IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Philip Murray Electric v. McCarron*, 2019 NSSM 22

Date: 20190610
Claim: No. SCP 487243
Registry: Pictou

Between:

Philip Murray Electric

CLAIMANT

And

Patrick McCarron

DEFENDANT

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: June 6, 2019, in Pictou, Nova Scotia

Counsel: Vince Neary, Agent, for the Claimant
Patrick McCarron, for the Defendant, personally

Balmanoukian, Adjudicator:

[1] Everyone who has undertaken a renovation project has a "contractor story." Some have more merit than others.

[2] I will refer to the claimant enterprise as "Murray Electric" and to Philip Murray as "Murray."

[3] Patrick McCarron knew Murray, through reputation and through work Murray or Murray Electric had done for the McCarron family. Thus, when he purchased a dated home in Stellarton, he engaged Murray Electric for the required electrical renovations.

[4] Murray provided a written quote for various necessary upgrades in late 2014. I will refer to this as the "Necessary Upgrades." He excluded certain items as "extras" which I will discuss in due course.

[5] Murray also advised as to desirable upgrades given McCarron's lifestyle and tastes. These, too, will enter into the narrative when required and will be referred to as the "Extra Upgrades." Notably, Murray testified that the cost of these "extras" was not discussed, but only that they would be over and above the original estimate. According to Murray, McCarron gave him the go ahead with "I trust

you." Certainly, McCarron knew that the Extra Upgrades were to be done and that these were not part of the Necessary Upgrades.

[6] In January 2015, Murray Electric began work. Murray himself played little role in this, except in a supervisory capacity. Various employees did the actual physical work. In due course, Nova Scotia Power did the required inspection and "signed off" on the work insofar as it pertained to safety and Code compliance.

[7] During this period, with small limited exceptions, McCarron neither occupied the house nor was in the area. He was principally in Ontario. Thus, although the work took far longer than the initial estimated two weeks, it was of no major concern to either party. At some points, McCarron complained of this delay in his testimony, but admitted in cross-examination that he suffered no pecuniary loss or extra expense as a result.

[8] By late May, 2015, Murray Electric had finished the work it was going to do to that point. The job was not complete and was not invoiced. Murray's testimony was that McCarron was going to remove ceilings in various rooms and replace them, and as well remove panelling from a room; as a result, temporary light fixtures were installed pending that work.

[9] It was common ground that neither party considered the work or job complete at that time. On July 7, 2015, Murray approached McCarron for payment, seeking $8,000 of $10,833 on the Necessary Upgrades. Eventually, they agreed on $6,000 cash, payable immediately. This was done.

[10] According to McCarron, this was subject to such payment being on a "no receipts" basis, and further subject to it being paid the same day as the agreement. There was no evidence that either party considered this to be a full and final payment for work to date.

[11] McCarron considers the reduction in this payment from $8,000 to $6,000 to be an agreement by Murray Electric to a $2,000 credit. Murray denies this.

[12] While one may speculate negatively about the motivations behind such an arrangement, I need not make any finding here. When the invoices were eventually rendered, the $6,000 was duly credited.

[13] Matters then fell into abeyance. McCarron testified that he asked Murray Electric to come finish the job at hand, including remedying certain defects, at various times. In general terms, these included replacing the light fixtures, rewiring a light switch to put the various switches in a different order, fixing non-

functioning or malfunctioning electrical outlets and lights, and making a dryer outlet more secure.

[14] According to McCarron, Murray balked at this as he was "busy" and that Murray Electric would only be able to do this in fits and starts as scheduling permitted. That took matters to late 2015.

[15] Matters festered with few if any developments until late 2017. According to Murray, he sent texts and emails, which McCarron says he did not receive (having disengaged his Ontario mobile phone).

[16] In November 2017, Murray finally attended on McCarron's home; Murray testified that McCarron told him that Murray Electric's work was "crappy," and that McCarron had "paid all that he would."

[17] On November 27, 2017, Murray Electric rendered two invoices – for $10,833 less the $6,000 payment in 2015, for the Necessary Upgrades; and $2,468.48 for the Extra Upgrades (which was net of a $92 credit for an item that had already been included in the Necessary Upgrades).

[18] Originally, I had questioned in my own mind (although neither party pleaded limitation) whether this was out of time pursuant to the two-year general limitation period now in effect under the Limitation of Actions Act . I believe that would

have been the case if the contract had been completed, or terminated before 2017, or if only remediation work had remained. Neither was the case – one of the few points on which the parties agree. It was only in November 2017 that it became clear that Murray Electric was dismissed from its task at hand.

[19] That said, Murray Electric cannot have it both ways – to bill the full amount as a debt due and owing, but with contractual work (that is, work other than repair or remediation) left to perform. If the contract was complete, Murray Electric is out of time; if it was not, it does not get paid for what is left to be done.

[20] In simple terms, Murray Electric makes a debt claim for a net total balance of $7301.48 ($10,833 less $6,000 under the Necessary Upgrades, and $2,468.48 for the Extra Upgrades).

[21] McCarron claims that there is but one contract, for a fixed price – a "fixed base contract" in his terms. He says that since there were no signed change orders and one contract, all he owes is the original balance of $4,833. He then deducts the alleged $2,000 "credit" and the cost of completing/fixing the original work, which he claims would be "between $3,000 and $3,500." He makes a counterclaim accordingly.

[22] I deal first with the claim that there is but one contract, for $10,833, and that the parties did not agree to anything over and above that; and that any changes must be effected by a signed change order.

[23] To Mr. McCarron, there are two types and only two types of contracts for this type of renovation – fixed-base (in which "the price is the price") and "cost-plus," which is "whatever it turns out to be, plus a markup." Since he had (to his thinking) a "fixed base" contract, no independent additional work - even if known and condoned - that is not evidenced by a signed change order can give rise to a debt obligation by the owner.

[24] Horsefeathers.

[25] There is no authority whatsoever for the proposition that a change in an estimate or quote, coming from work not contemplated in that estimate or quote, must be in writing. Certainly it was not for Murray Electric to go on an unauthorized frolic of "let's do this while we are at it" and bill accordingly. Nor was it open for Murray Electric unilaterally to change the price of the Necessary Upgrades quote because "we ran into stuff" or "it took longer than we thought." Had that been the situation before me, I would have dismissed it out of hand. To

that limited extent, McCarron is right that "a fixed price contract is a fixed price contract."

[26] Murray Electric tendered its time sheets in evidence. While there is not a full demarcation between the Necessary Upgrades and the Extra Upgrades, Murray testified that because of overruns Murray Electric incurred, the contract price for the Necessary Upgrades would effectively be "time and materials." This was not contested. Indeed, McCarron did not cross-examine Murray on any point despite active encouragement from the Court to do so.

[27] The question in this regard then comes down to whether the Extra Upgrades are subsumed into the Necessary Upgrades quote.

[28] They are not.

[29] Again, it would be one thing if Murray Electric did unauthorized work (for clarity, that does not mean in this case "known and authorized additional work that does not have a signed change order"). Murray Electric would also not be at liberty to add any underestimate from the Necessary Upgrades quote to the Extra Upgrades invoice as a back-door way of recouping a shortfall.

[30] It is clear on the evidence that the Extra Upgrades work was separate and apart from the Necessary Upgrades. I found McCarron's assertions to the contrary

to defy both common sense and credibility. It is as if he expects to be able to say, "while you're at it……do X and Y, but I'm not going to pay for X and Y." Whether one calls it an extra or *quantum meruit*, Murray Electric is entitled to just compensation for authorized work done over and above its original estimate. That does not require a signed change order unless there is a specific provision to the contrary.

[31] There is no assertion that anything in the Extra Upgrades was unauthorized.

[32] I now turn to the uncompleted work.

[33] Much was made of this; indeed, to this day, the preparatory work (such as ceiling replacement and panelling removal) remains to be done. The photos in evidence demonstrate this. McCarron says he left everything as it is – from temporary lights to holes for switch boxes to unsecured dryer plugs – for four years because he "knew this was going to come up." To the extent that I need to make a finding on this point, I do not accept that evidence. It is incongruous to believe that he has left the house in this state for over four years for a suit that was filed almost a year and a half after the last encounter between the parties – and that in turn some two and a half years after the $6,000 "interim" cash payment. It was certainly possible to evidence the state in which the property was left in mid-2015,

complete the work, and have that available should the parties ever find themselves in Court as they do now.

[34] I can make suppositions on why in fact this renovation and indeed even electrical work is incomplete, but it is for Mr. McCarron to choose how he wishes (safely and lawfully) to live in his home.

[35] Mr. McCarron presented no expert or written evidence of how much it would take to complete the work remaining under the Necessary Upgrades, or any defects existing either under the Necessary Upgrades or the Extra Upgrades. He "guesstimated" it would be between $3,000 and $3,500. He testified that he derived this figure from looking at what Canadian Tire would charge for its installation / contractor services (which it arranges through local subcontractors).

[36] I find that to be inadequate evidence; in addition to it being a hypothesis on Mr. McCarron's part, it adds a middleman layer (with associated markup) that is inappropriate here.

[37] I find a better benchmark is the 2015 discussion. Murray asked for $8,000 on the $10,833 contract, with the Extra Upgrades apparently to be dealt with under separate cover. I have already discussed the nature of the $6,000 "cash on the barrel" and reject that this was an agreement to a $2,000 discount. I accept that

this, either as a stand-alone motive or as part of a "cash deal" that did not get fully performed, was to get something in hand.

[38] As I have noted, neither party considered the contract completed as of 2015. I accept that Murray's original draw request is the best evidence at that point of his estimate of his work-in-progress under the Necessary Upgrades to that point. There is also no question that some work remained to be done, and both parties knew this.

[39] I therefore allow $2,833 ($10,833 less the $8,000 originally requested) as an offset for the work undone, or to be remediated, under both the Necessary Upgrades and the Extras Upgrades. This is, it will be noted, close to Mr. McCarron's lower ballpark estimate of $3,000 to $3,500.

[40] There was no material contest of the items listed on the Extras Upgrade. McCarron contested that some of the work was done properly. I am confident that the $2,833 set-off, together with how I will now deal with interest and costs, will collectively be more than adequate to compensate for such matters which remain, to this day, outstanding.

[41] In my discretion, I award neither prejudgment interest nor costs. This should have been resolved by agreement or litigation long ago. It is by the skin of

its teeth that I find Murray Electric's claim is not statute-barred. It would also be frustrating to anyone to be told that the outstanding defects – I am not speaking about items for which prerequisite work such as ceiling installation was necessary – would be addressed in fits and starts whenever time permitted. Most people have, at some time, been annoyed to distraction by a contractor who does not come back to a job 'because I got busy.' I do not condone this in any fashion.

[42] Nor do I condone unreceipted cash payments. The $6,000 was duly credited at invoice time in 2017 but the nature of the accounting between payment and invoice is not in evidence before me. It was incumbent upon Murray Electric to receipt that payment, at the time of payment.

[43] Finally, there was – with apologies to Strother Martin - a "failure to communicate" on both sides.

Conclusion

[44] I therefore allow Murray Electric's claim of $4,833.00 plus $2,468.48, less $2,833 for a balance of $4,468.48, without prejudgment interest or costs.

Balmanoukian, Adj.