

Citation: *Ceiling T' Floor Home Décor Ltd. V. Doll*, 2009 YKSM 7 Date: 20090605
Docket: 08-S0066
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Judge Faulkner

Ceiling T' Floor Home Décor Ltd.

Plaintiff
(Defendant by counterclaim)

and

Carla Doll

Defendant
(Plaintiff by counterclaim)

Appearances:
Glenda Murrin
Anna Pugh

Counsel for the Plaintiff
Counsel for the Defendant

DECISION

[1] The defendant, (plaintiff by counterclaim) Carla Doll is the operator of “Doll It Up”, a home design and renovation business. In September 2005, Ms. Doll thought that she had scored a coup. Her fledgling enterprise received a contract to remodel the lobby of the Westmark Whitehorse Hotel. This was, by far, her biggest and most important job to date. However, her dream job soon turned into a bit of a nightmare.

[2] One aspect of the hotel renovation was replacing the lobby floor. Ms. Doll decided to approach Ron Davy about the flooring. Mr. Davy and his wife Anne Marie Yahn operated the plaintiff corporation Ceiling T' Floor Home Décor Ltd. Amongst other things, they sold and installed tile flooring.

[3] Mr. Davy had done some flooring work for Ms. Doll's husband and had also installed some tile in the Doll's residence. He appeared to Ms. Doll to be a competent flooring contractor and someone she could trust. She asked Mr. Davy if he would be interested in taking on the Westmark job and he indicated that he would.

[4] Ms. Doll had seen a number of slate floors and liked the look of them, so she asked Mr. Davy if he could supply and install slate flooring. Mr. Davy replied that he could. Ultimately, Ms. Doll chose a slate tile from a sample board in Ceiling T' Floor's showroom.

[5] I am satisfied that Ms. Doll asked Mr. Davy if this tile would be suitable for the hotel lobby and that he replied that it would. I am further satisfied that Ms. Doll, a relative novice in the construction business, relied on Mr. Davy to provide advice and to select a suitable tile for the intended application.

[6] At Ms. Doll's request, a sample box of the tile was obtained. Ms. Doll examined the tile and showed it to the management of the hotel. Ultimately, it was agreed that Mr. Davy's company would supply and install the tile for a total price of \$ 59,885.62.

[7] At no time did Mr. Davy inform Ms. Doll that the chosen tile would produce a very rough and uneven floor and I am satisfied that the extent of this problem was not obvious from a viewing of the uninstalled sample tiles.

[8] The tile was installed in January of 2006. Mr. Davy did the work himself. Almost immediately after the installation started, Ms. Doll became concerned because the floor was very uneven, the tiles were very rough and there were differences in height of half an inch or more between adjacent tiles. It also

appeared that some of the tiles were installed upside down and that some were cracking.

[9] Ms. Doll discussed the matter with Mr. Davy. She said the floor looked beautiful but that she was concerned about the upside down and cracking tiles as well as by the uneven nature of the floor. Initially, Mr. Davy agreed to fix the mislaid and cracked tiles. Later, he said that he would attend to these matters at the end of the job. As to the uneven nature of the floor, Mr. Day said that it would be too much work to attempt to match tile heights as the floor was laid. He told Ms. Doll that the high sides and corners would flake off with use and everything would be fine.

[10] Ms. Doll did not order the work stopped, but let Mr. Davy carry on because she trusted him and believed his assurances that the discrepancies would be remedied. However, when the last of the tile was laid, Mr. Davy packed up to leave. Ms. Doll confronted Mr. Davy saying that he couldn't leave the floor like this and reminded Mr. Davy of his promises to change out the problem tiles. Mr. Davy replied that he'd done what he was going to do and needed to move on.

[11] Ms. Doll was rightly concerned that the floor, as laid, constituted a tripping hazard and that she and the hotel were sure to face lawsuits when a hotel guest fell and suffered serious injury. She went to Mr. Davy and told him that she wasn't going to pay his final invoice on the amount of \$ 21,753.34 unless he rectified the problems. Initially, Mr. Davy offered to order replacement flooring at cost. However, he also stated that, unless his invoice was paid, he was unlikely to be in business long enough to do anything. Discussions regarding rectification ended soon thereafter when Mr. Davy refused to do any further work.

[12] Meanwhile, Ms. Doll was faced with a serious situation. The hotel, which had been closed during the renovations, had reopened. The floor appeared very unsafe and the hotel's busy season was fast approaching. She decided,

properly, in my view, that the floor would have to be removed and replaced. Ultimately, she engaged a flooring contractor in Calgary, Alberta. The slate floor was torn up and replaced with a smooth rubberized product at a cost in excess of \$47,000. This expense was borne by Ms. Doll.

[13] Not having been paid its final invoice, Ceiling T' Floor Home Decor Ltd. sued Ms Doll; she, in turn, counterclaimed for the cost of replacing the floor. It should be noted that the action by the plaintiff has been hampered by the intervening and unfortunate death of Mr. Davy. The action is pursued by Ms. Yahn, his widow.

[14] The plaintiff virtually conceded during trial that the floor was unsafe because of the uneven nature of the tiles but says that the plaintiff simply installed the product chosen by the defendant, who thus bears the responsibility for the problem.

[15] As previously stated, I find that Ms. Doll relied on Mr. Davy to supply a suitable tile. It is true that Ms. Doll chose the tile, but only in the sense that she liked the style and the colour. She had no idea that the resulting floor would be so uneven as to be hazardous. Mr. Davy, who should have known, did nothing to enlighten the defendant.

[16] Ms. Yahn, in her testimony, acknowledged that the floor may have been unsafe because of the unevenness of the tile and conceded that she never discussed with the defendant the problems the uneven surface could cause. Ms. Yahn also acknowledged that the defendant did not appear to be particularly knowledgeable about construction matters.

[17] Even if one were to assume that the plaintiff bore no responsibility for the selection of the tile, I find that the tile was not installed in a workmanlike manner

– as the plaintiff impliedly undertook to do. This failure greatly exacerbated the unevenness of the floor, and thus, the potential for tripping.

[18] In this regard, the plaintiff called two flooring installers as witnesses. Both opined that Mr. Davy was a competent flooring installer. Both had previously worked for Mr. Davy, but neither man was involved in the Westmark job. One, David Walden, said that he viewed the floor at some point during installation and it looked fine to him. The other, Robert Balla, did not specifically recall seeing the floor. No attempt was made to qualify either man as an expert.

[19] I prefer the evidence of the defence witness Mihaly (Mike) Ambrus. Mr. Ambrus was qualified as an expert in flooring installation. Moreover, he was the man hired to remove and replace the floor Mr. Davy had installed and had ample opportunity to inspect the work. Mr. Ambrus found numerous defects in the installation. A number of the tiles were already loose and a number had cracked. Further, it appeared that the tiles were not properly bonded to the sub floor as sixty to seventy percent of the tiles came out as whole tiles. Properly bonded tiles would shatter when you tried to remove them. The lack of bonding likely resulted from laying tiles with the mortar already too dry, insufficient efforts to bed the tiles in the mortar and/or the failure to use mesh between the tile and the sub floor.

[20] Mr. Ambrus also noted what he first took to be heaves in the floor. These proved to be areas where excess mortar had been used. Most seriously, there was no evidence that any attempt had been made to arrange or install the tiles so as to minimize the height differences between tiles. This would have included matching tiles for height, turning the tiles so that the high sides were parallel with, and not perpendicular to, the flow of traffic, or “back-buttering” tiles with extra mortar to even up thinner tiles with thicker ones. As well, the grouting appeared substandard, most likely because it was too watery when applied.

[21] Mr. Ambrus also testified that the slate used was ungauged and varied considerably in thickness. He would not have used such tile in a high traffic area because it is too uneven. Flooring installed in an area like the Westmark lobby should not have height differences in excess of 2 mm. It will be recalled that the Westmark floor had height differences of a half-inch or more – or over 12 mm.

[22] It follows that the plaintiff's claim must fail since it breached implied terms of the contract by providing a product unsuitable for the defendant's use and failing to install the product in a workmanlike manner. The damage thereby caused exceeds the amount of the invoice.

[23] It remains to consider the counterclaim. I am satisfied that the defendant acted prudently in ordering the slate floor to be torn up and new flooring installed. The floor was unsafe, and no action short of replacement would have reduced the risk to an acceptable level.

[24] The quantum of damages may be easily calculated. Ms. Doll spent nearly \$50,000 replacing the floor and on various incidental expenses. Even after subtracting the \$21,000 not paid to Ceiling T' Floor, there remains a sum in excess of \$25,000, which is the limit of the court's monetary jurisdiction.

[25] I allow the counterclaim in the amount of \$25,000. It may be cold comfort to Ms. Doll as Ceiling T' Floor Home Décor Ltd. has ceased business and appears to have no assets. The defendant (plaintiff by counterclaim) will be entitled to her costs. If counsel cannot agree on the issue, costs may be further spoken to.

Faulkner T.C.J.