

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *MacIntosh Landscaping and Trucking Limited v. Stewart*, 2017 NSSM 75

2017

Claim No. SCT 460760

BETWEEN:

MACINTOSH LANDSCAPING AND TRUCKING LIMITED

Claimant

- and -

DAVE STEWART

Defendant

Hearing Date: May 1, 2017

Appearances:

Claimant: Tanya MacKenzie, Operations Manager
Defendant: Dave Stewart, Defendant



DECISION and ORDER

[1] This is a claim for the balance on an unpaid bill of \$3,011.43. The Defendant states that he has overpaid already, having paid \$15,000 so far, and counterclaims for \$7,640 to remedy what are alleged as deficiencies.

[2] In the counterclaim the following deficiencies are alleged:

- a. brickwork was not level;
- b. brick stairs were not even;
- c. ridge caps were loose and did not overlap properly;
- d. bricks supplied by Claimant were not cosmetically suitable;
- e. brick workmanship was substandard;
- f. back lawn was not leveled as agreed;
- g. back lawn was not graded as agreed; and
- h. sod was used improperly on back of lawn.

[3] With due respect, the photographic evidence does not support these allegations.

- [4] There may have been some minor deficiencies such as some loose caps. The Claimant was fully ready to remedy that but was denied permission to enter the Defendant's premises. In my view, the customer in such a case has an obligation to cooperate with the contractor who is seeking to remedy any deficiencies. Both parties in the circumstance have a duty to act reasonably with respect to their dealings at that stage. Sometimes, a contractor does not come back or only comes back after a significant delay or comes back and does not satisfactorily remedy the deficiencies or in some other way does not adequately fulfill its obligation to remedy the work it was contracted to do.
- [5] This is not one of those cases. Here the Claimant was fully prepared to come back and made a number of attempts to do so. It would appear that at that stage the Defendant was simply not prepared to deal with the Claimant. While practically speaking that is his decision to make, the legal consequence in this case is that he loses the right to claim back against the contractor for the alleged deficiencies.
- [6] Further, I would say that in the photographs I was provided, the job looked outstanding to my eyes.
- [7] My conclusion and I think this is the appropriate inference to draw is that the allegations of deficiencies were either created or exaggerated as a result of the Defendant's reaction to the amount of the bill.
- [8] As known, the final revised bill was \$18,011.43, including HST. The Defendant's evidence is that there was an original estimate of \$10,000. According to the Claimant, the original estimate was \$10,000 - \$12,000. However, after that initial estimate there were a number of extra items requested by the Defendant. There would appear to be little question about that. Further, the Defendant would or should have known that the original estimate would no longer apply. In any event, it was only an estimate, not a firm quote.
- [9] This was, based on the evidence before me, essentially a time and materials contract. If it were a fixed fee contract, it is highly unlikely that the Defendant would have willingly paid the third installment of \$5,000 which he made on May 26th at the point when the job was

essentially completed. I might also add that at that stage the evidence was that the Defendant and his fiancé were communicating how very pleased they were with the job.

[10] Things appear to have taken a nasty turn however when the Claimant started to seek payment of the final balance of \$3,011.43, being the total bill of \$18,011.43, less three payments of \$5,000 each. Perhaps Mr. Stewart believed he could negotiate a "settlement" of the account for \$15,000 by adopting the stance he did. In any event, I do not think there ever was any settlement on that amount as was suggested by Mr. Stewart.

[11] I found Ms. MacKenzie to be credible and had there been a settlement, I am quite certain she would have acknowledged that.

[12] As I have said, I conclude that the circumstances here are such that this was a time and materials contract and that objectively viewed, both parties knew that. I conclude therefore that the Defendant owes the balance of \$3,011.43. As well, I find that there is no merit to the counterclaim and it is to be dismissed. I will allow the claim and I will allow cost for the filing fee of \$99.70.

[13] As to any claim for interest, I find that there is not sufficient basis to find that there was a contractual obligation to pay interest on the overdue account. Therefore, I am not allowing any amount for interest.

ORDER

[14] It is hereby ordered as follows:

1. The Defendant pay to the Claimant the sum of \$3,011.43, plus costs of \$99.70, for a total of \$3,111.13;
2. The counterclaim is hereby dismissed.

DATED at Halifax, Nova Scotia, this 13th day of July, 2017.


MICHAEL J. O'HARA
ADJUDICATOR