SUPREME COURT OF YUKON

Citation: *Griffis* v. *Fireweed Plumbing & Heating Inc.*, 2013 YKSC 62

Date: 20130624
S.C. No. 10-A0102
Registry: Whitehorse

Between:

TAWNYA GRIFFIS and BRENT BJORK

Plaintiffs

And

FIREWEED PLUMBING & HEATING INC.
dba FIREWEED HOME COMFORT

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Meagan Lang	Counsel for the Plaintiffs
Donald Fulmer	Appearing on behalf of the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a matter involving cross-applications for summary judgment pursuant to Rule 18 of the Yukon *Rules of Court*. The dispute between the parties arises from the installation of a furnace and ductwork in early 2010. The defendant, Fireweed Plumbing & Heating Ltd. ("Fireweed") offered a "100% Money Back Guarantee" ("the 100% Guarantee") on the installation of the furnace and ductwork. The plaintiffs, Tawnya Griffis ("Griffis") and Brent Bjork ("Bjork"), were dissatisfied with the performance of the furnace system. About three weeks after the furnace was installed, they asked

Fireweed to honour the 100% Guarantee by removing the furnace and ductwork, by refunding the purchase price of the furnace and by relieving them of their obligation to pay the outstanding invoice for the ductwork, which had been invoiced separately. Fireweed refused to do so, claiming that it had not yet had an opportunity to finish its work by making further adjustments to the operation of the furnace system. Fireweed argued that its work had to be "complete" before the 100% Guarantee came into effect.

[2] The plaintiffs sued Fireweed claiming fraud and negligent installation of the furnace system, as well as breach of contract. Fireweed counterclaimed for the outstanding cost of the ductwork.

[3] The plaintiffs made their application for summary judgment on two bases. First, that there is no defence to their claim of breach of contract on the basis of the 100% Guarantee. Second, that there is no defence to their claim for compensation for the damage to their flooring and walls during the negligent installation of the ductwork. This second aspect of their claim is based in turn on: (a) an assertion that the job was not done in a good and workmanlike manner; and (b) the "Property Protection Guarantee" also offered by Fireweed in connection with the furnace system installation. The plaintiffs claim total damages of $17,468.40, plus prejudgment interest and court costs.

[4] Fireweed's cross-application for summary judgment is based on the outstanding invoice for the ductwork in the amount of $6,667.50.

LAW

[5] Rule 18(1) of the *Rules of Court* states:

> "In an action in which an appearance has been entered, … the plaintiff, on the ground that there is no defence to the whole or part of a claim, or no defence except as to amount,

> may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount."

[6] In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, the Supreme Court of Canada set out the principle that claims which have no chance of success should not proceed to trial. At para. 10, the Court said:

> "… The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial."

[7] In *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, the British Columbia Court of Appeal stated, at para. 12:

> "… The judge's function is limited to a determination as to whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met."

Skybridge was followed by this court in *Golden Hill v. Ross Mining Limited and Norman Ross*, 2009 YKSC 80, and in *Carlick v. Canada (Attorney General),* 2012 YKSC 92.

[8] While there is to be no weighing of the evidence on a summary judgment application, the Supreme Court did allow in *Lameman*, cited above, at para. 11, that inferences of fact could be made on the basis of undisputed facts:

> "… The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts [citation omitted]."

ISSUES

[9] The global issue in each application for summary judgment is whether the applicant has established beyond any doubt that the respondent has no defence, i.e. that there is no *bona fide* triable issue. The specific issues arising are:

1) (a) Does Fireweed have a triable defence to the claim that, pursuant to the 100% Guarantee, it was contractually obligated to remove the furnace system and refund the purchase price on demand by the plaintiffs?

   (b) If not, what are the plaintiffs' damages?

2) (a) Does Fireweed have a triable defence to the claim for the floor and wall damage?

   (b) If not, what are the plaintiffs' damages?

3) (a) Do the plaintiffs have a triable defence to Fireweed's claim for the cost of the ductwork?

   (b) If not, what are Fireweed's damages?

ANALYSIS

Issue 1(a): Does Fireweed have a triable defence to the claim that, pursuant to the 100% Guarantee, it was contractually obligated to remove the furnace system and refund the purchase price on demand by the plaintiffs?

[10] The following facts are either not in dispute or are based upon inferences of fact from other facts which are not in dispute.

[11] On January 5, 2010, a Fireweed employee inspected the plaintiffs' furnace in their home in the Porter Creek subdivision of Whitehorse. He detected a crack in the heat exchanger.

[12] On January 6, 2010, a different Fireweed representative met with Griffis to discuss the inspection of the previous day. Also on January 6th, Griffis entered into a "Purchase Agreement" with Fireweed for the purchase and installation of a "Premier" forced air oil furnace for a total price of $12,882.45[1]. The Purchase Agreement included the 100% Guarantee, which reads as follows:

> "**100% Money Back Guarantee** We guarantee that the equipment we have installed will perform as we have stated. If the system does not heat or cool your home to your satisfaction, we will remove it and return 100% of your investment."

[13] Griffis financed the purchase the same day through the TD Canada Indirect Home Improvement Loan Program. Pursuant to the TD financing, Fireweed was paid the full amount under the Purchase Agreement within 30 days of the Purchase Agreement being signed. The plaintiffs began making payments on the loan in March 2010 and have since repaid it in full, which amounted to $13,343.40, inclusive of interest.

[14] On or about January 21, 2010, Fireweed installed the replacement "Premier" furnace.

[15] On or about January 22nd, Griffis called Fireweed to complain that the new furnace was noisy; that the basement was hot, while the upstairs was cold; and that the

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[1] The copy of the Purchase Agreement in evidence is dated "Jan 06/09", but that is obviously a typographical error.

house felt dry. Fireweed's president, Don Fulmer ("Fulmer"), attended at the home to check the situation. He reset the fan to run continuously, to increase humidity and to assist with the heat distribution.

[16] On January 26, 2010, Griffis again called Fulmer to complain that there had been no improvement. Fulmer attended at the home and made further adjustments.

[17] On January 28th, Fulmer attended again at the plaintiffs' home and made further adjustments. On that occasion, he noticed for the first time that there was no ductwork present for a large portion of the home. He apologized to Griffis for not recognizing that sooner and stated that Fireweed should have noticed that the house was under-ducted before it started the furnace installation. Fulmer recommended that additional ductwork be installed to improve the air distribution of the furnace system.

[18] Over the following week, Griffis and Fulmer had further discussions about the additional ductwork and, on or about February 8, 2010, Griffis instructed Fireweed to proceed.

[19] On February 9th, Fireweed began the installation of the ductwork.

[20] On February 12, 2010, Fulmer telephoned Griffis and stated that Fireweed was finished with the ductwork, but that further adjustments would still have to be made. Fireweed's invoice for the ductwork specified a "Service Date" of February 12, 2010, and stated "Duct retrofit complete, Final adjustments to airflow & temperature rise incomplete as of date – 02/12/10". The invoice was for a total of $6,667.50.

[21] Although the installation of the ductwork was technically pursuant to a separate agreement, the position taken by Fireweed throughout has been that the installation of

both the furnace and the ductwork was part of one common agreement which included the guarantees referred to above.

[22] Griffis was unhappy, both with the large size of the ductwork, which she felt would make it difficult to cover with carpentry work, and the fact that the ducting did not remedy the noise or heat distribution problems.

[23] On February 15, 2010, Griffis met with two different heating companies to inspect the furnace system and obtain a second opinion. Fulmer also attempted to enter the residence to make further adjustments on that day, but was denied entry by the plaintiffs.

[24] On February 16th, Bjork spoke with Fulmer to indicate his dissatisfaction with the new furnace system. Fulmer indicated that Fireweed needed an opportunity to come back and make more adjustments with the system.

[25] On February 17, 2010, Griffis spoke with Fulmer and discussed the option of removing the furnace system. On February 18th, Bjork had a similar discussion with Fulmer.

[26] On February 25, 2010, Fulmer sent an email to the plaintiffs providing them with two options to resolve the problem with the furnace system, neither of which involved removal of the system and both of which suggested a “Tentative Start Date: March 9th” as the date on which the 100% Guarantee would become effective. The plaintiffs rejected both options and repeated their demand that the furnace system be removed.

[27] On April 22, 2010, the plaintiffs wrote to Fireweed demanding that it remove the furnace system and refund the full purchase price, and provided a deadline for doing so.

[28] On October 18, 2010, the plaintiffs commenced the within action.

[29] On June 13, 2011, the plaintiff's counsel wrote to Fireweed enclosing an offer to settle which included an option for Fireweed to take possession of the furnace by June 16th, failing which the plaintiffs would take steps to remedy the alleged damages, "including replacing the furnace in question and disposing of it in a suitable manner."

[30] In June 2011, the plaintiffs removed Fireweed's furnace system and replaced it with another system.

[31] The plaintiffs sent Fireweed an interrogatory asking what tasks had to be done before the work on the furnace system could be considered "complete". Fireweed's answer was:

> "Air balancing, fan settings, efficiency settings, temperature rise calculations. These would need to be done after each air adjustment. And then possibly again as to adjust temperature drops."

[32] As noted in *Palani v. 0715640 B.C. Ltd.*, 2007 BCPC 235, at para. 16, there is surprisingly little case authority involving disputes about "money-back" guarantees and such cases must be decided on a traditional contract law analysis. In *Palani*, the plaintiff had paid for a laser treatment program for hair loss. He was provided with a money-back guarantee for the treatment. The court noted that the guarantee was obviously an important marketing tool for the defendant. The court also commented that as a "consumer-related guarantee written by the defendant" any lack of clarity or dispute in its interpretation would be construed against the defendant.

[33] In the case at bar, the 100% Guarantee is also an important marketing tool for Fireweed and was specifically listed by Griffis as one of the reasons she chose to proceed with the purchase of the furnace system in the first place.

[34] Fireweed submitted that its argument that the work needed to be "complete" before the 100% Guarantee took effect is supported by the language in the guarantee: "We guarantee that the equipment we have installed will perform as we have stated." (my emphasis). I agree that the past tense of these words suggests that Fireweed must be given an opportunity to complete the installation of the hardware before the 100% Guarantee takes effect. However, Fulmer's email to the plaintiffs on February 25, 2010 confirmed that the "Duct installation was started on Feb 9 and completed on Feb 12" (my emphasis). That fact was further confirmed in Fireweed's invoice to the plaintiffs for the ductwork. Thus, there was no further "equipment" left to install. Rather, as was confirmed by Fireweed's interrogatory answer, the work which it maintained remained to be done all had to do with various adjustments to the system. Fireweed argued that it is only "common sense" to interpret the 100% Guarantee to mean that the completion of the installation must include an opportunity for Fireweed to make the necessary adjustments to the system so that it operates to the satisfaction of the purchasers.

[35] The logical result of this argument is that Fireweed should be able to determine, in its sole discretion, when the 100% Guarantee becomes effective. Indeed, Fulmer's submission at the hearing was "Once we tell them we're complete, we're complete." In other words, the purchasers may have to wait for an unspecified amount of time, which presumably could be 30, 60 or 90 days, or more, for Fireweed to make that determination.

[36] However, the unqualified language used by Fireweed in the 100% Guarantee does not allow for such an interpretation. The argument invites me to imply or read into the 100% Guarantee a condition which is simply not present, i.e. that Fireweed must be

given an opportunity to make adjustments to the system before the purchasers can claim that they are dissatisfied with it. On the contrary, the plain language of the 100% Guarantee is that, once the equipment has been installed: "If the system does not heat or cool your home to your satisfaction, we will remove it and return 100% of your investment." In other words, once the installation of the furnace system hardware is complete, then the 100% Guarantee is unconditional. Finally, if there is any ambiguity in the wording of the 100% Guarantee, then I would apply the principle of *contra proferentum*. That is, I would construe any lack of clarity or ambiguity in the interpretation of this consumer-related contract must be construed against the drafter, Fireweed. In short, the 100% Guarantee is virtually unconditional and there is no implied condition that Fireweed be given a reasonable opportunity to make adjustments to the furnace system.

[37] The evidentiary record shows that the plaintiffs were unhappy with the Fireweed system virtually from the first day or two of its operation. That dissatisfaction did not diminish with the installation of the ductwork. By the time the plaintiffs initially demanded that Fireweed remove the system and refund their purchase monies, the system had been operating for approximately three weeks. Finally, there was no suggestion by Fireweed that there was any lack of good faith by the plaintiffs in asserting their dissatisfaction with the system.

[38] Thus, I conclude that there is no triable defence to the plaintiffs' claim that, pursuant to the 100% Guarantee, Fireweed was contractually obligated to remove the furnace system and refund the purchase price, as demanded.

Issue 1(b): What are the plaintiffs' damages for the failure to honour the 100% Guarantee?

[39] Fireweed argued that it was never advised that the plaintiffs had removed the furnace system. However, Fulmer acknowledged in his affidavit that the removal was mentioned in an offer to settle from the plaintiffs dated January 4, 2011. Further, it is uncontested that the plaintiffs' counsel wrote to Fireweed on June 13, 2011 reminding it of the option to attend the plaintiffs' property to take possession of the installed furnace. The letter further indicated that if no steps were taken by Fireweed by June 16, 2011, the plaintiffs would be replacing the furnace and disposing of it. On this basis, I do not accept Fireweed's submission that it was never advised of the removal of the furnace system. Even if Fireweed was unwilling to accept the offer to settle, it could easily have made alternative arrangements to retake possession of the furnace system, but it obviously chose not to do so.

[40] Fireweed's other argument on damages was that the plaintiffs have only provided an estimate and not a final invoice to verify their actual cost for the removal of the furnace system. However, in her second affidavit, Griffis attached as exhibits three documents from Matheson Oil Burner Service. The first is dated March 15, 2010, and is marked as a "Quote" for the removal of Fireweed's furnace and ductwork in the amount of $1,500 plus GST, for a total of $1,575. The second document is also dated March 15, 2010, and is a further "Quote" for the replacement furnace in the total amount of $5,000, before GST. However, this document also includes a reference to a chimney liner as an "extra", in the amount of "$1,000 installed". Thus, the cost of the furnace alone was $4,000, as Griffis deposed in her affidavit. The third document is the final invoice dated June 30, 2011, showing that the cost of the new furnace "Installed" was

$5,500, before GST. However, as Griffis deposed, and confirmed by the first document, this price of $5,500 included the $1,500 for the removal of the old system, and the $4,000 for the new furnace. While the documentation is a little convoluted at first glance, I am satisfied that the plaintiffs have proven on a balance of probabilities that their damages for the removal of the furnace system are $1,575, inclusive of GST.

[41] Further, Griffis deposed in her first affidavit that the purchase price of Fireweed's "Premier" furnace was $12,882.45 and that the interest charges increased the total cost to $13,343.40. Fulmer accepted these numbers as "true" in his affidavit.

[42] Finally, the plaintiffs' damages in this aspect of their claim are reduced by the salvage value of the removed furnace. Griffis deposed in her second affidavit that she sold the removed furnace for $300.

[43] Thus, I conclude that the plaintiffs' total damages resulting from Fireweed's failure to honour the 100% Guarantee are $14,618.40 ($1,575 + $13,343.40 - $300).

Issue 2(a): Does Fireweed have a triable defence to the claim for the floor and wall damage?

[44] Here, counsel for the plaintiffs argued that Fireweed breached an implied term in the Purchase Agreement, and in the subsequent agreement to install the ductwork, that the work would be carried out in a proper and workmanlike manner. Counsel also focused on certain wood chip damage around the periphery of one of the air vent holes in the hardwood floor, which was still visible when the air vent register cover was in place. This led Fireweed to respond that Griffis had promised to install different decorative register covers, the borders of which would be wide enough to cover the wood chip damage.

[45] In my view, the wood chip damage is a red herring, as is the whole question of whether the work was carried out in a proper and workmanlike manner.

[46] The real issue here begins with Fireweed's refusal to honour the 100% Guarantee. That forced the plaintiffs to hire their own contractor to remove the "Premier" furnace and the ductwork. It was the removal of the ductwork which left the holes in the basement walls and in the upstairs wood floor. Accordingly, I interpret the 100% Guarantee to include the cost of the repairs to those holes. Further, any doubt in that regard is expressly resolved by the additional "Property Protection Guarantee" in the Purchase Agreement, which states: "All property such as…floors [and] walls…are protected. Damaged property will be replaced or repaired…"

[47] Fireweed argued that the plaintiffs "agreed" to the holes when they agreed to the installation of the ductwork. While that is no doubt correct, it is not a defence to the plaintiffs' claim for this damage. I do not accept the suggestion that the parties intended that Fireweed could honour the 100% Guarantee by removing any hardware installed without repairing any associated damage.

[48] Fulmer also pointed out at the hearing that the 100% Guarantee specified: "If the system does not heat or cool your home to your satisfaction, <u>we</u> will remove it…" (my emphasis). Fulmer then attempted to suggest that, since Fireweed did not remove the furnace system, that somehow gives rise to a defence on the damages. To restate the obvious, the reason Fireweed did not do the removal is because it breached its obligation to honour the 100% Guarantee. It cannot then argue that, because a third-party did the removal, Fireweed is not responsible for any associated damages.

[49] Fireweed similarly argued that it was an implied term in the Property Protection Guarantee that any replacements or repairs would be done by Fireweed, not a third-party, and that they were not given an opportunity to do the repairs. However, the reason Fireweed was not given an opportunity to do the repairs is because it declined to honour the 100% Guarantee. Once again, it cannot rely on its breach of contract in that regard as a defence to this aspect of the plaintiffs' claim. It was Fireweed's failure to honour the 100% Guarantee which left the plaintiffs with no alternative but to have the removal and associated repairs done by other contractors.

[50] Thus, I conclude that Fireweed has no triable defence to the claim for the floor and wall damage.

Issue 2(b): What are the plaintiffs' damages for the repairs to the floors and walls?

[51] Fireweed's principal complaint here was again that the plaintiffs had only provided estimates for this damage and not actual receipts. While it is correct that Exhibit "K" to Griffis' first affidavit was entitled "ESTIMATE", in relation to the drywall repairs, Griffis nevertheless directly deposed in the affidavit: "The cost to cover the duct holes in the drywall after removal was $1,050." She further confirmed in her second affidavit:

> "I do not have an invoice for the drywall repair. I confirm that I paid the amount of the quote attached as Exhibit K my first affidavit."

I accept this evidence as proof of the plaintiffs' wall damage in the amount of $1,050.

[52] With respect to the floor damage, Griffis deposed in her first affidavit that she and Bjork obtained a quote from Canada Flooring, because they were the original installers

of the floor. That quote was dated March 17, 2010 and was referred to as "… A Quotation to Supply and Install Flooring …". The document then refers to the materials to be used in the repairs to the living room and laundry room areas, and ends with the words "To supply and repair both areas - $1,500.99 + G.S.T." Griffis then deposed:

> "… However, we were advised that it would be quicker for our own contractor to do the work. We therefore paid the amount of the quote to our contractor as opposed to Canada Flooring."

[53] Griffis then contradicted herself in her second affidavit where she deposed:

> "I have an invoice for the labour required to repair the damage to our floors. It is attached as [an exhibit] to this Affidavit. I do not have an invoice for the materials, as we supplied the materials ourselves through Canada Flooring."

The referenced exhibit is an invoice dated July 15, 2011, but it is only for $253.75, and states "owner supplied flooring". The Canada Flooring quotation was for <u>both</u> materials and labour and did not specify what portion of the quotation was strictly for the materials the plaintiffs purchased from Canada Flooring and supplied to their contractor. It is also apparent from the above quote that the plaintiffs did <u>not</u> in fact pay the amount of the Canada Flooring quotation to their contractor, contrary to what Griffis deposed to in her first affidavit.

[54] In the result, the plaintiffs have only satisfied me on a balance of probabilities with respect to the cost of the labour for the floor repairs in the amount of $253.75. The cost of the materials has not been proven.

[55] Thus, the total damages for the repairs to the floors and walls are $1,303.75 ($1,050 + $253.75).

CONCLUSION

[56] Fireweed breached the Purchase Agreement by failing to honour the 100% Guarantee when it failed to remove the furnace system and refund the purchase price to the plaintiffs upon demand. Fireweed's damages in that regard are $14,618.40. Fireweed is further obliged to pay the plaintiffs' damages for the associated repairs to the floors and walls in the amount of $1,303.75.

[57] Given these conclusions, it is obvious that Fireweed's application for summary judgment on its counterclaim for the cost of the ductwork must fail.

[58] The plaintiffs are further entitled to prejudgment interest on the total damages pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128.

[59] Finally, as the plaintiffs were substantially successful on their application for summary judgment, they are entitled to their taxable court costs.

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Gower J.