Citation: *Allen v. White*, 2021 YKSM 3

Date: 20210722
Docket: 19-S0039
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Gill

GREGORY ALLEN

Plaintiff

v.

JOEL WHITE, MARILYN KAMANGIRIRA,
and COULEE RESOURSES LTD.

Defendants

Appearances:
Lynn MacDiarmid — Counsel for the Plaintiff
Joel White and Marilyn Kamangirira — Appearing on their own behalf and on behalf of Coulee Resourses Ltd.

REASONS FOR JUDGMENT

[1] The plaintiff, Gregory Allen, seeks judgment against the defendants, Joel White, Marilyn Kamangirira, and Coulee Resourses Ltd., in the total sum of $4,030.97, in labour and materials supplied by him at the request of the defendants for construction and renovation work at their residence. The defendants dispute the claim and advance their own counterclaim.

[2] I will deal at the outset with the question of liability of Coulee Resources Ltd. The invoices on which the plaintiff stakes his claim are made out to the corporate defendant

and although the payments for the invoices are paid by cheque from the account of the corporate defendant, this alone does not determine the question of that defendant's liability. For any defendant to be liable on a contract, it must be clear that the parties intended to contract with one another.

[3] In the present case, all dealings with respect to the work to be performed were between the plaintiff (or in some instances, the plaintiff's spouse) and the personal defendants, who I gather are also principals of the corporate defendant.

[4] The plaintiff did not present any sufficient evidence to establish that he intended to contract with the corporate defendant. Indeed, the only evidence from him on this point was that he sued the corporate defendant only because he was concerned that he might not otherwise be able to collect on any judgment that might be awarded to him in these proceedings. That explanation is not a sufficient basis to find liability. I find no intention to contract with the corporate defendant and as such, the claim against Coulee Resources Ltd. is hereby dismissed.

[5] I will now address the claim against the remaining personal defendants, Joel White and Marilyn Kamangirira, as well as the defendants' counterclaim. Here, it is clear that the plaintiff and these defendants intended to and, indeed did enter into a contract for the renovation work. Although the terms and conditions of that contract were predominantly oral, there were clearly some written communications between the parties that defined or modified the work as it proceeded.

[6] The subject matter of this case is not particularly unique, however, some challenges do arise in its adjudication, given the way the parties themselves agreed to

have the work performed. On the part of the plaintiff, he testified it was his practice to avoid entering into any type of written contracts or providing estimates or quotes of the work to be done. Rather, he preferred to simply provide a daily account of the hours worked and charge that work at the rate of $40 per hour. He would also charge for any materials purchased for the work. He did not like to provide any details of the work actually done.

[7] Although the defendants, according to their testimony, were not happy with this type of arrangement, I find on the facts that they did nonetheless agree to proceed on this footing. The only evidence indicating their hesitation in proceeding in this fashion was to ask the plaintiff to provide a written estimate. He initially declined to do so but eventually agreed and provided a very rough written description of the work and the estimated hours associated to it. As will be seen, the work he actually undertook at the defendants' request ended up encompassing considerably more time.

[8] The other complicating factor is that the plaintiff's work constituted only a portion of the larger renovation project that the defendants were having done to their home. This would have benefited from some coordination or supervision between the different tradespersons in attendance, which it would appear, was made more difficult if not entirely absent by virtue of the defendants themselves having been away from the home during much of this time.

[9] It was after the defendants had returned from their trip and examined the work conducted by the plaintiff that they expressed their dissatisfaction with the quality of the plaintiff's work, as well as what they felt to be the excessive number of hours he had

taken to perform it. They refused to pay for the outstanding invoices. The plaintiff abandoned the work and sued for payment, and the defendants counterclaimed.

[10] The plaintiff was initially hired to renovate the upstairs en suite bathroom. That work included gutting of the existing fixtures and then reframing and installing the floor, shower, bathtub, vanity, and related tile work.

[11] During that work, it became apparent that because the home was an older structure, the bathroom floor had sagged in some places thereby rendering the placement and alignment of tiles, both in the shower as well as on the floor of the bathroom, more difficult. It also required the floor itself to be reinforced from underneath so that it would safely bear the weight of the renovation. This necessarily extended the time needed to complete the work.

[12] The plaintiff testified that the work was further delayed because of the defendants selecting specific shower fixtures to be installed that required additional work with respect to the cutting of various holes in the tiles to accommodate those fixtures.

[13] As the bathroom work proceeded, and because the defendants were physically absent, they communicated primarily by text message and email. It is not necessary to scrutinize those communications in any particular detail other than to note that they established a continuing contractual relationship with information and instructions passing back and forth between the parties.

[14] During their absence from the home, the defendants became dissatisfied with the manner in which the plaintiff was completing his work. Despite the plaintiff's requests for

payment and their promises to transfer the moneys while abroad, the defendants, in fact, had decided to delay payment until returning home and actually inspecting the work. They were concerned, among other things, that the plaintiff was charging for more hours than he had estimated and that he was using too many bathroom tiles. The defendants also had a concern that the plaintiff was billing for work either that he had not performed, or for which he had already billed previously.

[15] Because of coordination and other delays associated with completing the upstairs bathroom, including awaiting the arrival of more tiles, the defendants asked the plaintiff to perform other work, not originally discussed between them. That work comprised the items set forth in paragraph three of the plaintiff's reply to counterclaim, involving work that included the downstairs bathroom, kitchen, mud room, and the fireplace, along with other miscellaneous tasks.

[16] The work performed by the plaintiff on the fireplace was a particular point of contention by the defendants. Their two main concerns were that they did not like the finished look and that the plaintiff had not reconstructed the fireplace to comply with fire safety requirements.

[17] The defendants hired a new tradesperson, Yolanda Maes, to complete the upstairs bathroom work from the point where the plaintiff had left off. While her own recollection with respect to the details of the work she performed and how she charged for it was lacking, it would appear from her testimony that she was not required to do very much, by way of correcting or redoing any work previously performed by the plaintiff. Her only testimony in this regard was that she replaced one tile because of a

1/4-inch gap that could not otherwise be fixed. She did not provide any specific dollar amount relating to the cost of that remedial work. In the absence of any better evidence, I fix the value of that remedial work by her to be in the amount of $200, which amount will be deducted from the amount of the plaintiff's claim if otherwise awarded in these proceedings.

[18] Ms. Maes agreed with the position taken by the plaintiff that a cap was indeed needed to cover some of the area where the shower tiles met the ceiling because of the previously mentioned alignment issues with the wall and ceiling. Whereas the plaintiff had previously recommended to the defendants a cap in the range of 4 to 6 inches, Ms. Maes had decided on something slightly smaller at around 3 inches. Either way, I do not see this as a point worthy of debate since clearly either of those options would suffice to meet the objective of covering the gap, and any difference in choice would really just be one of the defendants' personal preference and not in any way connected to the plaintiff or his workmanship.

[19] Here it should also be noted that Ms. Maes, in her testimony, did not appear to support the defendants' contention that bathroom tiles had been excessively ordered by the plaintiff, it being her recollection that there were not very many tiles at all left over after she completed the work that had been started by him. It can be the case that some excess materials will be left over on almost any such work, I do not consider this to require any deduction from the plaintiff's claim.

[20] The defendants hired Jedidiah Jobst to dismantle and reconstruct the fireplace. According to his testimony, a new fireplace design was arrived at in consultation with

Ms. Kamangirira, who wanted something more substantial than the stonework finish that had been installed by the plaintiff. This also accords with the testimony of the defendant, Joel White, who testified the stonework covering applied by the plaintiff was not something that he felt to be aesthetically pleasing. On this basis, it would appear that the stonework installed by the plaintiff was replaced with different coverings not as a result of any issues with the plaintiff's workmanship, but simply because the defendants wanted a different look.

[21] Regardless of aesthetics, the defendants maintain the stonework also had to be removed in order to disassemble the fireplace for the purpose of reconstructing the surround so that no wood would come into contact with the stove itself, so that it was not a fire hazard.

[22] The plaintiff maintained that no such precautions were necessary but on this point I disagree and prefer the evidence of Mr. Jobst, who testified that having done about 15 of these types of installations, he has never seen one performed where any wood framing was allowed to come into contact with the stove. As such, I conclude the plaintiff ought to have constructed the surround to meet that requirement and having not done so, he is responsible for the costs relating to that remedial work.

[23] The defendants say the plaintiff ought to be bound by what they assert is a written contract he provided to them early in their dealings on this matter. However, the document they rely on is not anything that I find to constitute a contract but is, rather, merely an estimate that the plaintiff provided. Clearly, it could not, and did not,

contemplate the unforeseen issues with respect to the upstairs bathroom as well as all of the other work he was asked to perform within the residence.

[24] I am satisfied on the totality of the evidence that the arrangement agreed to by the parties, despite the defendants' misgivings about doing so, was that the plaintiff would be paid for the number of hours he worked, at $40 per hour, and for the materials he purchased on their behalf. Indeed, the communications between the parties while the defendants were away, including the defendants reassuring the plaintiff that they were trying to arrange payment for his outstanding invoices by Interac e-Transfer, or that they would look after the outstanding amounts upon their return home, entirely support the existence of this arrangement.

[25] On the whole, and subject to the foregoing observations, there is no evidence before me to indicate that the plaintiff did not actually work the number of hours that he testified he worked and invoiced, at the request of the defendants. Indeed, the evidence of Bart Butler, another tradesman working at the residence who testified in these proceedings, was that he observed the plaintiff working very hard in the residence.

[26] Clearly, the defendants are of the view that the plaintiff should not have billed this many hours for the work he performed. The difficulty with the defendants' contention is that for much of this work they were not present in order to be able to personally supervise or direct it. Furthermore, they presented no evidence from another qualified tradesperson that would support their assertion that they were over billed for the actual value of the plaintiff's work.

[27] Two other matters in this regard raised by the defendants specifically are that firstly, the plaintiff billed for some hours when he was in fact at a doctor's appointment, and secondly, that he double billed for some of the work. I am satisfied, with respect to both of these issues, that to the extent the plaintiff may have made a mistake in double billing, he fixed the problem as soon as it was brought to his attention by the defendants. I am further satisfied that no portion of the amount currently outstanding and sought by the plaintiff represents time that he did not actually work, or materials that he did not actually purchase.

[28] Based on the foregoing, I conclude the plaintiff is entitled to all outstanding amounts sought by him, subject only to the deduction for the cost of some remedial work performed by Ms. Maes in the bathroom and also for the cost of Mr. Jobst dismantling and reconstructing of the fireplace for the purpose of rendering it fire safe. All other amounts counterclaimed by the defendants are dismissed.

[29] Regarding the upstairs shower remedial work, as earlier noted in these reasons, I have fixed that amount in the sum of $200.

[30] Regarding the fireplace, the defendants are entitled only to recover the labour cost of dismantling and reconstructing the fireplace itself, so that it could be brought into fire safety compliance.

[31] The defendants are not entitled to recover the cost of the stonework originally installed by the plaintiff because, as already noted, there was nothing wrong with that work itself, but rather it was simply a case that the defendants did not find that look to be aesthetically pleasing.

[32] According to Mr. Jobst, his work of disassembly and reassembly occupied 27 hours, charged at the rate of $60 per hour. This comes to a total of $1,620, which is the amount that will be deducted from the plaintiff's claim.

[33] Any other labour performed by Mr. Jobst, specifically including the replacement of a drywalled column, is disallowed as a counterclaim as there is insufficient evidence before me to conclude that this work was needed due to the fault of the plaintiff.

[34] The plaintiff claims, pursuant to three invoices tendered in these proceedings, the total sum of $4,030.97. For the reasons set out above, I am satisfied he is entitled to this sum, subject only to deduction in the amounts heretofore noted as regards remedial work in the upstairs bathroom ($200) and for disassembly and reconstruction of the fireplace ($1,620). This leaves a net amount owing in the amount of $2,210.97.

[35] The plaintiff shall have judgment against the personal defendants in the sum of $2,210.97, plus prejudgment interest completed from the date of filing his claim, and costs.

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GILL T.C.J.