman in the report. I do not find that they are sufficiently significant that the whole roofing job should be redone.
- [47] However, I do find that there were deficiencies in the provision of the labour and materials in this job. I find that there should be some allowance in this regard.
- [47] Bearing in mind the dispute with respect to the \$760.00, I order that the Defendants pay to the Claimants the sum of \$500.00. In addition, I would award the costs which include the cost of the report from Mr. Freeman of \$350.00 and the filing fee of \$80.00.

Disposition

I order that the Defendant pay to the Claimants:

Debt:	\$500.00
Costs:	<u>430.00</u>
Total:	\$930.00

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on November , 2004.

Michael J. O'Hara
Adjudicator

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