IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Farran v. Creemer*, 2017 NSSM 30

Claim No: SCK 453372
SCCH 436787

BETWEEN:

Leonardo Farran

Claimant

v.

Sherrie Creemer, Raymond Wilson, and Resolution Structure Contracting

Defendants

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

Leonardo Farran appeared on his own behalf;

Raymond Wilson and Sherrie Creemer appeared on their own behalf and the Defendant, Resolution Structure Contracting;

DECISION

Leonardo Farran and his fiancée purchased their home at […] Street in Wolfville, NS on February 25, 2016. The couple decided to reshingle the roof and sought an estimate from Raymond Wilson of Resolution Structure Contracting, which he provided on June 7, 2016. The estimate to remove the old shingles and reshingle the roof was estimated at $10,880 + HST or $12,512.00. Subsequently, it was decided that Mr. Farran wanted the rain gutters removed and the fascia removed and repainted. The revised quote was $16,989 inclusive of HST. The Defendants were hired. The Claimant paid the contractor at various stages. Before long, it was clear the estimate was going to be exceeded as Mr. Farran had paid approximately $18,000 in labour and materials and the work is not near complete. Mr. Wilson alleges that it was almost complete but they had not been given the opportunity to clean it up. The job was estimated to take 5-6 days. After 16 days on the job, Mr. Farran asked the Defendants to leave, essentially

firing them from that job. He is suing the Defendants for $12,512, on the grounds that the shingling work is of no value and has to be removed.

As noted later in these reasons, the evidence in this case consists only of the parties themselves. The evidence is sparse. The Claimant carries the burden of proof. However, his evidence for the most part, is based on his own personal beliefs. For their parts, the Defendants' evidence has its challenges as well. As a result, I have found for the Claimant but to a lesser extent than he is seeking.

Issue

Was there a breach of the contract between the Claimant and Defendant, and if so, what is the extent of the damages?

The Evidence

Leonardo Farran testified that he was put in contact with the Defendant through his fiancée's stepfather, Brian MacNeill. He met with Raymond Wilson to discuss the work that he wanted done. He had a set of sketches prepared showing an aerial view of the roof of the house. The house is an older model with dormers and several pitches on top of it. As a result, it is a complex roof design. The sketches were prepared by Eagleview Technologies and have been provided in evidence by Mr. Farran. Mr. Wilson met with Colin Burgoyne, the Claimant's future brother in law, who was assisting the Claimant in organizing the crew for the roof replacement. Mr. Wilson or Ms. Creemer provided the initial quote of $12,512. Mr. Wilson attended the home and met with Mr. McNeill. As a result of the discussions, the Defendants agreed to do additional work which is summarized in a detailed estimate and description. The revised quote is $16,989.

The sketches, and two quotes form part of a larger exhibit book which is marked as Exhibit 1. Any reference to tabs are in reference to this exhibit book.

The quote specified that Timberline shingles would be used. To that end, Mr. Farran included in his exhibit book installation instructions for Timberline shingles. He used these instructions as a reference point for the basis of his claim. The instructions deal only with installation. Presumably, they also come with warranty documents which are not included. They typically deal with limitations of liability and installation. Tab 5 shows that one of the dormers has been replaced and reshingled by Mr. MacNeill, prior to hiring the Defendants. He estimates only a third of the material was used with a total of $1346.50, with the remainder he believes taken by the contractor.

Mr. Farran and/or Mr. MacNeill went on the roof to look at the shingles. Mr. Farran has submitted photographs into evidence showing holes in the shingles with putty in and in other cases where they are exposed. This appears to be in the area of the event at the top of the house. Certain of the shingles are lined up at not a fully straight line while others show exposed nails.

Mr. Farran testified that he went on the roof and measured the width of rows of shingles. Specifically he noted the manufacturer's instructions provided for a layering of 6 inches at the first stage, 11" at the second and 17" at the third stage beginning at the left side of the roof. The photographs clearly show that this amount has been exceeded as the measurements show widths of 36", 26", 22" and 18". In several places, the shingles are uneven. In others they do not appear to join. In his opinion, rain will make its way in between the shingles in the valleys causing it to leak. He speculates that Mr. Wilson and his crew used smaller pieces of shingling presumably to save costs with the results being extra joints. He surmised that the roofing shingles would not last for the winter, although he did not provide any corroborating evidence to support that opinion. I asked Mr. Farran if there had been any leaks in the three months since the roof was installed. He indicated there had not.

The manufacturer's instructions recommend covering the metal flashing around the chimney with a cut shingle and affixing it with asphaltic plastic cement. The photographs show that a shingle was nailed to the flashing and the hole covered in cement.

Tab 9 provides instructions on how to shingle valleys. Mr. Farran testified that there was no GAF leak barrier and the nails were too close together. It also recommends the shingles not be bent. He showed photographs where there is considerable overlap and grooves along the valley. It is not a smooth run.

Tab 10 shows the fascia boards. He testified that the repairs to the fascia were supposed to be attempted after the installation of the shingles. The fascia was not replaced but rather the rotten wood was repaired and painted. The photographs show old wood rather than new that had been lined up and not fitting properly

Tab 11 shows damage to shingles in the form of a hole in them. He alleges that they were caused by the Defendant or his employees stepping on them or using improper tools. There is no evidence to corroborate his belief in the cause of the damage. Nevertheless, it is clear they are damaged. The photographs also show where the corners of some shingles are bent and curled. Tab 12 shows paint dripped on the deck and spilled on a significant number of shingles.

Tab 13 deals with an allegation that cleaning was not performed after a portion of the work was finished. Specifically, the cleaning was to be done on July 1 which was delayed to July 4. Photographs show some nails in the flower bed and some of the plants are not doing well. It is not clear this was the result of any actions of the Defendants. The gutter does have debris in it from the shingles when the roofing was being done.

Tab 14 contains an e-mail between Mr. Burgoyne, Mr. Farran and Mr. Wilson (or possibly Ms. Creemer under his e-mail) to discuss some of the damage that was incurred. There is also a packing slip from Kent which Mr. Farran claims is a forgery. It is clear it was not the original. I

am not satisfied it is a forgery. Nevertheless, nothing turns on that point. Mr. Farran alleges a window was broken during the process and wants to have it replaced.

Tab 17 is a letter from Gary Schofield, who did not give evidence at this proceeding. It states in part that he attended […] Street on July 7, 2016. He observed nails exposed through the ridge cap, flashing done improperly around the dormers (no details of the improper work are provided) small pieces used as patchwork during the shingling process, courses of shingles were not properly stepped, the fascia board does not appear to have been replaced and paint was filled on the two lower roofs.

The final tab shows a breakdown and receipts of all money spent by the Claimant on the roof. He included invoices for $324.35 to commence this claim and hire a process server to serve the documents on the Defendants. These last two items are items of costs rather than damages. In total, Mr. Farran paid $15,600 directly to Mr. Wilson and a further $1138.59 in materials including wood and plywood. They are also seeking $112.70 for the broken window.

Sherrie Lynn Creemer is the spouse of Raymond Wilson. She testified that she is registered as the sole proprietor of the business. She describes Mr. Wilson as an employee and manager of the business. He does all of the hiring and work for the company. She did not see the roof itself. There were no inspectors or others on site.

Raymond Wilson testified on behalf of the Defendants. His evidence was disjointed and it was difficult to keep him focused on his evidence. His evidence consisted mostly of direct responses to the Claimant's allegations.

He testified that he met with Brian MacNeill to take a look at the house and provide an estimate. He estimated it would take 5 to 6 days to complete the roofing assuming there would be no plywood replacement required. He testified that the fascia was bad in places but he did not get a chance to finish the work and fill the holes. He did not step the shingles around the flashing. He confirmed that IKO shingles were used rather than Timberline. His intent was to finish the fascia and gutter after the roofing was finished. He said the work was done in the hottest part of the summer and he felt pressured to get it finished. It is his evidence that Colin and Brian told him not to tab the roofing but rather to nail it on and cover it with tar. He testified that he performed his shingling from the center and worked his way over, rather than one side to the other. He described the roof as uneven as it was 84 inches on one side of the dormer and 79 inches on the other. He found it difficult to match and thus attempted to start from the middle. He stated that is common practice for certain types of roofs. He testified that he simply walked away from the fascia that it was just nailed to the borders. There was nothing to nail it to. There was no quote given for it. He said the instructions from Brian and Colin were inconsistent. Brian wanted the crown off while Colin did not. Timberline shingles recommend the nails be placed 6 to 8 inches apart while IKO recommends 4 to 6 inches.

Under cross-examination, he testified that the receipts were not forgeries but rather were replacement receipts received from Kent. He used the documents as receipts. He recalls being told not to return again by Mr. Farran. He did not apply cement under the shingles as the plastic was torn of to reveal the tar strip. There was no need for further gluing on the shingles. The reason he changed the type of shingles was he found the IKO more suitable for this job and they were cheaper, namely $23 per bundle.

The Law

In the case of *Lowe v. Shanmaura Developments Inc.*, 2013 NSSM 46, I stated the following:

"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.
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> [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.
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> [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 *Stavely 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.

While my comments and findings in previous cases are not binding, the authorities cited above for those comments certainly are.

Findings

In order to establish a breach of contract, the onus is on the Claimant to adduce evidence to prove on the balance of probabilities that the contract existed and it had been breached. The standard of work being performed in a workmanlike manner is an objective standard based upon local standards in the industry. Furthermore, as I have described later in this decision, if the

Claimant establishes liability, he must prove damages which are sufficient to put the parties in the position as if the contract had been fulfilled. In other words, if the contract was breached, the cost it would take to make it right.

It is curious to me why Mr. Farran chose not to call other contractors or experts to give evidence. The only opinion besides his own, came in the form of a very brief letter (less than one page) from Gary Schofield. It contains mostly vague statements, many without supporting evidence. Mr. Schofield did not give evidence in court. I did not place much weight on this document. Based on Mr. Farran's evidence, his fiancée's step-father and brother appear to have experience and expertise in construction. Indeed, they arranged much of the work. They did not testify either. Mr. Farran was only on site for a few days and he is not trained or experienced in construction fields. His opinion evidence is only partially corroborated by the documents and evidence. Frankly, yet respectfully, as evidence, his opinion has little probative value.

Similarly, it is equally unfortunate that neither Ms. Creemer nor Mr. Wilson sought to retain anyone to speak to the roofing job which they had performed. Once again, I am left to consider the competing opinions and observations of the parties. To do so, I must review the contents of the exhibits. As noted, for the most part, I have found liability where it is clear from the photographs and evidence.

Valleys, Flashing, Seams and Joints (Tab 7, 8, 9) – There have been a number of allegations concerning the proper way to install shingles, particularly around valleys, flashing, seams and joints on the roof. Furthermore the Claimant takes issue with the way the shingles were laid, in the centre, rather than from one side to the other. Some of the process creates larger seams than Mr. Farran considers appropriate. He believes certain rows ought to have been layered differently. As indicated at the outset, there has been no evidence from anyone with expertise in this area as to what would be a proper and appropriate way of shingling that roof. Installation instructions are helpful, but may not be the best source in the circumstances. Mr. Farran cited the provisions of the Timberline manufacturer's instructions. The shingles used were IKO brand. Manufacturer's instructions do not typically deal with exceptions. They also come with warranties that address who should install the shingles and the consequences of installing them differently. Finally, I note that Mr. Farran took exception to the Defendants' use of the tar strip rather than adhesive. The use of the strip is actually discussed in the first page of the instructions ("Wind Resistance/Hand Sealing"). The decision to use the tar strip without additional adhesive is reasonable.

Timeline - the original estimate suggested it would take 5 to 6 days to complete the reshingling portion of the work. Additional work was sought, namely the replacement and repair of the fascia boards as well as the removal of the gutter. I find is a fact that fascia boards were not replaced or repaired. Consequently, there is no reason for the work to have taken this long. The Claimant has not provided evidence as to any losses resulting from the delay. The Claimant is entitled to compensation for that.

Exposed roofing nails – The Claimant has tendered into evidence numerous photographs showing exposed nails through the open portions of the shingles. I am satisfied that work was either not completed or not appropriate.

Torn Shingles - I find certain shingles were torn. I find on the balance of probabilities, this was done by the Defendants and their employees.

Fascia Board Repairs - It was a material term of the revised quote that the fascia boards were to be repaired and replaced. It is clear from the photographs that this was not done. The difference between the two quotes was $16,989 for the roofing and fascia Board repairs. The previous quote was $12,512. There is no evidence that the gutter was not removed or repaired. Consequently I do not make any allowances for that. The difference between the two estimates is $4477.

Spilled and Dripped Paint – It is clear from the photographs in tab 13 that paint was spilled. I find without hesitation that the Defendants or their employees caused the spillage over a portion of the roof and the deck. The end result is an unsightly mess which must be cleaned up. No evidence or quote was provided as to what it might cost to repair or replace the shingles and the deck.

Missing material (Exhibit 5) - There is no evidence other than Mr. Farran's allegation that the materials that they purchased for the dormer were used by the Defendant. I will not award anything for this portion of the claim. This portion of the claim is dismissed.

There have been allegations of forged receipts for materials not supplied. I am not prepared to make a finding based on the lack of evidence to that effect.

Overall, I find the work was not performed in a workmanlike manner. The Claimant has satisfied me that there has been a breach of contract. If it were necessary, I would have found the Defendants received more money than was representative of the work that was done. In other words, I would have found them liable for unjust enrichment as well.

Aside from the breach of contract, I find the Claimant damaged the window. I assume the sum claimed is for a new window pane. There is no evidence of the age of the window but I am not prepared to provide full payment as this would amount to betterment.

While Ms. Creemer describes Mr. Wilson as the manager of the business, I find that at all times, Mr. Wilson was the person doing the contracting. There is no evidence that the Claimant believed Mr. Wilson was an employee of Ms. Creemer's or that he was her agent. From the Claimant's perspective this would appear at all times to have been a partnership, notwithstanding Ms. Creemer's position that the business is her sole proprietorship. Thus, I find both Ms. Creemer and Mr. Wilson jointly and severally liable.

Damages

As stated at the outset, the object of an award of damages for breach of contract is to put the parties in the same position financially as if the contract had been fulfilled. The Claimant has not provided any evidence of what that amount would be. He has claimed $12,512 without providing any reasons for that figure. If I were to award the amount he claimed, it requires me to find the work has no value. I am not prepared to make that finding. Having found in favor of the Claimant under several heads noted above, I order the Defendants to pay the Claimant an abatement in the amount of $4000 plus $75 for the broken window. I assess damages at $4075.00.

Costs

The Claimant shall have his costs of $199.35 filing fee and $125 for service or $324.35.

Summary

In summary, I find the Defendants, Sherrie Creemer, Raymond Wilson and Resolution Structure Contracting, jointly and severally liable to the Claimant as follows:

Damages:	$4075.00
Costs:	$ 324.35
Total	**$4399.35**

An order shall issue accordingly.

Dated at Halifax, NS,
on March 17, 2017;

Gregg W. Knudsen, Adjudicator

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