Citation: *Kmyta v. Ho,* 2012 YKSM 1

Date: 20120229
Docket: 10-S0139
Registry: Whitehorse

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

ALEX KMYTA

Plaintiff

v.

MAI HO

Defendant

Appearances:
James Tucker — Counsel for Plaintiff
Mai Ho — Appearing on her own behalf

REASONS FOR JUDGMENT

[1] Last month, a full two-day trial was required because of the failure by a contractor and a home owner to set out a clear agreement in writing. The plaintiff, who has been a renovation contractor since 1988, proceeded with a $27,620 job with nothing other than a poorly-drafted, incomplete contract proposal which he never even got the defendant to sign. It is quite likely that this matter would not have come to trial had both parties proceeded in a prudent manner right from the start.

[2] As a trial judge, I am not obliged to sort out every little detail, but rather to bring this avoidable situation to a just conclusion.

[3] The plaintiff contractor sues for breach of contract and seeks $10,053.34, which he says is the amount remaining unpaid for his work. The defendant counterclaims for $10,875, primarily based on the amount she had to pay R-Teck Construction to finish the project started by the plaintiff.

[4] The defendant and her witness, Evan Quinn, maintain that the contract proposal referred to above and filed as Exhibit 1, was not a document they were familiar with. Indeed, they claim they did not see this proposal, which is dated November 12, 2010, until these court proceedings began. They testified that they had been presented with a different document that was subsequently lost when they moved upstairs.

[5] The plaintiff testified that he met the defendant at her residence and discussed with her what she wanted done and looked at those areas of the house on which the work was to be done. Based on that, he prepared the contract proposal.

[6] This contract proposal was not signed by the defendant, contained no direct reference to which rooms were to be renovated, and no reference to a completion date. Materials to be supplied by the contractor were not listed.

[7] The proposal did state that the price of labour was $95.00 per hour for two men and the total number of hours required for the work was 240, or, put another way, the work required 480 man-hours at $47.50 per hour. This amounts to an anticipated labour charge of $22,800.00.

[8] There was no different hourly rate set for the contractor himself. Further, there was a statement on the proposal: “Any changes in the work and the price to be charged for same shall be made in writing”.

[9] In contrast, the defendant says the document she was presented with at the outset of her dealings with the plaintiff was a contract for $27,620. She advised him that this was too much for renovations to one bathroom and a new stairway. According to her, the plaintiff claimed that the quote was for two bathrooms, a stairway and a closet, and possibly more. The price of $27,620 was to include it all, and she had nothing to worry about.

[10] The defendant further claimed that this first proposal, subsequently lost, was vague and was prepared without the plaintiff even having seen the house.

[11] From the limited evidence, I conclude the following:

1. there was an agreement reached in November 2010 that the plaintiff would renovate two bathrooms and put a new stairway in the defendant’s house;
2. the agreement specified that the upstairs bathroom and stairway would be finished before Christmas 2010;
3. the work was to be done for a fixed price;
4. there was no provision for the defendant to get paid for his own work at the higher rate of $65.00 per hour;
5. despite the defendant’s evidence, there was no original quote, subsequently lost;
6. there was a loose understanding that any extra work of a minor nature would be included in the contract price;
7. the demolition work would be included in the contract price;

8. Evan Quinn would be on site and act as a middleman for purposes of most of the decision-making and communication between the plaintiff and defendant.

[12] Work commenced on November 17, 2010 and good progress was made in the early stages. The completion of the upstairs bathroom was delayed due to the anticipated late arrival of the vanity on December 14. Not knowing beforehand where the fixed shelving was located in the vanity prevented the plaintiff from completing essential preparatory work prior to the installation of the vanity. This concern was clearly communicated to the defendant.

[13] Nonetheless, the plaintiff assured the defendant as late as December 19 that the upstairs bathroom would mostly be completed by Christmas, although there appeared to be some concern about finishing the shower by then. It was well known that time was of the essence, as the defendant had company coming for Christmas.

[14] In the meantime, work was progressing on the stairway and the downstairs bathroom. The defendant was reluctant to have a mess downstairs as she had concerns about the dust and also having all the disruption. It was not the way she wanted to proceed with the renovations.

[15] The defendant was away at work during the day, only coming home for lunch when, generally, the men were away for lunch. It was Mr. Quinn who expressed concern to her that the men were not working full days, oftentimes not showing up until 9:30 am or so and leaving as early as 4:00 pm. Even though

Mr. Quinn did not keep accurate daily records of the workers' times, I am satisfied with his evidence overall as to the pattern of hours worked.

[16] I am not going to pore through every time sheet and determine whether the hours billed were hours actually worked, because I find that the loose agreement was for a fixed contract price, i.e. despite the hourly rate set out, the work was not to be paid for by the hour. Thus, other than expecting the upstairs bathroom and new stairway to be finished before Christmas, the defendant and Mr. Quinn ought not to have been overly concerned with the hours worked.

[17] As to the extra work claimed by the plaintiff, again, given the loose understanding described above, I find that the only legitimate claim for extra work is the laundry room. The lighting for the upstairs bathroom, the provision for heating in the entry way, and the new closet were not anticipated from the start and should have been discussed and put in writing. The claim for giving advice to Evan Quinn is disallowed.

[18] The work done for the laundry room was clearly outside the scope of the agreement. The defendant eventually admitted such. The plaintiff's claim for this extra work is substantially allowed.

[19] The defendant phoned the plaintiff on December 19, 2010 and asked him if all the work would be done before Christmas. Not satisfied with his answer that the upstairs bathroom, not including the shower, and the stairway would be completed, she terminated the contract (such as it was). The defendant

appeared somewhat surprised at this turn of events, picked up his equipment the next day and prepared the final invoice.

[20] The first invoice dated December 2, 2010, in the amount of $7220.00 plus GST was paid.

[21] The second invoice dated December 20, 2010, in the amount of $10,053.34, is the subject of this litigation. Both invoices were short on specifics. The defendant was billed in total $20,614.36; about $7000.00 less than the amount in the contract proposal, recognizing obviously that the work was not completed.

[22] The fact that the materials billed for in these two invoices exceeded the original estimate by $1,326.86 is not determinative of what the extras truly were. Rather, it points to a lack of precision and specifics in the original proposal.

[23] While the contract was terminated by the defendant, and not unreasonably so, given her concerns about Christmas and the perceived slow progress of work after December 1st, it necessitates an analysis of what the defendant should be paid for the work that was done.

[24] Counsel for the plaintiff presented *Smith v. Savard,* 2006 CanLII 808 (Ont. SC), a ruling by Master MacLeod which was upheld by the Divisional Court in November 2008.

[25] In *Smith v. Savard,* Master MacLeod stated at para 35,

> I have concluded that the owners were entitled to terminate the work at their discretion as there was never a true fixed price contract. Under

> those circumstances, the contractor is not entitled to claim lost profit on the portion of the work that was not completed and the owner is not entitled to claim for cost overruns resulting from new trades charging more than the original contractor would have. The contractor is entitled to be paid the value of the work done to the date of termination and the owners are entitled to set off against that, the reasonable cost of rectifying any defective workmanship and paying unpaid trades and suppliers…

[26] In determining the amount of work done by the plaintiff, I take into account the series of photographs provided by the defendant. There are depictions from before the work, at the time of termination, and after completion of the project by another contractor. These photographs assist in a general way.

[27] The defendant called Alan Sheardown as a witness. Mr. Sheardown did not know the plaintiff or defendant before. He has substantial experience as a contractor and has completed "hundreds of renovations of every kind". He possesses a certificate in carpentry.

[28] Mr. Sheardown prepared two documents which were entered as Exhibits 26 and 30. The former was prepared in late August 2011, after spending about 20 – 30 minutes at the defendant's residence. It was prepared to assist her in the pre-trial conference. Mr. Sheardown has admitted that this document was not entirely accurate and he should have spent more time on it.

[29] In preparation for trial, Mr. Sheardown prepared Exhibit 30 which sets out the number of hours he believes the job should have taken from start to termination. He readily admitted that much more time and attention was given to the preparation of this second document.

[30] I accept Mr. Sheardown's evidence that under half the work contracted for was completed as of December 19, 2010. It is difficult, if not impossible, to precisely determine the percentage of work that was completed on this project at that time but I am prepared to rule that 45% is a reasonable figure. Thus, the plaintiff's claim for labour is accepted in the amount of $10,260 (45% of $22,800).

[31] In addition, although the work on the laundry was outside the original understanding between the parties, the plaintiff's claim for materials is allowed and his claim of 6.5 hours labour is accepted, but not at the rate of $65 per hour which was never discussed, let alone agreed to. Rather the labour charge will be awarded at the rate of $47.50 per hour. The laundry comes in at $189.91 for materials and $403.75 for labour for a total of $593.66.

[32] The issues with the jackhammer, the Home Hardware bill and the dumping fees have been satisfactorily explained. There is an acknowledged credit due to the defendant for material picked up by David Kmyta and the amount of $59.99 plus GST of $3.00 will be credited to her.

[33] The concerns about workers' productivity, smoking breaks, and accuracy of time sheets are not particularly relevant, as the key issue is the fair value of the work actually done, remembering that there was an, albeit loose, fixed price arrangement.

[34] There is no evidence of defective workmanship nor of significant errors in the billing for materials.

[35] This regrettable situation which has caused much stress to the parties arose in large part because there was not a clear meeting of the minds on specific details of the contract, and because nothing meaningful was put in writing and duly signed. I am not able, nor am I willing, to conclude that either party was acting in a deceitful manner towards one another.

[36] Indeed, even when there are extensive discussions, a written contract properly signed, a further additional proposal not signed, a congratulatory card presented by the renovator, dinner, wine, etc., major problems can still arise: *Bonilla v. Ciurariu*, 2008 BCSC 925.

[37] In Canadian jurisprudence there are numerous instances of renovation contracts breaking down and leading to litigation. A very recent example is revealed in *Wiebe v. Braun*, 2011 MBQB 157.

[38] I find that, here, more should have been done, particularly by the plaintiff who has been in this business for over 20 years, to start things off right with a reasonably detailed and accurately written proposal, followed by a subsequent signed written contract. The plaintiff should have never started this project without such documentation; indeed, the defendant also should have been wise enough not to have allowed work to start in the absence of a written and signed contract.

[39] In conclusion, the plaintiff's case is only partially successful. He is awarded judgment in the amount of $10,260.00 (45% of labour billed) plus

$593.66 (laundry) less $7,220.00 (labour already paid) less credit of $59.99 for a total of $3,573.67 plus 5% GST, bringing the final figure to $3,752.35.

[40] The counterclaim is dismissed.

[41] There will be no order as to costs.

LUTHER T.C.J.