

Citation: *Brewster v. Parker et al.*, 2013 YKSM 2

Date: 20130430
Docket: 11-S0080
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Chief Judge Cozens

MELISSA BREWSTER

Plaintiff

v.

COLLEEN LORETTA PARKER and
DAVID ALLAN PARKER

Defendants

Appearances:
Melissa Brewster
Colleen Parker
David Parker

Appearing on own behalf
Appearing on own behalf
Appearing on own behalf

REASONS FOR JUDGMENT

[1] The Plaintiff, Melissa Brewster, claims against the Defendants for monies in the amount of \$21,265.00 she states is owing for work she performed pursuant to a contract for the construction of a deck at the Defendants' residence (the "Deck").

[2] The Defendants' position is that the Plaintiff has no standing to bring this claim as she was not the party they contracted with. Alternatively, the Defendants submit that they should not be obligated to make any payment beyond that set forth in the contract between the parties.

[3] Further, the Defendants have counterclaimed in the amount of \$3,076.94 for costs related to staining the Deck, which the Defendants submit was the

responsibility of the Plaintiff under the terms of the contract, as well as for time off work in order to prepare for and participate in these proceedings.

[4] The Plaintiff states in her Reply to Counterclaim that it was not a term of the contract that the Deck staining would be the Plaintiff's responsibility.

Evidence

Plaintiff's Evidence

[5] The Plaintiff testified that she is the girlfriend and business partner of Dan Stewart. "Nail It" is the name of the construction company Mr. Stewart operates in his native New Zealand. Mr. Stewart and the Plaintiff undertook various projects in Canada under the name Nail It, which is not a company registered to conduct work in the Yukon.

[6] Mr. Stewart is not named in these proceedings nor did he provide evidence. He should have been involved. It was evident that the reason he was not is because his status in Canada does not allow him to work, and the Plaintiff was concerned about the impact of this should he testify in court. The services Mr. Stewart was providing for individuals, including the Defendants, was "under the table" on a cash-only basis. No income taxes were being paid by him for the work he performed.

[7] Mr. Stewart and Ms. Brewster attended at the Defendants' residence together on June 10, 2011 to look at deck plans that had been drawn up by a friend of the Defendants. A quote was provided to the Defendants in the amount of \$20,179.00. Tax was not mentioned in this quote. This quote was for a

treated spruce sub-frame and cedar decking seating, stairs and rails. It stipulated that "All decking will require weather protection". This quote was provided under the name "Nail It" and the names of Dan Stewart and Melissa Brewster. (Exhibit #2)

[8] A second quote was provided in the amount of \$27,922.00. Taxes were not mentioned in this quote. This quote reads:

Build deck as per plans supplied. Plans redraw to submit for permit.
Refurbish deck to match make up of new deck. Deck includes treated sub-frame. Cedar decking, steps, seating and siding. Including one gate access to spa pool maintenance. Railing aluminum as requested.
Concrete pad to spa pool and concrete pads for deck support structure.
(Exhibit #1)

[9] This is the quote that the Plaintiff states was followed. She testified that the date of June 10, 2011 on this quote is incorrect and that it uses the term "NZ" incorrectly, due to computer programming/formatting issues. This quote is also in the name of Nail It but names Melissa Brewster only.

[10] There was a quote dated July 8, 2007 that provided several prices for the deck rail options. The Defendants chose the Aluminum option at an estimated value of \$6,552.00. This is factored into the quote of \$27,922.00 that was accepted and which work proceeded upon.

[11] Payment was to be made in three instalments: 1/3 at the start of the project, 1/3 when the decking was completed and 1/3 at the completion of the project.

[12] There was also a quote dated June 27, 2011 in the amount of \$17,392.00. Tax was not mentioned in this quote. This quote was for treated spruce. It stated that "All decking will require bleaching and staining for weather protection". This quote was provided under the name "Nail It" and the names of Dan Stewart and Melissa Brewster.

[13] During the deck construction stage, Mr. Stewart provided another quote for the construction of a garage for the Defendants. Mr. Stewart ended up working primarily on the garage and the Plaintiff did most of the work on the deck.

[14] The Plaintiff primarily dealt with Ms. Parker in relation to the deck work.

[15] The Defendants provided two cash payments of \$9,300.00 each, without being invoiced (payments made on August 19 and September 10, 2011). The Plaintiff received the cash payments directly from Ms. Parker. The Plaintiff stated that she told Ms. Parker that she wanted to be paid in cash and that she did not want the money to be paid into an account.

[16] The Plaintiff subsequently sent an Invoice dated September 21, 2011 in the amount of \$36,155.78 (Exhibit #5). The Plaintiff reduced the labour costs from \$50.00 per hour to \$30.00 on condition that payment in full was received promptly. After crediting the Defendants the \$18,600.00 already paid, this left the Defendants owing the Plaintiff the amount of \$17,555.78.

[17] As payment was not received, the Plaintiff then submitted a final invoice,

dated October 1, 2011, in the amount of \$39,865.00 based upon a labour rate of \$50.00 per hour. Less the \$18,600.00 already paid, this left the Defendants owing the Plaintiff the amount of \$21,265.00.

[18] This amount is broken down, more or less, as follows:

- \$19,215.08
 - \$17,868.00 materials for contracted work;
 - \$1,052.50 materials for extra work;
 - \$112.50 for concrete delivery charge; and
 - \$182.78 for Building Permit Fee.
- \$20,650.00
 - \$11,000.00 for contract labour;
 - \$6,750.00 for extra labour on contract work; and
 - \$2,900.00 for extra labour on extra work.

[19] I note that the invoice is not entirely clear in how the costs for labour and materials are applied, however, the above breakdown seems to best interpret it.

Extras

[20] The Plaintiff claims that the following was extra work not contemplated under the contract, for which she should be paid an additional \$50.00 per hour, as per the original agreement:

- Change in deck seating – 24 hours labour. The interior of the deck seating was changed to make the storage capacity larger. This change required some work already completed to be re-done, such as the sub-frame;

- Hot tub changes – 8 hours labour. The measurements of the hot tub when delivered were different from the manufacturer’s specifications; therefore the hole cut-out did not work. The hot tub had to be raised and blocked, and there was some jiggling out required for aesthetic purposes;
- Change in guttering system to avoid drip staining – 5 hours labour;
- Extra gate for under-deck access; single hinge gate changed to larger two gate system for larger access entry – 16 hours labour;
- Building permit fee and preparation of drawings – 5 hours labour. These drawings should have been submitted by the Defendants, but the Plaintiff prepared and submitted them herself;
- Concrete delivery charge. This was an unexpected charge for a small load of concrete;
- Extra labour to complete deck project – 135 hours labour;
- Deck railings (came in under quote); and
- Rail caps (under quote)

[21] Payment was to be made on three occasions: when the project was underway, upon completion of the decking, and, upon approval by the building inspector.

[22] The Plaintiff testified that it was not part of the contract that the cedar would be weather-protected by the Plaintiff. She said that she first became aware that this was an issue when the Defendants came to her and Mr. Stewart when they noticed that the Deck was being constructed without being treated. She stated that the Defendants were upset at the time. Ms. Brewster said that the Deck was 75% completed. She further stated that she was unaware of the Western Red Cedar Lumber Association’s (“WRCLA”) recommendations regarding the finishing of cedar structures until after the Defendants brought the

issue to her and Mr. Stewart's attention.

[23] Ms. Brewster testified that it has been her experience to let a cedar deck sit through the winter before staining it. It has always been her practice to install the product first and then stain it, when she has been responsible for the staining.

[24] Ms. Brewster said that she told the Defendants that she would do the deck staining if requested and provided them a quote. The Defendants ended up doing the staining themselves.

Defendants' Evidence

Colleen Parker

[25] Ms. Parker testified that the Defendants hired Dan Stewart to do the work on the deck. She agreed that the contract was in the amount of \$27,922.00 for a cedar deck. Ms. Parker also agreed to make all payments by cash.

[26] Ms. Parker testified that there were no written agreements between the parties regarding any extra work over and above what was originally contracted for.

[27] Ms. Parker stated that the Defendants asked that the access gate for the under-deck storage be made larger than originally designed. She questions, however, the amount that the Defendants were charged for this work. The invoice for the gate material is for \$33.99.

[28] Ms. Parker said that she agreed to Mr. Stewart's suggestions that the gutter be added, understanding that the Defendants would only be charged for

materials and not labour. The invoice for the gutter work, however, includes a \$50.00 charge for material pickup and a labour charge of \$250.00 (for 5 hours labour).

[29] She further agreed to Mr. Stewart's suggestion regarding the railing caps, and chose the railing caps herself. The material cost was \$254.36.

[30] Ms. Parker denied that there was any change to the decking required for the installation of the hot tub. The hot tub that was installed had the same dimensions as the one that had been specified and that the Plaintiff believed was to be installed. The Defendants provided correspondence from Waterstone Products, confirming that the dimensions of the Coast Spas Manhattan Hot Tub they purchased in 2011 were the same as the dimensions on the specification sheets put out in 2010 and 2011. Ms. Parker testified that Mr. Stewart told her that the final adjustments for the installation of the hot tub would be made once it was there and not to worry about it. She stated that the Defendants wanted a natural step into the hot tub from the beginning of the project.

[31] Ms. Parker also stated that there was no change required for the deck seating, rather what occurred was that the deck seating was initially improperly constructed by Ms. Brewster. While there were no storage dimensions on the original drawings, Mr. Stewart had been told what the Defendants required for storage and, as a result of not building in adequate storage, he was forced to redo some of the work, in particular the spruce framing. This extra work was completed the same day that the observation by the Defendants was made. The

Defendants agreed to pay for the purchase of additional cedar materials to complete the seating in the amounts of \$153.41 and \$198.24.

[32] Ms. Parker stated that the concrete delivery charge is something that should have been included in the quote and not something the Defendants should have to pay.

[33] The Defendants stated that the Plaintiff was required to stain the Deck as part of the agreement between them. Ms. Parker stated that the Defendants wanted a finished look and not a naturally-aged cedar look. While not specifically stated in the quote upon which the parties agreed for the work to proceed, the Deck staining was, in Ms. Parker's view, "inherent" in the quote and in the recommendations of the WRCLA. She stated that she raised this with the Plaintiff and with Mr. Stewart during the Deck installation but was told by the Plaintiff that they had not agreed to do this. Ms. Parker testified that Mr. Stewart "balked" when she asked him about this.

[34] The Defendants provided the Court a website excerpt setting out the Mission Statement of the WRCLA (the "Mission Statement"). The Defendants also provided an instructional guide from the WRCLA entitled *How to Finish Western Red Cedar* (the "Guide") which is a "summary of the essential "best practices" for finishing, care and maintenance that will lead to a positive experience with your Western Red Cedar".

[35] The following is stated in the Mission Statement:

Western Red Cedar is well known and well regarded as a superior

building material with a long history of excellent performance in withstanding the rigours of time and weather. However, like any other building material, it gives its best performance when properly specified, installed and finished.

[36] The Guide contains instructions with respect to factors to consider and steps to take when finishing Western Red Cedar. It, of course, presumes that there has been a decision to finish the product. I note that the following is stated in the Guide:

Finish Decks for Optimal Performance

Although Western Red Cedar is a naturally durable wood ideal for decks, its performance is enhanced when protected by an appropriate finish.

...

Unseasoned decking should be air dried (not exposed to direct sunlight) and finished on all sides prior to installation.

[37] The Defendants provided invoices in the amounts of \$286.62, \$561.70, \$230.96, \$185.16, and \$246.88; for materials purchased for the deck staining. The Defendants also claim for 24 hours of Mr. Parker's labour. Ms. Parker stated that the Defendants did not claim for the labour of others or preparation time.

[38] Ms. Parker testified that she was never aware or agreed that the Plaintiff would charge at a rate of \$50.00 per hour for labour.

Dave Parker

[39] Mr. Parker testified that the Defendants dealt with Mr. Stewart in coming to an agreement to hire him. The agreed upon price was \$27,922.00. There was no agreement as to an hourly rate for labour. He stated that the Plaintiff was

working for Mr. Stewart and took her directions from him.

[40] Mr. Parker testified that the hot tub was undersized and required some additional framing for support. The hot tub depth was 40” and the Deck was at a height of 48”. This was known from the beginning, and it was clear that the hot tub would need to be mounted on blocks and not on the concrete slab. Mr. Parker believed all along that the hot tub was to be raised and not sit flush with the deck surface. Mr. Stewart indicated to him that he would frame in the hot tub, but he never asked Mr. Stewart to do so.

[41] Mr. Parker stated that he noticed the lack of storage space in the Deck seating while Mr. Stewart was building the benches. He pointed this out to Mr. Stewart at the time to ensure that there was adequate storage. He stated that the changes to the seating storage space only required that two cross pieces be moved in each of the three storage locations. He disputes the time the Plaintiff claims that these alterations required, stating that the changes made by Mr. Stewart only took “minutes”.

[42] Mr. Parker recalls discussing the staining with the Plaintiff and Mr. Stewart and the issue of the time required for the wood to dry was part of that conversation. He stated, however, that the Defendants always wanted the Deck to be stained. He recalled that Ms. Parker stated at the time the quote was agreed to that she wanted a “finished project”, but can’t say one way or the other whether the issue of the staining of the Deck was specifically addressed.

[43] Mr. Parker stated that the deck staining was done by him, Ms. Parker, his

sister-in-law, Jacqueline Moore, and his daughter. He said that it took approximately a week to complete but that the Defendants were only claiming for three days.

[44] He concurred with the evidence of Ms. Parker with respect to the rail caps, the gutter system and the agreement to pay for the extra costs of cedar to complete the deck seating.

[45] He also testified that the Defendants requested the increased access to the crawl space beneath the Deck, but stated that the extra work should have taken eight hours maximum.

Jacqueline Moore

[46] Ms. Moore is Ms. Parker's sister. She was living with the Parkers when the Deck was being constructed. She stated that she was present at the meeting between the Defendants, Mr. Stewart and Ms. Brewster when the quote was given and discussed. She was of the opinion that Mr. Stewart was the main contractor, not the Plaintiff, who, in fact, was corrected by Mr. Stewart during the meeting.

[47] She testified that Ms. Parker stated that she wanted a finished project and made that clear. As such, Ms. Moore stated she was shocked when she became aware that the Plaintiff and Mr. Stewart would not be staining the Deck.

[48] She stated that she was present when the Plaintiff brought stain samples for Ms. Parker to view.

[49] Ms. Moore testified that she was aware that the Defendants wanted under-bench storage and that, in her opinion, the changes made by Mr. Stewart did not require the work on the benches to be redone. She believed that the work had only been completed on one of the three benches when Mr. Stewart was asked to change the construction of the benches.

Analysis

[50] The Plaintiff bears the burden of establishing her claim on a balance of probabilities, as do the Defendants in establishing their counterclaim.

[51] This is not a case where I have any concerns with regard to witnesses fabricating evidence or attempting to mislead the Court with respect to the events that transpired. I believe that all the witnesses testified honestly with respect to events as they perceived them.

[52] As I stated earlier, this is a case in which Mr. Stewart should have been involved. It is clear that he was the contractor with the most experience and that he was the directing mind behind the project, at least from the contractor's point of view. While Ms. Brewster was involved in the original meetings between the parties and very involved in the Deck construction, Mr. Stewart was essentially an ever-present participant. It is also clear that he was the individual the Defendants primarily dealt with in coming to an agreement with respect to the work to be done and the price to be paid for that work. Mr. Stewart would have been able to provide evidence relevant to these proceedings that would no doubt have assisted me in the fact-finding process. He likely should have been a

Plaintiff, but there is nothing that prevented any of the parties calling him as a witness.

[53] I find that the re-adjusting of the documentation that was done by the Plaintiff in order to remove Mr. Stewart's name was not intended to mislead this Court, but to hopefully avoid any implications that could arise from Mr. Stewart illegally working in Canada.

[54] I do not accede to the Defendants' position that Ms. Brewster has no status as a Plaintiff to bring this action. She and Mr. Stewart were partners in the enterprise, albeit with Ms. Brewster taking instructions from Mr. Stewart and working under his direction. Although he could and should have been a Plaintiff, this does not detract from Ms. Brewster's ability to advance a claim.

[55] I am satisfied that the quality of the Deck work that was done under the terms of the agreement between the parties is not at issue, recognizing that the Defendants were not entirely satisfied with the aesthetics of the cedar work done to complete the Deck seating component.

[56] It is clear that the Plaintiff is entitled to be paid the contractual amount which the parties agreed to, subject to my findings regarding the staining of the Deck. As the Defendants have made payments totalling \$18,600.00 to date, this *prima facie* leaves a balance of \$9,322.00 owing from the Defendants to the Plaintiff.

[57] In addition, the Plaintiff is entitled to be paid for any work outside the

agreement that was agreed to or requested by the Defendants.

Deck Seating

[58] I find that the Plaintiff is not entitled to be compensated for changes to the Deck seating. The evidence of the Defendants was that they always intended to use the benches for storage and that Mr. Stewart knew this. I have no difficulty accepting the position of the Defendants. It is apparent from the photographs that the bench seating was constructed with either hinged tops or removable tops and there would be no reason for this design other than to ensure that they could be used for storage. I also accept the evidence of the Defendants that the cross pieces needed to be altered to allow for adequate storage, that they advised Mr. Stewart of this soon after he had started work on the benches, and that the work Mr. Stewart needed to do to ensure that storage was adequate was not particularly extensive or time-consuming.

Hot Tub Framing

[59] I also find that the Plaintiff is not entitled to be compensated for any changes required for the hot tub to be properly installed. I accept the evidence proffered by the Defendants that the hot tub that was installed had the same dimensions as the one originally ordered and that Mr. Stewart understood was to be installed. The Plaintiff has not satisfied me otherwise or that there was any additional work done that was over and above what Mr. Stewart would have expected to be done. While it is clear that there was some framing and support work completed, I am not satisfied that this was work that was over and above what was contemplated by the parties at the time they made the original

agreement for the Deck construction.

Change in Guttering System

[60] I find that the Plaintiff is not entitled to be compensated for the labour costs associated with the changes to the guttering system. There is nothing to contradict the evidence of the Defendants, which I accept, that Mr. Stewart stated that they would be charged for materials only for this work. As such, I allow the Plaintiff the amount of \$62.88 for gutter materials. I am not awarding the Plaintiff any monies for charges associated with the time spent picking up these materials.

Extra Gate for Under-deck Access

[61] This extra work was at the request of the Defendants. I am not satisfied, however, that the Plaintiff has established that it took 16 hours labour for this extra work. I will credit the Plaintiff for eight hours labour. I will do so at the rate of \$50.00 per hour for labour. I do so on the basis of the quote which indicates that 220 hours of labour made up \$11,000.00 of the construction price for the project. Therefore the Plaintiff is entitled to \$400.00 plus \$33.99 in material.

Building permit fee and preparation of drawings

[62] I find that the Plaintiff is not entitled to be compensated for this claim. There is no evidence that the Defendants agreed that this work was outside of that contemplated by the agreement between the parties.

Concrete Delivery Charge

[63] I find that the Plaintiff is not entitled to be compensated for this claim. The charge for delivery of concrete should properly have formed part of the estimate Mr. Stewart and the Plaintiff provided the Defendants and the agreement reached between them. The failure to do account for this cost, which was an oversight of the Plaintiff and Mr. Stewart, is not one the costs of which the Defendants should be required to bear.

Extra labour to complete deck project

[64] I find that the Plaintiff is not entitled to be compensated for this claim. I understand this to be a claim for additional labour hours to do the work contemplated under the original agreement between the parties. The fact that the project took longer to complete than the Plaintiff expected does not give rise to a claim for payment for the additional labour hours expended, in the absence of an express agreement by the Defendants to pay the Plaintiff more than originally agreed to. Such an express agreement does not exist and, as such, the Plaintiff simply has to abide by the terms agreed to. As a general principle, individuals agreeing to pay contractors a specified amount for a specified project, should be able to rely on the cost figure provided by the contractor as an accurate representation of what they will be required to pay. Work over and above that contemplated or exigent circumstances are factors that can change costs, however that is not what happened here with respect to the 135 hours claimed.

Deck Staining

[65] I decline to award the Defendants any money in compensation for the

Deck staining. While I do not doubt that the Defendants may have subjectively thought that staining was included, I am not satisfied that, objectively speaking, there is sufficient evidence to support the Defendants' position that the parties agreed that it was. I find no evidence on which I can conclude that either the Plaintiff or Mr. Stewart ever made such a representation to the Defendants, or that such a representation should be inferred from the evidence. It is clear from one of the earlier quotes provided to the Defendants that Deck staining was not included. The fact that the quote that was accepted is silent on the issue does not mean that there was an intention to include deck staining. The Defendants should have clarified this point when they entered into the agreement. This is not a case where there is a meaningful power imbalance between the Plaintiff and the Defendants, as the Defendants in this case were more than capable of ensuring that the contract had the terms that they wanted.

[66] The documentation from the WRCLA does not alter my opinion. It is clear that it is not necessary to finish the cedar decking, only that it is preferable. This was not documentation that was provided by the Defendants to the Plaintiff or Mr. Stewart prior to entering into the agreement.

CONCLUSION

[67] In conclusion, I find that the Plaintiff has failed to satisfy me of the bulk of her claim. I do, however, find that she is entitled to recover the \$9,322.00 owed at completion of the contract plus \$62.88 for gutter materials and \$433.99 for work and materials on the gate.

[68] Post Judgment interest is awarded pursuant to the *Judicature Act*, RSY 2002, c. 128.

[69] The Counterclaim is dismissed.

[70] I decline to award costs to either party.

COZENS C.J.T.C.