

Claim No: SCCH - 468609

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Wilman v. Tyrell, 2018 NSSM 17

BETWEEN:

SUZANNE WILMAN and GARLAND WEIR

Claimants

- and -

MICHAEL TYRELL, doing business as MT Contractor and
MT Home Inspections and CHRISTINE WILLIAMSON

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on February 14 and 15, 2018

Decision rendered on March 27, 2018

APPEARANCES

For the Claimants

Alison J. Reid
Counsel

For the Defendants

Lindsay Cuvelier
Counsel

BY THE COURT:

[1] This is a case concerning a basement renovation job. The Claimants own a house on Portland Hills Drive in Dartmouth which they purchased in September 2014. It had a largely unfinished basement. In 2016, they decided to finish the basement and create bedrooms and other space for their family.

[2] The Claimants are military couple with four children of various ages. Mr. Weir is retired on a medical disability, while Ms. Wilman works as a financial clerk.

[3] The Claimants sought recommendations from a friend for a contractor, and the name of Mr. Tyrell came up. Mr. Tyrell had recently relocated to Nova Scotia from Ontario and was just setting himself up in business. In his dealings with the Claimants he sometimes operated under the names of MT Contractor or MT Inspections, but neither of those names appears to be registered and, for purposes of this case, they are at most alter egos of Mr. Tyrell.

[4] Ms. Williamson is the spouse of Mr. Tyrell. There is no question that it was Mr. Tyrell who physically did all of the construction work in this case, or who hired workers to do work which he supervised. As will be elaborated upon below, Ms. Williamson entered into the picture later on in a capacity that could best be described as problem-solving and/or mediating, when issues arose with the project. The Claimants seek to hold her responsible as a partner with her spouse, Mr. Tyrell. The Defendants' position is that Ms. Williamson did not function in any partnership capacity and that she was just someone stepping in to assist her spouse.

[5] Mr. Tyrell claims to have over 20 years of experience in construction, however most of that was in Ontario. As mentioned, he was fairly recently moved to Nova Scotia when this construction project was being discussed, and the Claimants were apparently his first Nova Scotia clients.

[6] Sometime in or about November 2015, Mr. Tyrell attended at the Claimants' home to look at the job. He was asked to and did prepare a quote for the entire basement renovation. The price quoted was \$17,044.14.

[7] The Claimants decided that they could not afford this all immediately and preferred to proceed in increments. They accordingly asked Mr. Tyrell to give them a separate quote for merely framing the basement. This he did, and the quote came to \$3,222.18.

[8] While deciding whether or not to go ahead with the quote, Ms. Wilman emailed Mr. Tyrell and asked him the question:

Just a few questions, are you insured and do you have a warranty? We have all our quotes in now so we will be making a decision this weekend.

[9] It is clear to me that the Claimants were concerned about what recourse they might have in the case of deficient work. They were relatively inexperienced in matters involving construction or renovation, and probably ought to have been informed by Mr. Tyrell (who is presumed to know this) that programs such as new home warranties do not apply to renovation projects. Instead, Mr. Tyrell provided a response that I find quite problematic in several respects. The response was:

Hello Garland and Suzanne yes all my work is guaranteed and as for being insured I do carry error and omissions insurance because of my home inspection so you are safe.

[10] The facts as they truly stood establish that this was both an untrue and misleading answer. Mr. Tyrell was also carrying on, or planning to carry on, some degree of business as a home inspector, and for that profession there is available such a thing as errors and omissions or liability insurance, which covers them for negligence. While such insurance would not have been of any value to the Claimants, because this was not a home inspection situation, nevertheless Mr. Tyrell did not even have such insurance at the time. His evidence was that he had looked into the possibility of taking out errors and omissions insurance but decided against it because he did not have enough work as a home inspector to justify the expense. So, the mention of having error and omissions insurance was simply untrue.

[11] The statement that all his work was guaranteed, may have been true to the extent that he recognized that he would have the obligation to correct his own errors, but he ought to have known that the Claimants were looking for something more, namely recourse to a third-party (such as an insurer or warranty company) in the event Mr. Tyrell did not perform properly. The statement that they were "safe" is simply misleading. As later events have shown, they were no safer than anyone else would be, in the sense that all they had was the implied warranty under the *Consumer Protection Act* that Mr. Tyrell's work would be done reasonably, in a workmanlike manner, which is something that would have applied to any service provider.

[12] Arguably nothing of substance would turn on these misrepresentations, but they do create a real problem for Mr. Tyrell's credibility. He was simply not honest in his dealings with the Claimants, right from the get go.

[13] The reason that the Claimants wanted to proceed with incremental contracts, was to enable them to do some of the work themselves, as well as to try to get the best price for individual parts of the job.

[14] Mr. Tyrell did the framing work and was paid for that work. There was actually a signed contract for that work, but future jobs done by Mr. Tyrell for the Claimants did not proceed in the same fashion, document-wise, but were the subject of various emails, text messages, quotes (both printed and handwritten) and verbal understandings. Many of the printed quotes look different from each other, and bear obviously fictitious dates, as Mr. Tyrell was (as he put it) experimenting with different templates and formats. In the result it is very difficult to follow the sequence of invoices. However, what is clear is that Mr. Tyrell was paid in excess of \$15,000.00 for work undertaken.

[15] The framing job appeared to have been reasonably done, although as problems later presented themselves, it is quite likely that there were some errors or imprecision in the framing that could not have been detected at the time.

[16] The framing job commenced on November 23, 2015 and was completed shortly thereafter.

[17] After the framing, the next dealings had to do with various electrical and plumbing rough-ins, and the installation of pocket doors, all of which had to be done before hitting the drywall stage. There were delays in starting the drywall, which included a short delay because of an outside contract for spray insulation. The Claimants complain that Mr. Tyrell caused some weeks or even months of delay, which appears to be true, but in the final analysis this does not really figure into their claim for deficiencies, although it soured their view of Mr. Tyrell and the job overall.

[18] While most of the work which is the subject of this claim was for the basement, there were a few minor jobs that Mr. Tyrell did upstairs.

[19] Framing and electrical rough-in was all completed by the end of 2015.

[20] The Claimants were sufficiently satisfied with Mr. Tyrell's work to ask him to quote on the fairly considerable drywall job. He was asked to, and did prepare separate quotes for drywalling the entire basement, or only the ceilings. The drywall quote for the entire job was \$6,148.84. The Claimants decided to go ahead with this quote.

[21] Again, the Claimants had considerable issue with how long it took Mr. Tyrell to get around to doing the drywall, once they had accepted his quote, but I suspect that if the job had been done to their satisfaction, there would be no claim arising from the delays.

[22] From this point forward, there is a great deal of back-and-forth through emails, much of which was originated by Ms. Wilman who was very much the

member of the Claimant couple who was overseeing the project. Mr. Weir was doing more of the physical work, such as the sub-flooring and other things that they had decided not to contract out.

[23] As April and May 2016 dawned, the Claimants were getting very impatient as a result of the job still being unfinished. A good example of the frustration being experienced by the Claimants is an email dated May 2, 2016, in which Ms. Wilman states:

I'm literally at work holding back tears, this is so unfair.

We have been so accommodating to you when it comes to finishing jobs up. We have never made you wait for your pay. You have given us times you would be back and you consistently haven't come back at that time. We deserve at least a phone call, email, something.

You have actually been overpaid because we were only supposed to pay you half of the job and the other half at the end. Can you either return the funds so we can have the job finished by somebody that will show up. This is extremely unprofessional, your name was given to us by Erin, she is recommending you to people, this is her reputation.

I am beside myself right now, we have been nothing but fair with you, please show us the respect we deserve and either finish the job, come tomorrow or refund us the overpayment.

[24] It was roughly at this point that Ms. Williamson became involved. She testified that she knew her husband was having some problems with his customer, which had spilled over into postings on Facebook and lengthy email and Facebook Messenger exchanges. She said that she was trying to help her husband out to see if she could facilitate a resolution to the problems.

[25] Coincidentally, Ms. Williamson and Ms. Wilman had known each other in the early 2000's when they were both in basic training with the military, so there was a certain informality to their communication, most of which took place on the Facebook IM platform. The exchanges are lengthy and are largely only relevant on the question of whether or not Ms. Williamson could be held liable as a partner. The Claimants point to certain exchanges as evidence of a partnership between Ms. Williamson and Mr. Tyrell. For example, on May 29, 2016, Ms. Williamson wrote (partially corrected for grammar and punctuation):

OMG Suzanne I am so sorry honey. Yes there are no excuses why this hasn't been done. You please send me a list of what has to be finished. I will do up a contract of the items and he will be there and you can sign off on all of the items. He is having the worst time with employees but that isn't your problem honey. I totally understand this.... From now on Mike and I feel that I'll be the one talking to customers about the finishing touches okay.

[26] Later that day she wrote:

I'm going to inspect all jobs once the men say they are done. I'll have the last part of the contract with a complete list of everything that was done and I'll walk through the site with the client and check everything off. If there is something that has to be redone or finished Mike will come back personally and finish it himself. So are you able to email me a list?

[27] A few days later, Ms. Wilman texted the following to Ms. Williamson:

Hi Chris, it is a long list I have to get G [Garland] to go through. The drywall is still not done, the sliding doors are not fitting properly, the hot water is hooked up to our outside tap [we blew through an entire tank of hot water on our lawn], the trimming on one of the upstairs doors is not finished, some of the doors that were installed upstairs are grinding against the frames, we are pretty desperate to get this done, the job could've been completed over three months ago but Mike kept taking jobs from other people and not coming back when he said he was. He would not answer our calls or emails but would be posting videos of the work

being done for his garage on FB ... The list is longer, but the longer he doesn't come back to fix the hot water, drywall, doors, the longer we can't have our basement finished.... I really need the hot water, drywall and doors fixed ASAP. I will get Garland to do a proper list up tomorrow, but we need somebody here to fix this. I appreciate that you are listening but I have zero confidence in Mike coming back at this point.

[28] Later on June 6 Ms. Williamson stated:

Hello Suzanne I just checked my inbox and see nothing from you or Garland. I will draw up this part of the contract tonight and I'll be out tomorrow morning to go through this list with Gary and yourselves. I hope this is okay. I will be able to add a few more things to this contract but I would prefer it to be typed up properly so saying this Gary and I will be at your place between 8:30 to 9 AM. I don't want to come too early...

[29] Later that day, Mr. Weir emailed a list of deficiencies to Ms. Williamson.

That list identified the following:

Sand existing coat of crack filler on all walls and ceilings in basement

Fix all walls and ceilings with second coat and do final sanding ready for painting

Repair three existing pocket doors

Straighten up existing electrical boxes

Shim one door and finish installing

Complete installation on upstairs door that was partially installed

Fix doors that are scraping against frame in parts

Fix water tap to outside

Finish caulking tub

[30] On what appears to have been either June 8 or June 10, Mr. Tyrell showed up prepared to remedy the claimed deficiencies. On that occasion, he placed some form of a written contract in front of Mr. Weir which had a list obviously taken from the itemized list in the above email. He had Mr. Weir put his initials by each of the items as they went through the house. The Defendants rely on this document as evidence that the deficiencies were addressed and accepted by the Claimants.

[31] One of the issues with how this unfolded was that it was clearly Ms. Wilman, and not Mr. Weir, who was the spokesperson for the Claimants, and having Mr. Weir sign off on these items was unfair. Mr. Weir is someone who suffers from a medical condition which causes him to have a certain amount of social anxiety. According to Mr. Weir, Ms. Williamson was there with Mr. Tyrell. Ms. Wilman was unable to be part of this process, because she was unwell.

[32] Ms. Williamson testified that she was not actually there for this meeting.

[33] Regardless of who is correct, I give very little weight to this document. My impression is that Mr. Weir was under some pressure to initial all the items, and I very much doubt that, had she been included, Ms. Wilman would have signed off. I find there is an element of unfairness and that the Defendants sought to take advantage of Mr. Weir's easy nature.

[34] In addition, the page which has been put into evidence appears to be but one page from a seven-page document, the balance of which was not in evidence. I am unable to conclude that there is any binding contract. All that I can say is that Mr. Tyrell did some work and attended to the deficiencies noted,

but the question of whether or not the work achieves a standard of reasonable workmanship is a separate question.

[35] So where did matters stand after the attempted rectification?

[36] It appears that the parties had very different views about where matters stood. Mr. Tyrell appeared to believe that everything was looked after, and he sought payment of his last invoice in the approximate amount of \$1,200.00.

[37] Mr. Tyrell testified that he spent approximately eight days rectifying deficiencies, a claim that I find to be improbable. Mr. Tyrell also testified that he believed everything was looked after, which I also doubt.

[38] In a lengthy email dated June 20, 2016, not even two weeks after deficiencies were supposedly addressed, Ms. Wilman communicated something very different. I will quote selectively from that email, which gives the flavour of how the Claimants saw things.

I'm going to be honest, I start taking pictures every time I go downstairs something else pops out. I'm not sure who did it, but whoever installed the door for the crawlspace under the stairs over cut, then decided it was a good idea to glue it back together, in three separate uneven places. It was a \$200 door now needs to be replaced.

I think G was just fed up with the whole situation. It is actually unbelievable at this point. Every single corner and every point where the ceiling and walls meet are unfinished or uneven.

And I am confused as to why there would be any kind of additional contract, we already had one, with what Mike was supposed to accomplish. I know in my line of work I'd double/triple check my work for mistakes. Construction would require more than that. If you are hired to do the job, we cannot ensure you completed it?

The problem is, there are so many issues it is hard to catch them all in one shot, like I said, every time one of us looks more concerns pop up. If it were my business, I would have done a full inspection myself.

I will get Garland to send some of the pictures tonight, but there are a lot of pictures, and only half done. It is hard to see in a lot of the pictures how bad the drywall is because it is white compound on light drywall base. There are parts not sanded, corners are not finished properly, screws that were not covered....

Chrissy, I thought my basement would have been completely done a few months ago at this point. I honestly can't believe this has even happened. I need somebody I can count on for quality, to complete the job properly, and in a timely fashion.

I don't know if Mike communicates to you what is really going on, because it doesn't sound like it, but I could send you email traffic with me pretty much begging Mike to come back to complete the job. If I was lucky I would get a response, been told he would be there Monday, Monday would come and go. How does a person come back from treating customers like that?

I'm sorry this has become your problem Chrissy, I have lost faith.

[39] A few days later, in response to some of the pictures, Ms. Williamson wrote:

Mike and I just looked at the pictures of the work the boys did. Like holy crap. He is pissed. He also can't understand why the door was cut like that??? So again, Mike will go through the whole basement, not just things you're asking to be finished. He will look wall-to-wall. Wow what a mess. He will finish this mess. No worries Suzanne.

[40] The evidence is a little bit unclear, but there were further communications in the days that followed, though it does not appear that any work was done by Mr. Tyrell to correct it. On July 10, the Claimants sent an email advising Mr. Tyrell that they planned to have other professionals in to assess the situation.

[41] Indeed, other workers were brought in to deal with the problems starting in or about August 2016.

[42] As Ms. Wilman testified, it was difficult to get contractors to give firm quotes on the jobs that needed to be done to correct the work already done, because it is hard to estimate how much time will need to be spent once the work begins. In the end, they had some of the work done on the doors and drywall in 2016, at a cost of over \$2,000.00, and later in 2017 they hired an individual by the name of David Josey who worked on a time plus materials basis and billed \$6,000.00 to the Claimants for work which is outlined in his invoice. I will not recite the lengthy list in full, but among the repairs he listed were repairing pocket doors and other doors, plumbing repairs to correct the fact that Mr. Tyrell or his workers had mixed up the cold and hot water lines, major repairs to the drywall to correct unevenness, correcting light switches, removing hundreds of staples that were inexplicably put into the sub-floor by some of the workers, installing a metal bar in the ceiling to prevent repeated cracking, removing and reinstalling corner beads, redoing some of the framing in some of the rooms, installing more strapping to one of the ceilings, tearing out and reframing three windows, correcting crooked outlets and light switches. He also noted that he could not repair numerous crooked walls without tearing out the entire basement.

[43] Even with this work, the Claimants are unhappy with what they have. They have not completed everything in the basement, because they do not believe that it is going to look proper.

[44] The Claimants placed into evidence a lengthy series of photographs purporting to show, as much as is possible in a photograph, the deficiencies.

The Defendants say that many of the deficiencies shown in the photographs were taken before Mr. Tyrell came back in early June 2016. The Defendants themselves provided a few photographs, but nothing that is exhaustive and, moreover, many of them are distant shots that would not show up deficiencies in the same way a close up shot would.

[45] On a balance of probabilities, I find that the Claimants have mixed in photographs both before and after the June corrections.

[46] Even so, the workmanship depicted is clearly deficient in many respects. Many of the things, such as uneven drywall requiring further applications of drywall compound (mud) plus sanding, are clearly pictures taken after Mr. Tyrell did his last repairs. The most charitable thing I can say is that it is possible that some of these deficiencies would not have been fully visible until the first coat of primer went on, but I believe a competent drywaller would have done a much better job making sure that the drywall was paint ready. I do not believe that the degree of deficiencies experienced is normal for drywall jobs.

[47] To the extent that the photographs may show deficiencies that were there before Mr. Tyrell came back to correct them, they are something of a window into the low standards that Mr. Tyrell or his men applied to this job. Deficiencies of such a glaring nature should have been dealt with earlier. I am reminded that Mr. Tyrell believed that his job was complete, even though he agreed to come back. The pictures make it plainly obvious that this job was nowhere near complete when Mr. Tyrell believed it to be.

[48] It is true that many construction projects result in deficiency lists, but usually these are minor matters. The matters here were much more systemic.

[49] However, having found that at least some of the pictures do not accurately portray the situation that existed after Mr. Tyrell's last work, I am left in some doubt as to how much still needed, or needs, to be done.

[50] For reasons that will never be known, Mr. Tyrell did not do a professional job. On his own evidence, he appeared to be having difficulty finding employees in Nova Scotia, and he could not do all of the work himself. However, he has to take responsibility for everything. I find as a fact that the work he did, and for which he was paid, has significantly less value than it ought to have, and has cost the Claimants already more than \$8,000.00 (based on invoices submitted) to rectify.

[51] The claim here is for \$25,000.00. They say that they paid Mr. Tyrell \$15,969.89, and that they have paid a significant amount already in additional materials plus labour for outside suppliers such as Mr. Josey.

[52] The measure of damages that would normally apply to the current situation is that amount of money which the Claimants will have to spend, over and above what they have already spent, to achieve their objectives and get the "benefit of their bargain." To some extent, they are speculating that it would cost as much as a further \$25,000.00 over and above what they paid to Mr. Tyrell, to get a properly finished basement. I am not satisfied that this amount has been shown to be the case.

[53] I am prepared to accept that the Claimants have spent at least \$8,000.00 strictly on work to correct Mr. Tyrell's work. I am prepared to accept that there is further work to be done, but the full extent of that work has not been established.

While the Claimants are unhappy with the job as it stands, they are too far into rectifying it to just start over. It may be that they will never have a perfect basement, but they can have a reasonable one.

[54] I assess the Claimants' damages at \$12,000.00.

Was Ms. Williamson a partner?

[55] The *Partnership Act* of Nova Scotia recognizes rules for determining when a partnership comes into being. I find the following sections applicable:

Definition of partnership

4 Partnership is the relation which subsists between persons carrying on a business in common, with view of profit, but the relationship between members of any incorporated company or association is not a partnership within the meaning of this Act.

Rules to determine existence of partnership

5 In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

(b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;

(c) the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of the business, does not of itself make him a partner in the business and, in particular,

(i) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such,

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such,

(iii) a person being the surviving spouse or a child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such,

(iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing and signed by or on behalf of all the parties thereto,

(v) a person receiving by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

[56] The evidence does not establish to my satisfaction Ms. Williamson was in any form of partnership with Mr. Tyrell. She had no expectation of profit, beyond what any spouse might enjoy from the earnings of their spouse. She had nothing to do with his work performing construction or home inspections but appears only to have stepped in when she saw Mr. Tyrell having difficult exchanges with the Claimants over email. I find that she acted as a volunteer, creating perhaps a type of agency or employment where she was given the authority to communicate on Mr. Tyrell's behalf and play an administrative role, but that is very far from the type of activity that would point to a partnership in the

construction business. The evidence falls far short of pointing to a legal partnership. It rings true when she says that she was a concerned spouse trying to take an administrative burden off the shoulders of her husband.

[57] In the result, I find no legal accountability can be placed upon Ms. Williamson, and the claim against her is dismissed.

General damages and costs

[58] The Claimants have sought general damages of \$100.00 to compensate for the aggravation suffered as a result of Mr. Tyrell's breach of contract. I find that this is an appropriate case for such an award, given all of the inconvenience that the Claimants have suffered.

[59] The Claimants have incurred costs of \$199.35 for filing and \$134.00 to serve the claim, which amounts are added to the order.

[60] The Claimants will accordingly have judgment against Mr. Tyrell for the following:

| | |
|--------------------------------|-------------|
| Damages for breach of contract | \$12,000.00 |
| General damages | \$100.00 |
| Cost to issue and serve claim | \$333.35 |
| Total | \$12,433.35 |

Eric K. Slone, Adjudicator