

Citation: *Jenni v. Stockley*, 2017 YKSM 9

Date: 20171221  
Docket: 15-S0105  
Registry: Whitehorse

**SMALL CLAIMS COURT OF YUKON**  
Before His Honour Judge Chisholm

EDWARD ROBERT JENNI of 35535 YUKON INC.  
doing business as PRO NORTH CONTRACTING

Plaintiff

v.

ANN MARIE STOCKLEY and  
GERRY AUBREY STOCKLEY

Defendants

Appearances:  
Edward Jenni  
Ann Stockley and  
Gerry Stockley

Appearing on behalf of the Plaintiff

Appearing on behalf their own behalf

**REASONS FOR JUDGMENT**

[1] The Plaintiff sues the Defendants for \$11,042.06 in unpaid accounts, plus interest and costs, stemming from painting work performed during the construction of the Defendants' home in 2015. The Plaintiff submits that the agreement between the parties regarding payment for this work was that the Plaintiff be paid on an hourly basis.

[2] The Defendants counter this claim by asserting that, prior to commencing the painting work, the Plaintiff provided a quote, upon which the Defendants relied. Alternatively, the Defendants argue that the Plaintiff's work should be assessed on a *quantum meruit* basis.

[3] The Defendants also allege that the workmanship of the Plaintiff was deficient and that the cost to repair these deficiencies should be set off against any amount found owing to the Plaintiff.

[4] By way of Counterclaim, the Defendants claim damages for work undertaken to remedy the Plaintiff's negligent work. The Defendants also seek compensation for an allegedly invalid lien placed on their home by the Plaintiff pursuant to the *Builders Lien Act*, RSY 2002, c. 18, as amended (the '*Act*').

[5] The Defendants also contend that Ms. Stockley assisted with the painting job which decreased the amount of work the Plaintiff was required to do, and as such, should have lessened the amount charged.

#### *Summary of Relevant Facts*

[6] In 2013, Gerry and Ann Marie Stockley decided to build a home on the Mayo road in Whitehorse. In 2014, they requested Tytus Hardy, a building contractor, to bid on the project.

[7] After receiving the building plans and contacting various trades, Mr. Hardy provided the Defendants with a quote for the total cost of the project. This undated, one page quote contained a breakdown of costs from various tradespeople, including the Plaintiff, Mr. Jenni.

[8] When initially contacted by Mr. Hardy, the Plaintiff reviewed the house plans and provided a painting price for the interior of the home. After feedback from Mr. Hardy, the Plaintiff submitted a second, slightly lower figure to Mr. Hardy, in the amount of

\$28,000, which Mr. Hardy used in his quote to the Defendants. The description associated with the \$28,000 figure was 'Paint basic quote. Includes doors and trim'.

[9] The Defendants ultimately chose Mr. Hardy to head up the project which commenced in early 2015. Despite the fact that Mr. Hardy bid on the project as a whole, he and the Defendants agreed that he would not act as a full general contractor. Although Mr. Hardy had arranged for the sub-trades, the Defendants paid the individual tradespeople directly, thus saving on the cost of paying for a full-time general contractor.

[10] The Defendants understood the Plaintiff's \$28,000 quote to be the worst case scenario (i.e. maximum) price, whereas the Plaintiff was of the view that the quote was a ballpark figure and that he and his assistant were working on an hourly basis.

[11] Unfortunately, there was no written contract and very little communication between the parties. In fact, prior to Mr. Jenni starting work on the construction site, he and the Stockleys had never met.

[12] The Plaintiff provided periodic invoices, detailing hours worked, to Ms. Stockley who promptly paid them. The Defendants noted that the invoices displayed hours worked and hourly rates for Mr. Jenni and his assistant, but viewed this as a method for Mr. Jenni to keep track of the hours of his assistant painter for payment purposes.

[13] The Defendants became concerned with what they perceived as the slow progress of the Plaintiff's painting work, considering the amount of money they were periodically paying him. This ultimately led to a meeting on August 12, 2015. By this

time the Defendants had paid the Plaintiff \$26,229 (inclusive of GST) in labour costs, although this amount included approximately \$4,000 of unrelated work that he and his assistant had done on the concrete floors of the home.

[14] In other words, the Defendants had paid the Plaintiff \$22,229 in labour costs for the painting work by August 12, 2015. The Defendants believed that a substantial amount of work remained to be done.

[15] The Plaintiff advised the Defendants soon after the meeting that, in order to finish the painting job, he estimated another \$10,000 in labour would be required, in addition to unbilled hours from July and the first part of August.

[16] Based on the fact that the estimated total painting cost would exceed \$40,000, the Defendants requested the Plaintiff to cease work and leave the premises. This occurred by way of an exchange of e-mails on August 20 and 21, 2015. The Plaintiff did cease work soon thereafter.

[17] The Plaintiff subsequently billed the Defendants \$11,042.06 for the July and August hours, \$10,847.81 of which comprised labour inclusive of GST.

[18] The design of the Stockley home included concrete floors in the basement and on the main and upper levels. The sealing and finishing of the concrete became an issue during the course of the construction. Mr. Hardy included in his overall quote the cost of sealing and waxing the concrete floors. Although Mr. Hardy had never previously used the polyurethane product which the Defendants chose, he understood from his research that it would be straightforward to apply.

[19] This work turned out to be much more difficult than expected. Mr. Hardy ultimately requested Mr. Jenni's assistance with this work. Despite some reluctance, Mr. Jenni agreed to assist. Mr. Jenni told Mr. Hardy that he would work on an hourly basis. Mr. Hardy estimated that Mr. Jenni and his assistant performed 80 hours of work, in total, on the concrete floors.

[20] Mr. Hardy and Mr. Jenni attempted a few different methods to properly finish the floors, before settling on a preferred approach. They initially sprayed the polyurethane product on the basement floor, however when they moved to the upper levels, issues arose when employing this method. As I understand it, they completed the upper level floors with rollers.

[21] During Mr. Jenni's spraying of the basement bathroom floor, overspray of the clear product landed on the tub and shower unit. The damage caused by the overspray was only discovered by Ms. Stockley after she had asked Mr. Jenni to leave the work site, as the result of the dispute between them over the cost and efficiency of his painting work.

[22] The Defendants moved into the house at the end of August 2015. They subsequently hired Donald Aubin to remove and replace the shower and tub unit. Due to the significant structural work required to remove and replace the unit, the total cost amounted to \$4,662.

[23] Mr. Aubin has been in the construction industry on a full-time basis for nine years. Prior to that, aside from another career, he worked at times constructing his own homes.

[24] Mr. Aubin's experience is that painting companies normally determine cost based on the number of "board feet" of the house. The range per board foot is between 90 cents and \$1.30 cents, with the average being \$1.15 cents. This amount does not include GST.

[25] Mr. Aubin concluded that the Defendants' house equalled 4,800 square feet or 14,000 board feet. In his experience, the \$28,000 quote that the Plaintiff provided was at the very high end of what he would expect to see for a painting job of this scope.

[26] Mr. Dustin Grant has worked as a painter for 10 years, the last seven of which he has run his own business. After the business relationship of the Plaintiff and Defendants ended, Mr. Grant completed the outstanding painting for the Defendants at a cost of \$2,646. He also estimated another \$630, plus GST, to rectify deficiencies on doors in the home that the Plaintiff had stained, although that work is still outstanding.

[27] Also, the Defendants requested that Mr. Grant provide a quote for the entire painting job. Mr. Grant indicated that he would have charged \$18,656, including GST, for the interior painting of the Defendants' home.

[28] In addition to Mr. Grant's work to finish the interior painting, Mr. Hardy spent 14 hours sanding and staining doors. This work was to have been completed by the Plaintiff.

[29] During the course of the project, Ms. Stockley spent part of a week priming baseboards, door and window trim, and Crown mouldings for the Plaintiff.

[30] Finally, both Mr. Grant and Mr. Hardy spent a number of hours rectifying a deficiency in the basement stairwell, and Ms. Stockley performed work removing overspray from various items.

## **ANALYSIS**

[31] These are the issues to address in this matter:

1. Was there a contract between the parties?
2. If there was no contract, what is the value of the work performed?
3. Are the Defendants entitled to monies spent to rectify deficiencies?
4. Are the Defendants entitled to compensation from the Plaintiff for damage done to the basement bathroom?
5. Are the Defendants entitled to damages for what are claimed to be invalid liens filed by the Plaintiff?

### **Issue 1: Was there a contract between the parties?**

[32] The Plaintiff argues that the parties entered a contract under which he would be paid on an hourly basis until completion of the job. However, I find that there was never any discussion on this point which might have led to an oral contract. Additionally, there was certainly never a written contract to this effect.

[33] It is true that the Plaintiff billed the Defendants periodically and that hourly rates were included in the billings. However, the Plaintiff initially provided a quote or estimate to the Defendants of \$28,000 which formed part of an overall estimate for the complete

home construction cost. No mention was made by the Plaintiff at the time of the quote, or subsequently, of his intention to work on an hourly basis, which could ultimately result in a total price well over \$28,000.

[34] Indeed, the Plaintiff and the Defendants had never spoken to each other prior to the work commencing. As a result, each had a different understanding of how the Plaintiff was to be compensated. In Mr. Jenni's mind, he was providing the \$28,000 figure solely as a rough estimate, whereas the Defendants understood that this was the 'worst case scenario' price.

[35] As stated in *Northside Collision Clinic v. Lexow*, 2005 YKSM 3 at para. 18:

...there is a clear element of mutual mistake in this case. Each of the parties believed the agreement to mean something different. ... The evidence suggests no actual meeting of the minds took place on the issue of price.

[36] Having considered the evidence of the parties on this point, I am satisfied that there was no binding contract between the Plaintiff and the Defendants.

[37] Therefore, the Plaintiff's claim for breach of contract, based on unpaid accounts, must be dismissed.

## **Issue 2: What is the value of the work performed?**

[38] By way of Counterclaim, the Defendants claim from the Plaintiff the difference between the fair market value of the work completed and the amount the Defendants paid the Plaintiff up until the business relationship ended.



[39] The principle of *quantum meruit* is that, in the absence of a contract, a party may seek a declaration to prevent another's unjust enrichment.

[40] Professor Mitchell McInnes writes in *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada Inc., 2014) that unjust enrichment concerns a claim that:

typically is said to consist of (1) an *enrichment* to the defendant, (2) a *corresponding deprivation* to the plaintiff and (3) an *absence of any juristic reason* for the enrichment. p. 4

[41] The measure of recovery is, as described in *Ketza Construction Corp. v. Mickey*, 2000 YTCA 4, "the amount [the claimant] deserves" or "what the job is worth".

[42] The Defendants by way of Counterclaim argue that the amount of money charged by the Plaintiff for his work is unreasonable and not in accordance with industry practice.

[43] As indicated, two individuals in the construction industry testified with respect to their respective opinions as to the cost of the painting job which the Plaintiff had accepted. The respective prices each of them provided were similar, that being in the range of \$19,000, inclusive of GST. As outlined, Mr. Aubin provided a price range for this work, per board foot, and part of this range coincided with the \$19,000 amount set out by Mr. Grant.

[44] On the other hand, the Defendants initially understood that the upper end price for the painting work would be \$28,000, including GST. They were prepared to enter into a contract for this amount. There is no indication that Mr. Hardy, who is also

experienced in the construction industry, and who compiled an overall price for the Defendants' home, had any difficulty with the \$28,000 painting quote.

[45] As a result, in my view, the painting job was worth between \$19,000 and \$28,000. Even though a contract never materialized between the parties, as the Defendants were prepared to enter into a contract for the upper end of this range, I find that, in all the circumstances, this is the proper value to assign to the completed painting job.

[46] However, as indicated, the relationship between the parties ended prior to the Plaintiff completing the job. Mr. Grant, who was hired by the Defendants to complete the painting work, charged \$2,646, including GST, to complete the work<sup>1</sup>.

[47] Additionally, Mr. Hardy performed 14 hours of sanding and staining of doors, which work I value at \$700, inclusive of GST.

[48] Based on the amount charged by Mr. Grant to finish the painting work (\$2,646), and the \$700 of work by Mr. Hardy, the total cost to complete the painting work amounted to \$3,346. This figure represents 18 percent of what Mr. Grant's overall cost for the job would have been (i.e. \$18,656). Therefore, I find that 82 percent of the job had been completed by the Plaintiff prior to his termination.

[49] This 82 percent completion figure translates into a value of \$22,960 (i.e. 82 percent of the \$28000 overall value of the job). The Defendants paid the Plaintiff

---

<sup>1</sup> The Defendants claim they paid \$1,500 to another painter before Mr. Grant was hired; however, no evidence was led to establish when this occurred and what work was done; therefore the Defendants have not met their burden of proof in this regard.

\$22,229. Therefore, the Plaintiff is successful in his claim for the outstanding amount, which I calculate as \$731. The Plaintiff is additionally entitled to \$180 in unpaid materials.

[50] Regarding the priming work Ms. Stockley performed for the Plaintiff, I value it at \$300.

**ISSUE 3: Are the Defendants entitled to monies spent to rectify deficiencies?**

[51] The Defendants seek compensation by way of Counterclaim for the amount of money spent to rectify deficiencies in the Plaintiff's work. The Plaintiff argues that the Defendants never presented him with a deficiency list during the time he worked on the project, and in any event, he was never allowed the opportunity to rectify any deficiencies.

[52] In the circumstances of this matter, I find it would not have been reasonable for the Defendants to permit the Plaintiff to return to rectify the deficiencies. The relationship between the two parties had ended because of a dispute over costs. The Plaintiff's overall estimated cost to complete the painting work had increased from \$28,000 to well over \$40,000. In my view, this amount was excessive for the scale of the work.

[53] In the circumstances, it made sense for the Defendants to hire another worker to deal with the deficiencies.

[54] I conclude that the Defendants are entitled to set-off the amount of \$1,239.50, for rectifying deficiencies, based on the following work:

- \$661.50, including GST, to sand and refinish interior doors;
- \$141.75, including GST, for three hours of work by Mr. Grant to sand and repaint stairwell area leading to the basement;
- \$236.25, including GST, for five hours of work by Mr. Hardy to sand part of the stairwell area leading to the basement;
- \$200 for the work performed by Ms. Stockley to remove overspray material on various items.

**ISSUE 4: Are the Defendants entitled to compensation from the Plaintiff for damage done to the basement bathroom?**

[55] The Defendants claim by way of Counterclaim that the Plaintiff's work in sealing and finishing the concrete floors in the basement was negligent in that overspray ruined the basement bathtub and shower unit. The cost to remove and replace this unit totalled \$4,662.

[56] The Defendants argue that they contracted with the Plaintiff to seal and finish the concrete floors in the home. The Plaintiff denies having entered into a contract with the Defendants with respect to this work. The Plaintiff submits that he was assisting Mr. Hardy who was the individual responsible for this work. The only item the parties agree upon in this regard is that the Plaintiff was to be paid \$50 an hour for this work.

[57] Mr. Hardy was equivocal in describing the working relationship between him and the Plaintiff concerning the work on the concrete floors. In direct examination Mr. Hardy explained that he agreed with the Defendants to undertake this work. When he experienced difficulty with the job, he requested assistance from the Plaintiff. Mr. Hardy explained that he engaged the Plaintiff to assist him with this work.

[58] However, on cross-examination, Mr. Hardy stated that it was the Plaintiff who was in charge of the sealing and that it was the Plaintiff who provided direction to him.

[59] I find that Mr. Hardy contracted with the Defendants to do the flooring work. He provided an initial price to them and he commenced the finishing and sealing work with a product he had never used before. Mr. Hardy ran into unexpected difficulties and required assistance to get him out of a bind.

[60] When Mr. Hardy initially approached the Plaintiff to assist him, the Plaintiff declined. Ultimately, however, the Plaintiff reluctantly accepted to aid Mr. Hardy.

[61] In all the circumstances, I conclude that Mr. Hardy was the only party who contracted with the Defendants with respect to the flooring work. There was no contractual relationship between the Plaintiff and the Defendants in this regard. Therefore, any negligent work with respect to the flooring is the responsibility of Mr. Hardy, and not Mr. Jenni.

[62] The Defendants counterclaim with respect to the cost of replacing the bathroom shower and bathtub is dismissed.

**Issue 5: Are the Defendants entitled to damages for what are claimed to be invalid liens filed by the Plaintiff?**

[63] The Defendants seek \$500 for what they describe as two invalid liens pursuant to the *Act*.

[64] The Plaintiff filed two liens, one for materials in the amount of \$180 and one for wages in the amount of \$10,336.25, on September 8, 2015. The Plaintiff did not commence an action within the required 90 days pursuant to s. 22 of the *Act*.

[65] The Defendants claim is for the expense of having the liens removed from the title of their property.

[66] I conclude the Plaintiff did not comply with the requirements of the *Act*, thus rendering the liens invalid. The Defendants had to hire a lawyer to remove the invalid liens from the Defendants' certificate of title, and as such, are entitled to be compensated for this expense.

[67] I award the Defendants \$300 in this regard.

### **Conclusion**

[68] The Plaintiff is awarded \$731 in unpaid labour and \$180 for unpaid material, for a total of \$911. I have calculated the deficiencies as being \$1,239.50. This amount is set-off against the \$911 owed to the Plaintiff, resulting in \$328.50 owing to the Defendants.

[69] Additionally, I have valued the priming work done by Ms. Stockley at \$300.

[70] As indicated, the Defendants are additionally awarded \$300 with respect to the invalid liens.

[71] Therefore, the Defendants shall have judgment in the amount of \$928.50. Pre-judgment and post-judgment interest is payable on this amount in accordance with the

*Judicature Act*, RSY 2002, c. 128.

[72] I award costs to the Defendants in the amount of \$100.

---

CHISHOLM T.C.J.