Citation: *Blumenschein* v. *Buckle,* 2013 YKSM 6

Date: 20130906
Docket: 12-S0103
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Luther

MICHAEL C. BLUMENSCHEIN
SYLVIA J. BLUMENSCHEIN

Plaintiffs

v.

KIRK BUCKLE

Defendant

Appearances:
Darcy Lindberg — Counsel for Plaintiffs
John Laluk — Agent for Defendant

REASONS FOR JUDGMENT

[1] The plaintiffs owned Lot 1470 Gully Road near the City of Whitehorse and in 2007 R.K. started building a home for them. R.K. was fired and in 2008 the Defendant was hired. The defendant was specifically asked if he would take over the construction project. He agreed and prepared an estimate for the Plaintiffs.

[2] The quote dated 7 July 2008 was for $21,577.50 including GST. Of this amount, $9,500.00 was to install the siding. The final invoice dated 23 September 2008 came to $32,891.25 including GST. It was paid within a few

days. A further invoice date 23 October 2008 amounted to $1,555.00. The defendant completed the work agreed to in the early fall of 2008.

[3] There was clearly a contract entered into between the plaintiffs and the defendant. Simply put, the plaintiffs agreed to pay the defendant to perform the work set out in the quote to an acceptable standard.

[4] By November of 2008, the plaintiffs noticed some trouble with the siding in four areas: the east garage wall, a bay window, near the electrical panel and near the barbeque pit. They called the defendant but not until January or February 2009. The defendant went out in the spring and supposedly repaired the problem areas, which “looked good” to the plaintiffs until the problems were observed again in the fall of 2009 at which time the defendant came back and apparently fixed them again. The same happened in both the spring and fall of 2010. The defendant did not charge for these “adjustments”.

[5] In March 2011, the defendant was asked to come out again but did not do so despite repeated calls.

[6] Scott Dickson, a neighbour and friend of the plaintiffs’ was approached by them to rectify the problem. Mr. Dickson has 22 years’ experience in home construction and is presently a housing and infrastructure manager for a Yukon First Nations Government.

[7] Mr. Dickson’s work was started in August 2011 and completed in September 2011. It included removing all the siding, putting up 1 by 4 strapping

and replacing the siding. The invoice of 30 September 2011 was in the amount of $11,540.00 (no GST). The plaintiffs have had no complaints with the siding since then.

[8] The Statement of Claim was filed 26 November 2012 in the amount of $12,226.25 to recover the amount paid to totally rectify the problem and to recover what would have been a federal government rebate on the GST from the defendant's invoice.

[9] Some of the problems arose because the defendant took on a job that had already been started and there was clear indication that there were some issues with R.K.'s work and some uncertainty as to how well and accurately the house had been framed. Also there was no written or verbal warranty for the work being done. It was apparently not contemplated.

[10] We can draw on the words of Gower J. in *Kareway Homes Ltd.* v.*37889 Yukon Inc.,* 2012 YKSC 10 at paragraph 131:

> I do not recall any evidence as to the length of the warranty. However it is probably reasonable to speculate that it would have been about a year or two…

[11] The biggest issue is the defendant proceeding to install the siding without the wood strapping even though it was acceptable to do so provided that the nails actually went into the studs. From the evidence of Scott Dickson, who initially removed a wall of siding, he observed that there were a few patches that did not have any nails at all for four feet or so and that he was able to pull out

four or five nails with his hand and several more with a cat's claw.

[12] Mr. Dickson testified that if siding is not stretched enough at installation, it would flap and the nails would loosen. He told the plaintiffs he would only do the remedial work if the whole place were strapped.

[13] As to the idea of strapping the house in the first place, the defendant unwisely did not take this step. He asserts that the plaintiffs did not insist on strapping and says that the plaintiff told him he did not strap his previous house. It was not up to the plaintiffs to tell the defendant how to perform his work in the absence of the defendant fully briefing them on what the options were.

[14] To complicate the situation somewhat, the plaintiffs appeared to be pleased with the work performed by the defendant. On 25 June 2009 they signed off on the final approval of the inspector's report and did not tell the inspector of the problems with the siding.

[15] Furthermore, in the fall of 2009, the plaintiffs were having problems with doors bought from another company. This was in no way attributed to the defendant. Indeed, he was asked to rectify this problem for them which appears to indicate that they still had faith in the defendant despite the issue with the siding.

[16] As to the siding, during the period from the spring to the fall of 2009, the plaintiffs appeared content with the siding.

[17] Unlike two recent cases from Newfoundland, *Barrett* v. *Reardon,* 2012

NLTD (G) 83 and *Rendell* v. *Coastal Building Products and Services (2012),* 333 Nfld. & P.E.I.R. 219 (P.C.), there is no independent expert opinion provided here. Scott Dickson is experienced but not able to offer as convincing evidence as, for example, Mr. Guihan, an independent expert in the Newfoundland cases.

[18] In *Barrett* v. *Reardon,* Orsborn*,* C.J. concluded at paragraphs 89 and 90:

> The primary defects that can be attributed to Reardon's work relate to insufficient fastening and poor cut and fit in some locations. The evidence is that some siding and trim was left onsite to facilitate any future repair work. Beyond that and beyond Guihan's 'do it carefully' admonition, there is no evidence as to what material and labour would be involved in remedying the identified defects that can be said to be Reardon's responsibility.
>
> I am satisfied from all of the evidence that, apart from the bowing question, the effects for which Reardon is responsible in the siding installation are minor and not widespread. The Barretts are entitled to some compensation reflective of what would be required to fix the problems. Given the lack of evidence, my fixing of any such amount is essentially arbitrary, informed only by the initial cost of the siding contract - $9400, including HST. In the circumstances, I assess the damages for breach of contract at $2,000.

[19] In the present case the defects are of more consequence and more widespread than in *Barrett* v. *Reardon* but less than those in *Rendell* v. *Coastal Building Products and Services.*

[20] The plaintiffs had every reason to expect that the siding would be installed properly, but not necessarily perfectly. Any defects in a reasonable warranty period of two years or so should have been addressed so that the problem did not recur. The defendant, while returning a few times to address the issue, in the end did not fix it. The implied warranty period would be in the vicinity of two

years, see *Kareway Homes*. The replacement work by Mr. Dickson took place three years after the initial work of the defendant. The problem for the defendant is that his efforts to fix his own defective work were not successful. These same defects continued to exist from two months to two and a half years after the defendant completed the job, much to the chagrin of the plaintiffs.

[21] Mr. Dickson re-installed the siding using strapping. The plaintiffs ended up with a better job than that for which they originally contracted.

[22] In *Rendell* v. *Coastal Building Products and Services,* Orr P.C.J. wrote at paragraph 21 “that it is frequently difficult to assess and estimate the actual loss suffered by the Plaintiff”.

[23] While the defendant installed the siding reasonably well in some places, he did not install it to a satisfactory degree overall, as there was flapping in four locations within a few months of the installation. While the defendant returned a few times to attempt to rectify the problem, he never really did.

[24] As indicated above, this case falls somewhere between the two Newfoundland cases. Judgment for breach of contract is awarded at 50 percent of the replacement work performed by Mr. Dickson’s company.

[25] With regard to the GST issue the court largely accepts the evidence of the defendant that extra work he did for the plaintiffs which was not invoiced served

as a tradeoff for the GST rebate the plaintiffs anticipated.

[26] Judgment is entered for the plaintiffs in the amount of $5,770.00 ($11,540.00 ÷ 2). There will be no order for costs.

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LUTHER T.C.J.