Citation: *Ciprani v. Morris*, 2016 YKSM 5

Date: 20160713
Docket: 15-S0006
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Chisholm

ROBERTO CIPRANI,
cob as ROBERTO CIPRANI GENERAL CONTRACTING

Plaintiff

v.

LARRY MORRIS

Defendant

Appearances:
Claire E. Anderson — Counsel for the Plaintiff
Anna Starks-Jacob — Counsel for the Defendant

REASONS FOR JUDGMENT

Introduction

[1] The Plaintiff performed retrofitting and renovation work on the mobile home of the Defendant (the 'Project'). Despite the fact that the parties had entered into a contract regarding this work, their relationship deteriorated before the work was completed.

[2] The Plaintiff sues the Defendant for $19,580.07 in unpaid invoices. The Defendant denies that any money is owing to the Plaintiff, and counterclaims in the amount of $1002.04 for work done to remedy deficiencies.

Relevant Facts

Estimates & Contracts

[3] The Plaintiff produced written estimates for the Project prior to the signing of a contract. The Plaintiff provided an estimate to the Defendant dated May 29, 2014, setting out an amount of $30,472.05, including taxes. On May 30, 2014, the Plaintiff submitted an estimate dated May 29, 2014 to the Yukon Housing Association, from whom the Defendant was seeking financing, in the amount of $31,980.59. The Plaintiff provided a final estimate to the Defendant, dated July 3, 2014, which revised the total amount to $37,791.43, including taxes.

[4] The Plaintiff and the Defendant entered into a written Home Improvement Contract (the 'Contract') on July 11, 2014. It stipulates that work should commence on or before July 14, 2014. The Contract describes the work to be completed:

> Removal of mobile home roof and replacement of new roof trusses, insulation, removal of siding, replacement of siding, skirting and disposal.

[5] The Contract does not include a Project price. It does state that the Defendant would make payment by way of 'Yukon Housing Grant'.

[6] The Yukon Housing Association ('Yukon Housing') had approved the Defendant for the maximum grant amount of $35,000.

[7] Clause 11 of the Contract deals with changes to the Contract: It is set out as follows:

> 11. Change Orders, Amendments, and Modifications
>
> Any subsequent amendment or modification, which alters this Contract, and which is signed or initialled by Contractor and Owner, shall be deemed a part of this Contract and shall be controlling in case of conflict with any other provision Contract *(sic).*

[8] Clause 13 of the Contract deals with additions and modifications. It reads:

> 13. Extra Work and Changes
>
> If Owner, Construction Lender, or any public body or inspector directs any modifications or addition to the work covered by this Contract, the charge for that extra work shall be determined in advance and the cost shall be added to the Contract price in addition to Contractor's usual fee for overhead and profit. Owner shall make payments for all extra work as that work progresses, concurrently with regularly scheduled payments. Contractor shall do no extra work without the prior written authorization of the Owner. Any authorization for extra work shall show the agreed terms and shall be approved and signed by both parties.

Robert Ciprani (the Plaintiff)

[9] Mr. Ciprani is a general contractor who has been working in the construction industry since 1996.

[10] Mr. Ciprani stated he had not visited the home before providing the estimates. Before delivering the final estimate to the Defendant, he had met with Roger Hanberg from Yukon Housing and had viewed photographs of the home, shown to him by Mr. Hanberg.

[11] The Plaintiff commenced work on the home soon after the signing of the Contract. After removing the skirting around the mobile home, the Plaintiff encountered problems with the cribbing (i.e. foundation) underneath. According to the Plaintiff, extensive work had to be done with respect to the cribbing as the trailer was not level and some of the timber was rotten.

[12] The Plaintiff testified that although he knew that the Defendant was dealing with Yukon Housing, he was not aware of the maximum grant amount provided by Yukon Housing. He had dealt with six prior renovations in which Yukon Housing was involved.

[13] The Plaintiff obtained a building permit from the City of Whitehorse for this Project on August 7, 2014. By this point, Mr. Ciprani testified to being aware of the unanticipated work to be completed underneath the trailer. In addition to the cribbing work, he ultimately upgraded the vapour barrier and insulation underneath the trailer.

[14] During his testimony, Mr. Ciprani expressed frustration at what he perceived as the changing nature of the work during this Project. He stated that he was attempting to stay under or within budget, but that the scope of the work was continually changing.

[15] According to Mr. Ciprani, the Defendant agreed to some changes in the work. For example, the Defendant accepted Mr. Ciprani's suggestion that a metal roof be installed, as opposed to an asphalt roof. He explained to the Defendant that although the material would be more expensive, it would take less

time to complete the roof.

[16] Regarding other issues, for example, the thickness of the insulation, the Defendant was less amenable to changes to the initial plan.

[17] The invoices for which the Plaintiff did not receive full payment are dated October 26, 2014 and November 30, 2014, respectively. The amount of the October 26 invoice is $7350, but reflects a $1500 payment by the Defendant, leaving an outstanding balance of $5850. The invoice outlines a $5500 charge for labour for the installation of ridged foam and for work to make the windows flush to this insulation. The $1500 charge is for work to remedy a rot issue around the front door.

[18] The amount of the November 30, 2014 invoice is $13,730.07, including a $9000 labour charge for work with respect to the roof. The remaining amount of $4730.07 is for materials.

[19] The total outstanding amount, according to the Plaintiff, is $19,580.07.

Larry Morris (the Defendant)

[20] Mr. Morris testified that he hired the Plaintiff in the summer of 2014 to upgrade his older model mobile home. He has no experience in the area of construction. He indicated that Yukon Housing had pre-authorized him for a $35,000 grant, the full amount of which he was to repay.

[21] He testified that when he met with the Plaintiff, they discussed a complete retrofit of the trailer from the ground up, including: levelling, insulating

the walls and roof, as well as a new roof. He agreed to pay the Yukon Housing grant amount to the Plaintiff.

[22] The Defendant testified that he did not expect to pay any more than the value of the maximum Yukon Housing grant of $35,000. He believed the cribbing work was included in the Plaintiff's estimate. When discussing 'extras' during this Project, the Plaintiff indicated to him that they could work it into the Contract. The work was to be completed within 40 days.

[23] The Defendant paid three invoices with funds provided from Yukon Housing. The three invoices totalled close to $23,000. He provided the invoices to Yukon Housing for its approval. Yukon Housing subsequently provided him with cheques which he cashed, and thereafter used the funds to pay the Plaintiff. The Defendant also paid a further $1500, in partial payment of a fourth invoice. This money was for work done to repair rot around one of the doors. This was not money that the Defendant obtained from Yukon Housing. The Defendant made this partial payment of the fourth invoice, as Yukon Housing would not disburse any further money, based on its assessment that the Project had not progressed since the third invoice.

[24] Some changes to the Project occurred as the work progressed. For example, the roof was to be asphalt, however the Plaintiff advised him at some point that a tin roof would be less expensive. The Defendant agreed to the change. The Defendant indicated that he and the Plaintiff 'probably discussed' the cribbing work. He understood all the work could be completed within budget.

Breakdown of the Relationship

[25] Neither the timing nor the manner in which the relationship between the Plaintiff and Defendant broke down is in dispute.

[26] The Plaintiff ceased work towards the end of November 2014, after receiving only partial payment for the fourth invoice and no payment for the fifth invoice.

[27] The Defendant sent a letter to the Plaintiff on January 21, 2015 pointing out that the Plaintiff had not done any work on his mobile home since the end of November 2014. He noted that the Plaintiff had been paid for 60% of the work and would be paid the remaining 40% upon completion. He asked that the work be completed by February 28, 2015. He asked that the Plaintiff advise if he would be fulfilling the July 11, 2014 contract which had stipulated a much shorter timeline; otherwise he would hire another contractor.

[28] The Plaintiff replied by letter on February 23, 2015, simply stating that he would return to the work site as requested. He did not do so until April 2015.

[29] In April 2015, the Defendant received assistance from Dale Best and other friends to complete the Project, including remedying deficiencies that affected part of the roof, and which the City inspector had brought to the Defendant's attention.

Roger Hanberg

[30] Mr. Hanberg is a technical officer with Yukon Housing Corporation. He is a journeyman carpenter and has many years in the building trade. He was working in his professional capacity during the course of these events. He was called by the Defendant to testify.

[31] He explained that the first step of the home owner grant process with Yukon Housing is an inspection of the property. After the home is assessed, Mr. Hanberg makes a recommendation to the Finance department.

[32] If a project is ultimately approved, once work starts on the home, progressive payments are made as work is completed. A technical officer assesses the work done, prior to money being released.

[33] The maximum grant amount at the time was $35,000.

[34] Yukon Housing approved a $35,000 grant for the Defendant in 2014. The Plaintiff had supplied two estimates for this work, the first being $31,981. Mr. Hanberg deemed the estimate to be insufficient in terms of detail. Yukon Housing later became aware of a second estimate in the amount of $37,791.43.

[35] By October 7, 2014, Yukon Housing had released $22,846.24 of the $35,000, based on the progress of the work. Mr. Hanberg visited the site on October 27, 2014 after receiving a further invoice. He noted the Project had not advanced meaningfully since the last release of funds. Outstanding work included the installation of siding, as well as the completion of the roof, including

some gables, fascia and soffits.

[36] Mr. Hanberg further inspected the site on November 21, 2014. He was of the opinion that little progress had been made and that the incomplete work was open to the weather. He was concerned that this could lead to the entry of rain, snow, and small animals, such as squirrels and birds into the attic.

[37] Mr. Hanberg estimated that 60% of the Project had been completed. As a result, Yukon Housing would not release further funds for payment of the Plaintiff's fourth and fifth invoices.

Mark Vigneau

[38] Mr. Vigneau has been a red seal journeyman carpenter since 2000. Although he still works in the construction industry at times, he does have another unrelated full-time job. He was called by the Plaintiff to testify.

[39] He lives in the Defendant's neighbourhood and would visit the work site a few times a week. He knows both Mr. Ciprani and Mr. Morris. According to what he observed, approximately 10 to 12% of the job was left to be completed when the relationship between the Plaintiff and the Defendant broke down.

[40] His involvement in the Project in question was limited to visiting the work site and observing.

Peter Craft

[41] Mr. Craft is a building inspector with the City of Whitehorse. He was called by the Defendant to testify.

[42] He visited the residence of the Defendant in April 2015 to inspect the work being performed. He indicated that he required a couple of issues to be resolved before the work could pass inspection. Firstly, he wanted roof vents installed to allow for proper ventilation of the area underneath the roof. He also required that a tar paper membrane be placed underneath the new roofing on the addition to the house, in order to prevent condensation leaking into the insulation below.

[43] On April 29, 2015, he returned to assess the deficiencies. As they had been remedied, he approved inspection.

Dale Best

[44] Dale Best is a friend of the Defendant. He has experience in the construction industry. He and other friends of the Defendant assisted in finishing the Project in April 2015.

[45] Much of the labour required to complete the Project was volunteered by the Defendant's friends. He estimated that in addition to the deficiency work noted by the inspector, 300 hours were required to complete the Project. A number of the Defendant's friends assisted with this work.

[46] Mr. Best only charged the Defendant for labour and materials to

remedy the deficiencies noted by Mr. Craft, the building inspector with whom they were dealing. The amount of labour charged was $700 (14 hours at $50 an hour). The cost of the materials was $302.04.

[47] The rest of the outstanding work (i.e. wrapping the house, siding, and roof work) was done by a work party over the course of two weekends. The Defendant paid for the materials required to complete the Project, including the siding, but his friends did not charge him for labour.

Position of the parties

[48] The Plaintiff takes the position that estimates provided by the Plaintiff were only with respect to a specified scope of work: namely, re-roofing, retrofitting; re-siding; insulating and skirting. The scope of work expanded once the Plaintiff was on site and realized that significant cribbing work had to be undertaken.

[49] The Plaintiff states that he is not bound by the estimate given on July 3, 2014 as the scope of the work changed significantly over time. The cribbing work and the rot work around the door were hidden defects that he was unaware of at the time of making the estimate.

[50] The Plaintiff argues that the initial contract did not address this extra work. The Plaintiff submits that the Defendant's payment of the invoices for the cribbing work confirms a verbal agreement between the parties for this extra work.

[51] In response to the Counterclaim, the Plaintiff submits that he was not permitted to remedy the deficiencies noted by the Defendant.

[52] The Defendant argues that this was a fixed price contract worth $35,000, based on the reference in the Contract to the Yukon Housing grant. The Defendant did not consent to additional charges. The Plaintiff should only be entitled to 60% of the contract price, as that was the percentage of work completed when the Plaintiff ceased work.

[53] The Defendant says he received assurances all work would be within the Contract price. He submits that the Contract provided that extra work was to be approved in advance in writing. The lack of approval for the cribbing work supports the view that this had not been deemed to be extra work as per the Contract.

[54] The Defendant also argues that the Plaintiff overbilled, especially with respect to the cost of labour.

Analysis

Nature of the building contract

[55] The first question to be addressed is the nature of the building contract with respect to value and payment.

[56] In terms of the Contract's value, I am unable to accept the Defendant's contention that the Contract entered into is for the maximum Yukon Housing grant of $35,000. I appreciate that the Contract does stipulate payment

by way of a Yukon Housing grant, however it does not stipulate the overall cost of the Project. There is insufficient evidence to establish a cap of $35,000, especially when the July 3, 2014 estimate was for $37,791.43.

[57] The next question to be answered is whether the Contract between the parties incorporated the July 3, 2014 estimate.

[58] Estimates may have a contractual effect depending on the circumstances. The law was summarized in *Golder Associates Ltd. v. Mill Creek Developments Ltd.*, 2004 BCSC 665:

> [20] While an estimate for the cost of services to be provided is not a guarantee or warranty at law, it may have contractual effect, in essence setting a limit beyond which fees may not go: see *Price v. Roberts & Muir* (1987), 19 B.C.L.R. (2d) 375, [1987] B.C.J. No. 2279 (B.C.C.A.). In that case, involving a lawyer's estimate to the client, Madam Justice McLachlin, as she then was, for the Court, limited the circumstances in which such a finding may be made, at 378:
>
> > Depending on the circumstances, a lawyer may not be bound by an estimate, if for example, he or she does work outside the estimate at the request of the client, or if the client by his or her conduct unduly increases the amount of the work, or if unforeseen circumstances add a new and unexpected dimension to the work.
>
> [21] In similar vein, the defendants cited *Kidd v. Mississauga Hydro-Electric Commission et al.* (1979), 97 D.L.R. (3d) 535, 23 O.R. (2d) 385 (H.C.J.), where the Court stated at 540:
>
> > ... I do not, of course, mean to say that all estimates are necessarily binding. Clearly they are not, and the plaintiff here might well have been allowed, because of the vagueness of his estimate, a substantial margin of error. But where the eventual figure is almost three times the original estimate, it is my view that the estimator should be held to that original figure.
>
> [22] Mitigating in favour of an estimate having binding effect is the

> principle that although estimates are necessarily somewhat imprecise, persons in the business of providing work preceded by estimates should be able to do so with some accuracy: see *Kidd*, supra at 540.
>
> [23] The plaintiff cited the recent Alberta case of *Husky Oil Operations Ltd. v. Ledcor Industries Ltd.*, 2003 ABQB 751, [2003] A.J. No. 1111. In that case, the Court examined the principles underlying the question of whether an estimate is binding, and stated at para. 36: "It is clear the court has to look at the circumstances in which an estimate is provided, the positions of the two parties, the knowledge of the party providing the estimate and whether it was relied upon by the party requesting it."
>
> [24] In sum, the Court must determine if the estimates were made in circumstances which imbue them with contractual effect and, if so, what margin of error may limit the extent to which the estimates are binding.

[59] If the estimate is found to have contractual effect, the Contract would fall into the category of a fixed price or lump sum contract.

[60] If the estimate does not have contractual effect, it may properly be labeled a cost plus contract. Heintzman and Goldsmith on *Canadian Building Contracts* 5th ed. set out the following definition of a cost-plus contract:

> Under a cost plus contract the owner agrees to pay to the contractor the actual direct costs of the contractor performing the work plus a stipulated fee, which is usually expressed as a percentage of the cost, for overhead and profit.

[61] The Court in *Strait Construction Ltd. v. Odar*, 2006 BCSC 690, set out a number of factors to consider in determining the nature of a building contract.

> [17] Much of the case law in this area addresses the situation where the final costs of construction are higher than the builder's estimate and the owner claims that the contract was a fixed price contract, while the contractor claims the contract was a cost plus contract.

[18] I have reviewed the cases on this issue and have extracted the following factors which have been considered by the courts in determining the nature of a building contract:

> 1. Did the agreement provide for a percentage of the project cost as a fee to the contractor?
>
> See *Sawchuk v. James* (1992), 5 C.L.R. (2d) 66, [1992] B.C.J. No. 2263 (S.C.).
>
> 2. Was price of overriding importance for the owner and was that communicated to the contractor?
>
> See *Hugh's Contracting Ltd. v. Reid*, [1998] B.C.J. No. 73 (S.C.); *Medallion Investments Inc. v. Close*, [1998] B.C.J. No. 1129 (S.C.); *Cherry Homes Ltd. v. Perler* (2004), 32 C.L.R. (3d) 8, 2004 BCSC 28 (S.C.).
>
> 3. Was an estimate provided and did the owner rely on the estimate?
>
> See *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.* (1998), 39 C.L.R. (2d) 205, [1998] B.C.J. No. 1123 (S.C.).
>
> 4. Did the owner require the contractor to design a project at a specified cost or seek assurances as to what the project would cost?
>
> See *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.*, *supra*.
>
> 5. Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done?
>
> See *Sawchuk v. James, supra; Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd.*, supra; *Hugh's Contracting Ltd. v. Reid*, *supra*.
>
> 6. Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate?
>
> See *Sawchuk v. James*, *supra*.
>
> 7. Did the contractor provide the owner with information regarding rates for labour and equipment rental etc.?
>
> See *Hugh's Contracting Ltd. v. Reid, supra*; *Greenhill Properties (1977) Ltd. v. Sandcastle Recreation Centre Ltd., supra.*

[62] In the matter before me, the above-mentioned factors which support a fixed price contract are:

- there was no agreement that a percentage of the Contract price would be payable to the Plaintiff;
- there is evidence, which I accept, that the overall price was of significant importance to the Defendant, and this was communicated to the Plaintiff;
- the Defendant, who was inexperienced in the construction domain, relied on the July 3, 2014 estimate provided by the Plaintiff; it was in the vicinity of the amount of the grant he was to receive from Yukon Housing;
- the Plaintiff acknowledged that discussions took place with the Defendant with respect to the Project remaining on budget – indeed, he conveyed to the Defendant that he was making every effort to stay within budget;
- there is no evidence that the Plaintiff clearly stated he was not assuming any of the risk that the final price would exceed the estimate;
- the Plaintiff never provided any rates for labour, aside from lump sum figures included in the invoices. These lump sum figures did not provide a hint as to how they were arrived at. In fact, even after hearing all the Plaintiff's evidence, it is still unclear as to how labour charges were calculated.

[63] The factor which points away from a fixed price Contract:

- The Plaintiff's periodic invoices point away from the estimate having contractual effect.

[64] Having weighed these factors, I find that the July 3, 2014 estimate was intended to have contractual effect. The only factor suggesting the estimate was not to have contractual effect – the periodic billing – is not sufficient to

override the great majority of the factors pointing to a fixed price contract.

[65] As stated in para 24 of *Golder*, even where an estimate is deemed to have a contractual effect, courts should determine 'what margin of error may limit the extent to which the estimates are binding'.

[66] The margin may vary from case to case (in *Dunn v. Vicars,* 2007 BCSC 1598, a 20% increase to the estimate was awarded; in *Sea-Bright Builders Inc. v. Graves,* 2016 BCSC 709, a 5% increase; and in *L. Merrick Developments Ltd. v. Fidler,* 2008 BCPC 199, a 10% increase).

[67] In this case, the Project may be described as reasonably straightforward. The Plaintiff had submitted more than one estimate before the Contract was signed. Although the Plaintiff was faced with some unexpected work, he believed once he was fully familiar with all the work to be done that he could comply with the estimate. This is similar to the *Merrick Developments* case where the contractor had 'familiarity with the project'. I recognize, as indicated in *Golder*, that there is a certain imprecision to estimates. I find that an appropriate margin of error in this case is 10%.

[68] I therefore find that the July 3, 2014 estimate should be increased by $3779 (i.e. 37,791.43 x 10%) for a total amount of $41,570.43.

Was the scope of the Contract expanded?

[69] The Contract briefly described the improvement work to be done in this Project. However, once on site, it became apparent to the Plaintiff that

cribbing problems would have to be rectified. This should have been apparent at the time of the July 3, 2014 estimate, however, inexplicably, the Plaintiff provided the estimate without having ever visited the home.

[70] The Contract was subject, of course, to additions or deletions to the work to which both parties had agreed.

[71] The Plaintiff submits that because of the cribbing issues, the scope of the Contract changed significantly from the July 3, 2014 estimate. The Plaintiff argues that the Defendant was aware of the expanded scope of the Contract and verbally agreed to the additional work.

[72] Counsel for the Defendant cross-examined Mr. Ciprani regarding discussions he had with Mr. Morris about this work.

> Q. Did you ever discuss with Mr. Morris any additional costs, like how much this additional work would cost?
>
> A. To be exact, I didn't know myself. The more you move around this trailer, the more costs, the more things were going wrong…
>
> Q. And did you ever assure Mr. Morris that everything would be within the budget?
>
> A. I tried, I tried to assure that we would meet this budget. I said that if we downgrade this rigid foam we can meet this budget…

[73] This exchange accords with the Defendant's recollection that he was continually being told that the Project was still within budget. There is also some support for the Defendant's testimony in this regard, namely the Plaintiff's application for a building permit on August 7, 2014.

[74] By August 7, the Plaintiff had already been working on the Project for some time, and he admitted in his testimony that he knew the extent of unanticipated issues. He, nonetheless, indicated when obtaining the building permit that the value of the work was $36,000. The work description includes cribbing work, which had not been included in the Contract. The Plaintiff testified he still believed at that point that he was within the estimated price.

[75] Although the Plaintiff suggested in his testimony that the scope of the Project was continually changing through no fault of his own, it was he who approached the Defendant regarding possible changes. For example, he convinced the Defendant that it would be beneficial to alter the roofing material, so that it could be installed more quickly. Also, I believe the Defendant when he says that the Plaintiff approached him regarding a change to the colour of the siding, because the Plaintiff could buy another colour at a cheaper price. Again, the Defendant agreed to this change, although the Plaintiff ceased work before this purchase was made. It was ultimately the Defendant who bought the siding in April 2015 in order that his friends could finish the Project.

[76] The Plaintiff testified that at some point, he approached the Defendant regarding a reduction in the thickness of the insulation to be used, in order to stay within budget. If this is accurate – as the Defendant has no recollection of such a conversation – it highlights the Plaintiff's state of disorganization. These efforts by the Plaintiff to make Project changes also lend credence to the Defendant's evidence that the Plaintiff's stated goal had always been to stay within the estimated cost.

[77] Despite the fact that the Defendant paid invoices dealing with the cribbing work, I find that the Plaintiff's representations to the Defendant preclude the Plaintiff from now seeking payment for this work as an 'extra'.

[78] The Plaintiff, at no time, complied with clauses 11 and 13 of the Contract which stipulated that the terms for any extra work would be approved and signed by both parties. I find that, even though the scope of the work changed somewhat, the Plaintiff took the view that he could nevertheless complete the Project within budget and he expressed this sentiment to the Defendant.[1]

[79] I do not accede to the Plaintiff's argument that there was a verbal agreement between the parties with respect to the additional work. There is no evidence to support this argument.

[80] In my view, in a situation such as this, there is an onus on the contractor to clearly set out the specifics of any extra work and the estimated cost. The Plaintiff did not meet this standard.

What percentage of the Project was completed when the Plaintiff stopped work?

[81] The Plaintiff suggests that there was little work left to be done by the end of November 2014. He finds support in this regard from Mr. Vigneau. On the other hand, the Defendant points to the amount of work done by Mr. Best and

[1] However, it should be pointed out that by the time he ceased work at the end of November 2014, the total amount charged by the Plaintiff was just under $44,000, approximately $6000 more than the July 3, 2014 estimate. The Project was not complete.

others to complete the Project, as well as the 60% completion figure provided by Yukon Housing, to demonstrate that significant work was left to be done.

[82] Mr. Vigneau did believe that 88 to 90% of the Project had been completed by the Plaintiff. However, he was not directly involved in the Project and only dropped by the property from time to time.

[83] It should be noted that when confronted with the 60% completion figure in the Defendant's letter of January 21, 2015, the Plaintiff never disputed the figure in his response of February 23, 2015.

[84] Both Mr. Hanberg from Yukon Housing and Mr. Best outlined a significant amount of work that remained to be completed after the Plaintiff ceased work. I much prefer the evidence of Mr. Hanberg and Mr. Best to that of the Plaintiff and Mr. Vigneau. I find that 60% of the work had been completed by the Plaintiff before he stopped work.

Was there a breach of Contract and, if so, who breached it?

[85] In *William v. Hodson and Gates,* 2011 MBQB 187, the Court stated at para 28:

> Where a contract is not completed, it is usually as a result of the fault of one party or the other. It is for the court to determine who is at fault.

[86] The Plaintiff ceased work on the Project because the majority of the last two invoices had not been paid. According to the Contract, he did have the option of stopping work in the event of a lack of payment.

[87] However, it is important to consider the Defendant's situation. Yukon Housing would not release further funds due to the lack of progress on the Project. He was relying on these funds. Additionally, based on the amount of money that had been paid to the Plaintiff and the amount of work left to be completed, despite what the Plaintiff had communicated to the Defendant, it is clear the Project would never have been completed within the estimated amount.

[88] The Plaintiff had substantial experience as a contractor. The Defendant was an unsophisticated individual in the area of construction. The onus was on the Plaintiff to better communicate with the Defendant and to keep him fully apprised as to progress and costs. This did not occur.

[89] The Defendant communicated with the Plaintiff in January 2015, asking that the Project be completed by the end of February. Despite the Plaintiff agreeing to do so, he did not return in a timely fashion.

[90] I find the Plaintiff at fault for not completing the Project. It was appropriate for the Defendant to treat the Contact as having been breached, and to have Mr. Best complete the outstanding work, including the deficiencies.

[91] In terms of the amount charged by Mr. Best to remedy the deficiencies, the quantum has not been contested. There is nothing to suggest that the amount charged is anything but appropriate. As a result, I find the Defendant to be successful in his Counterclaim.

Conclusion

[92] I have found the July 3, 2014 estimate may be increased by 10%, bringing it to a total of $41,570.43. The Defendant's completion of 60% of the Project is therefore valued at $24,942.26.

[93] The Defendant paid the Plaintiff a total of $24,346.24, comprised of $22,846.24 for the first three invoices and an additional $1500.00 for part payment of the fourth invoice. That leaves an amount of $596.02 owing to the Plaintiff. However, since the Defendant has been successful with respect to his counterclaim in the amount of $1002.04, the amount owing to the Plaintiff is set-off, leaving $406.02 payable by the Plaintiff to the Defendant.

[94] In the final analysis, there will be judgment for the Defendant in the sum of $406.02. Pre-judgment and post-judgment interest is payable on this amount in accordance with the *Judicature Act*. I award costs to the Defendant in the amount of $250 for filing and preparation fees, and a counsel fee of $400.

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CHISHOLM T.C.J.