

CANADA / JUDGMENT

Northern Sun Developments Ltd. v. Cook

2011 BCSC 384

COURT

Supreme Court of British Columbia

DECIDED

30 March 2011

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2011 BCSC 384 Northern Sun Developments Ltd. v. Cook

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Northern Sun Developments Ltd. v. Cook,

2011 BCSC 384

Date: 20110330

Docket: 15293

Registry: Smithers

Between:

Northern Sun Developments Ltd., Incorporation No. 230090

Plaintiff

And

Nathaniel Arnold Cook

Stefanie Christina Reichel-Cook

Defendants

- and -

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Docket: 15216

Registry: Smithers

Between:

Young's Plumbing Ltd. Inc. No. BC0514770

Claimant

And

Stefanie Cook and Nathaniel Cook

Defendant

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for Northern Sun Developments Ltd., Incorporation No. 230090 & Young's Plumbing Ltd. Inc. No. BC0514770:

G.E. Greene

Counsel for Nathaniel Arnold Cook and Stefanie Christina Reichel-Cook:

D. Giddings

Place and Date of Trial:

Smithers, B.C.

February 10, 11, 14, 15, 2011

Place and Date of Judgment:

Smithers, B.C.

March 30, 2011

- [1] The plaintiff Northern Sun Developments Ltd. ("NSD") has filed a builder's lien against property owned by the defendants, and alleges it is owed \$37,874.76 for renovation work performed on a residence in Smithers, B.C. The claim was filed in contract but was amended at the outset of trial to include a claim in quantum meruit. The defendant's Counterclaim was also amended at the outset of trial to include additional allegations respecting failure to obtain work permits. Both amendments were by consent.
- [2] The second action brought by Young's Plumbing Ltd. was transferred from Small Claims Court to be heard with NSD's action. This claim is for \$3,701.53 from the plumber who worked on the project. By the end of the evidence, the defendant agreed that she should pay that claim so judgment is granted on that matter as reflected at the end of these reasons.

I

- [3] In December, 2007, the Cooks, who live in California, bought a house in Smithers as an investment property for \$285,000. They paid \$200,000 down and financed the rest.

- [4] Ms. Cook came to Smithers to make the purchase. She made some inquiries about tenants and was satisfied they could rent the house. She completed the purchase and found a tenant. However, the house was badly vandalized during early 2008 and on the recommendation of the realtor, the realtor's brother, and the tenant who was to move in September 1, 2008, Ms. Cook hired Scott Marko to handle the renovations made necessary by the vandalism. Meanwhile the tenant moved into a trailer on the property.
- [5] Mr. Marko works for the plaintiff Northern Sun Developments Ltd. ("NSD") and testified that at the time he met with Ms. Cook he was running the company himself for all practical purposes, as the owners were working elsewhere. Ms. Cook was under the impression that Mr. Marko had just started his own business, an impression fortified by his use of generic invoices with "Northern Sun Developments" handwritten at the top.
- [6] Mr. Marko and Ms. Cook met at the house on May 28, 2008 to determine what had to be done.
- [7] On June 3, 2008, Ms. Cook, back in California by this time, sent Mr. Marko an email. She set out in the email what she understood to be the scope of the project and the time line. Mr. Marko had refused to give her a quote for the job because he said with an old house, there was too much unknown. He told her the company billed at \$45/hour. In the email, Ms. Cook said she understood the billing rate but wanted "a more focussed write up on the extent of the project, timeline for completion and some estimates and budgets/allowances on the project."
- [8] She suggested to Mr. Marko that he send her "a weekly report detailing the work that has been done that week and the percentage of completion of the project (i.e. installation of floors, building of deck/entrance steps) and that I can pay you on a weekly or every other week basis."
- [9] She then set out a list of items to be done with various details and instructions:
- repairs to stable
 - replace well cover
 - remove debris and damaged dog house
 - build large cedar deck with a picket railing
 - replace front door and garage doors
 - strengthen and repair railing on back deck
 - new house number
 - remove carpets and laminate flooring and replace
 - new posts and railing with pickets on interior stairs

- remove carpets and flooring downstairs and replace with a floating floor
- remove closets in bedrooms and rebuild
- remove wall between kitchen and living room
- replace ceiling tiles downstairs and finish walls
- paint the interior
- replace interior doors
- install trim and crown moulding
- coordinate installation of kitchen with the kitchen installer
- cabinets in mud room
- install recessed lighting
- ensure all plumbing is in order and to code
- replace heating register covers
- install baseboard heaters
- replace downstairs windows
- remove woodstove
- coordinate with alarm installer

[10] Ms. Cook testified that she had a budget in mind and told Mr. Marko she wanted to spend about \$60,000 to \$70,000 on the project. However she testified that she did not consider it Mr. Marko's business how much she was ultimately prepared to spend and does not like to give contractors too much information about her financial situation. Mr. Marko denied ever being told what the budget was, although Ms. Cook's emails continually make reference to the necessity for one from her point of view. In the end, nothing turned on whether Ms. Cook specified a budget or not.

[11] An issue arose during examination of the witnesses as to whether Mr. Marko was a general contractor or not. Ms. Cook testified that as far as she was concerned, Mr. Marko had agreed to be her general contractor. Mr. Marko said he was not a general contractor. Whether that is a proper designation for what he had agreed to do (which according to plaintiff's counsel has significance under the Builders Lien Act because of the requirement for a holdback), it is clear from the initial email that Ms. Cook was expecting Mr. Marko to coordinate with the various sub-trades. As Ms. Cook could not obtain a contract price from Mr. Marko and was paying by the hour, the issue of a holdback is not of consequence.

[12] Ms. Cook had hired a separate installer to do the kitchen and planned on buying much of the materials herself, including fixtures, appliances, cabinetry, flooring and tiles. She set up an account at a local supplier, Windsor Plywood, and bought the windows, paint, trim and other interior finishing products herself.

[13] Mr. Marko and his co-worker Patrick began work on the house. Mr. Marko said as soon as they began to pull out the gyprock they could see the house was mouldy, had no vapour barrier and was deficiently wired. He said the project ballooned. Mr. Marko says the following was extra work which was approved by Ms. Cook:

- moving the electrical panel (done and paid for through the electrician)
- moving the power pole and digging an underground cable (although NSD oversaw the work, it was paid for through the electrician and BC Hydro)
- new wiring (this was done by the electrician but NSD had to do some additional work as a result)

-plumbing (referred to in original list; this was done by the plumber but NSD had to do some additional preparation work)

-drywall in basement ceiling (referred to in original list)

-insulating and finishing basement walls

-replace kitchen window and replace living room window with a French door

-laundry room/breezeway to garage

-two new bathrooms with tile floors and showers

-new back deck instead of merely strengthening the existing one

-removing additional walls

-built-in cabinet in dining area

-custom railings on deck

-library panelling on stairwell

-timber framing between living and dining area

-heat ducting downstairs

[14] Ms. Cook agrees these things were added to the project and that she wanted this work done. She also agreed that she wanted good quality work that met all local building code standards.

- [15] Mr. Marko obtained an electrician to do the electrical work and Ms. Cook paid the electrician separately at Mr. Marko's request. Mr. Marko suggested a plumber and she paid the first invoice directly to the plumber, again at Mr. Marko's request.
- [16] On July 25, 2008 Ms. Cook sent Mr. Marko an email telling him she had ordered the downstairs flooring, and asking him for a local supplier for the upstairs flooring so she could order it. She asked for the local price of the tile she wanted, and said she would order it herself if it was not available in Smithers for less than she could get it in California.
- [17] Despite Ms. Cook's request for detailed weekly reports, Mr. Marko said he did not have time to do this extra work and preferred to deal with Ms. Cook by phone. He adduced phone records showing about 70 calls over the course of 5-6 months, comprising about 10 hours. Ms. Cook agrees this is a reasonable estimation of the time they spent on the phone. Mr. Marko also sent Ms. Cook a series of undated pictures on July 31 and September 6, 2008.
- [18] Relations between the parties, despite the lack of detailed reports, were fairly smooth in June. Mr. Marko asked for an advance and Ms. Cook gave it to him. Ms. Cook testified that in July she began to be concerned at the invoices showing hundreds of hours of labour, with no allocation to particular tasks. Ms. Cook visited Smithers in early August. She became anxious as the date for her tenant to move approached and the renovations were not complete. Throughout early and mid September she sent emails insisting on a fully detailed written report and a time line, and expressing concern at the "glacial" progress. However, she continued to pay the invoices as they were submitted.
- [19] Mr. Marko submitted a summary of his invoices. It is difficult to reconcile the dates with the actual copies of invoices in his documents, and there is some uncertainty as to what they cover - only two of them have any notations on the list of amounts from suppliers. The invoices themselves are dated June 20 and July 13 (\$18,260.95), August 10 (\$11,613.20), September 1 (\$16,964.35), September 11 (\$9572.13, accompanied by a note that the electrician will be emailing a separate bill for \$10,855.36), an undated invoice sent September 22 (\$7850.34), and another undated one to cover September 22-October 3 (\$13,822.14). He said he included with his general invoice copies of the various suppliers' invoices. Ms. Cook agreed she had received copies of some invoices but said she could not make them tally up.
- [20] Mr. Marko testified that Ms. Cook always paid late. However his own summary of his invoices, setting out dates rendered and dates paid, show that these invoices, totalling \$78,083.11, were generally paid in good time.

- [21] In response to Ms. Cook's demand for a detailed report, Mr. Marko complained to her that he had not included a fee for doing the extra organizational work and it was all done on his own time. He said a general contractor would charge 10-20% over his hours to do this work, but he said he had volunteered to do it for her. Ms. Cook testified that she was being billed at \$45/hour for two workers who were paid much less than that so she felt she was already paying a premium for this service.
- [22] Of the \$45/hr that was billed for Mr. Marko's hours, Mr. Marko said \$30 was his wages and the rest covered overhead. His co-worker, Patrick, was paid \$18-\$20/hour and was billed out at \$45 as well. Mr. Marko had a student who did general work for \$10/hour and was billed to Ms. Cook at that rate. The parties disagreed on whether Mr. Marko arranged the student's rate on his own or whether Ms. Cook insisted on it.
- [23] On September 15, 2008, Mr. Marko emailed a list of things still to be done, broken out over the next three weeks, saying "the inside should be finished by the 5th [of October] but I would probably push it back a week for a move-in time just to avoid any bad happenings."
- [24] Mr. Marko agreed in cross examination that in this email, he estimated a maximum of 320 hours to complete the project, and that he eventually billed for 458 hours. He said he had given only a rough estimate.
- [25] Ms. Cook visited the property again in early October. She testified that from what she could see, the house including the breezeway was almost complete. On October 14, 2008, Mr. Marko sent Ms. Cook an email saying he was almost finished and would be moving on to another job. Ms. Cook replied on October 15, 2008, with some instructions regarding installation of sinks and appliances, and completion of the garage and upstairs bathroom.
- [26] On October 19, 2008, Ms. Cook sent an email asking Mr. Marko for "a summary invoice of work performed in the last few weeks and ... a summary of the outstanding invoices due since the last payment. Also, if you can tell me what remaining work you have to do there in the coming week and your timeline ...". On October 21, Mr. Marko re-sent an email he had submitted previously for the week of September 8 - 19, which was for over \$7,000 worth of labour and some supplies. This invoice was paid on November 5, 2008. A further invoice for another approximately \$6,000 worth of labour from September 22 to October 3, 2008 was paid at the same time. Each invoice from Mr. Marko has attached to it a handwritten note with figures, many with no description at all, some with initials designating certain suppliers. Only two have some notes for some items showing what the supplies were for.
- [27] On October 30, 2008, Mr. Marko sent a "list of remaining duties" for the plumber, the electrician and the tiler. He said all that remained for himself was to install the kitchen fan and the washer/dryer and vent.
- [28] Ms. Cook said she was surprised, since she thought the house was almost finished when she visited in early October, to receive an invoice on November 23, 2008 for \$36,712 for the month of October, which included 233 hours of labour (\$11,009.25).

- [29] A handwritten attachment contained a list of suppliers and amounts apparently owing to them or to NSD on their behalf - \$17,558.36 for materials, \$5,600 to the painter and \$2,684.74 to the tiler. Another smaller invoice for \$1,162.41 followed on December 12, 2008.
- [30] The last two invoices have not been paid and are the subject of this action. At the time she received these invoices, Ms. Cook had been diagnosed with a serious form of cancer and was undergoing surgery and treatment. She gave the invoices to her husband to handle. Although Mr. Marko was aware of Ms. Cook's illness, he was obviously anxious to be paid and continued to call and send invoices. He said the last time he spoke to her by phone was after Christmas. Thereafter he got no response from her - Ms. Cook just seemed to "drop off the face of the earth." Ms. Cook testified she told Mr. Marko whenever he called that she needed a full accounting and once he had submitted that to her, they could discuss his bill. No accounting was provided. A lien was filed on January 9, 2009 and this action followed in June of 2009.
- [31] Ms. Cook was cross examined for over a day. She was accused of conspiring to refinance the property and repay herself for the down payment so that she could walk away from a bad project and leave the bank with the loss, although she still owns the property, which is subject to a lien which has prevented her from refinancing. She was accused of not reporting income. She was accused of hiding documents. She was accused of hiding the scope of the kitchen installation to be done by another contractor. Despite the many emails, she was accused of making up her requests for an accounting on the spot in the witness box. She was understandably frustrated and upset and made indignant speeches.
- [32] The plaintiff, seated in the gallery, audibly expressed his displeasure with Ms. Cook's evidence.
- [33] Tempers flared in the courtroom, with counsel for the plaintiff exacerbating the tension. The court was forced to reprimand counsel and the parties more than once, and the plaintiff apologized through his counsel.
- [34] I mention this only because the tension between the parties and their lawyers seems to have created a situation which led to this four day trial over a fairly small amount of money.
- [35] Although counsel for the plaintiff says he has all the relevant invoices from the suppliers in his office, he says counsel for the defendant did not ask for copies, although he did go examine them. The suppliers' invoices were not put into evidence so I do not know if they contain any helpful detail. According to Ms. Cook the ones she received do not. She says they do not add up and do not allow her to ascertain what they cover.

II

- [36] Ms. Cook says she is entitled to receive an accounting of hours and materials for each step of the project to demonstrate what, if anything, she still owes, and Mr. Marko refuses to provide it. Mr. Marko says he is unable to attribute the hours to particular projects at this late stage. In effect, he says "trust me, I did the work, pay me."
- [37] Counsel for NSD suggests that giving Ms. Cook an accounting of hours would be useless because Ms. Cook, not being a contractor herself, could not tell if the charges were reasonable anyway. Ms. Cook testified she has been involved in many investment projects and has a general idea of costs associated with various projects in similar houses. For that reason she did not question the electrician's bill, which was in line with other projects she has undertaken.
- [38] Ms. Cook claims she has tried her best to reconcile the invoices with emails and pictures but has been unable to account for over 400 hours of labour. The large invoice sent on November 23, 2008, with the handwritten sheet attached listing supplier's accounts, contains references which she says does not understand. The list reads:

Smithers Lumber Yard - \$16,090.22 (\$2,809 crossed out)

Mulder concrete - \$373.63

Airco Serve - \$373.63 (it was never explained who or what Airco Serve is)

Aqua North - \$320.60 (this is apparently another plumber)

Home Hardware - \$36.34

Windsor - \$151.20 (this is the supplier with whom Ms. Cook has her own account)

Northcountry - \$202.05

Aires Asphalt - \$3,570, \$1,890 (painter)

RAW contracting - \$2,684.74 (tiler).

- [39] At the conclusion of the evidence, Ms. Cook agreed that the painter and tiler should be paid. She could not tell what the smaller amounts were for, and there was no explanation of the large amount allegedly owing from Smithers Lumber Yard. Counsel for the plaintiff said in argument that it was for flooring, but his own book of documents contains an email from Ms. Cook dated June 25, 2008 in which she says she is paying for the flooring herself.
- [40] Ms. Cook testified that she ordered all finishing products, cabinets, faucets, vanities, fixtures, floors and tiles. Mr. Marko said Ms. Cook ordered the downstairs flooring online. Her email of June 3, 2009 states that she has picked out some flooring, estimating she would need about 900 square feet, which was available for \$5.00/sq. ft. at Windsor Plywood. Mr. Marko said Ms. Cook later decided on a more expensive flooring from Smithers Lumber Yard. Ms. Cook was asked in cross-examination if she spent \$11,000 on the upstairs flooring

and \$5,000 on the downstairs. She said she did not recall the exact amounts she spent on most of the supplies because they were bought on account and she paid by credit card. She said she knew she had not spent \$16,000 on less than 1,000 square feet of flooring. It was not suggested to her during cross-examination that the flooring has never been paid for and remains outstanding.

- [41] It is Ms. Cook's position that when she visited the house on October 3 -7, 2008, it was near completion. The floors were done, although there were some gaps to be finished. There was some finishing work to be done, and some tiling, and the installation of appliances.
- [42] Photographs were put to her to establish that was not the case and that substantial work still had to be done. However, earlier photographs in the same group did show the same work finished, for instance the floors, which were not finished in later pictures.
- [43] Ms. Cook outlined her requirement for weekly reports at the beginning of the relationship. She wanted to know estimated costs and time lines for each job. She paid the invoices as they came along because she initially trusted Mr. Marko and wanted the job done so she could get her tenant in by September 1. As she said, she let Mr. Marko have dessert before he finished his dinner - that is she just paid the invoices without getting the weekly reports she wanted. She has now learned her lesson.
- [44] Ms. Cook testified that, having been told the project would be finished by the second week in October at the latest, and having had the impression that the house was almost finished at the time of her visit in the first week of October, she requested an itemized list of the projects to which the 233 hours from October 4 - 24 and the additional 12 hours in November were allocated. She says she is willing to pay for anything for which she has had the benefit. However, she wants to be assured that she is not being asked to pay for things she has already paid for and is not being billed for hours that were not spent on her property. She says she also wants to be assured that the supplier's invoices are for materials used on her property.
- [45] Ms. Cook is entitled to know what she is paying for. More importantly for the court, now that the plaintiff has brought this action, the plaintiff must prove that the amounts claims are owing, either in contract or quantum meruit.
- [46] Before the plaintiff concluded its case, the court asked plaintiff's counsel if this was a case where the court would want to know what was being billed for, what money was being paid, and what it was being paid for. Counsel said this was not the case; two invoices were unpaid and that was all they cared about.
- [47] However, at the end of the case, that is exactly what the court needs and has not been given.
- [48] The court requires the evidence to adjudicate on what has been proven to be owing by the defendant to the plaintiff for work done on the house. There are two areas of contention: hours worked and supplies.

- [49] Mr. Marko testified he cannot tell what hours were spent on what at this late date.
- [50] His time notes record hours per day only; there is no reference to what was being worked on or how much time was required for each part of the project. His log notes show back to back periods on various jobs - for instance 8:00 a.m. to 10:00 a.m. at one place, and 10:00 a.m. to 12:00 noon at Ms. Cook's. He said the places were close to each other and he had a minimum call out time of two hours, although he does not always note two hour time increments in his log book.
- [51] The pictures are not dated so they do not demonstrate what was done when, or assist with ascertaining how the projects relate to hours in the log book or materials supplied. Counsel for Mr. Marko suggested to Ms. Cook that the photographs, although not dated on their face, are dated on the CD entered into evidence. The court advised him that the dates did not appear on the copy of the CD the court had looked at. No further assistance was provided on that issue.
- [52] The individual supplier's invoices are not in evidence so it is not possible to tell if there is sufficient detail to establish what was used on what and when.
- [53] I am not prepared to say "I believe whatever Mr. Marko says - pay him." Mr. Marko is testifying to events that took place two years ago. His recollections are vague.
- [54] As well, his evidence is not consistent with the documents and other witnesses. For instance, Mr. Marko said his work was delayed by the plumber, and that the plumber could not complete his work because Ms. Cook bought the wrong fixtures. The plumber did not testify to any delay and said he did complete the work, after making adjustments for the fixtures.
- [55] Although the discrepancies are not large, Mr. Marko's hours from his log book do not tally by either 3 or 6 hours (depending on who added it up - defendant's counsel or Mr. Marko) with the hours billed for a particular period in May and June. Mr. Marko explained this by saying he had billed extra hours for his telephone time and booking time and "extraneous circumstances" that did not show up on his hourly sheets. On the other hand, he said earlier in his evidence that he did not bill Ms. Cook for this extra work, which he found onerous. There are other unexplained omissions in the log book.
- [56] Mr. Marko testified they installed about 2000 square feet of decking for Ms. Cook. When asked to look at his notes and calculate the area, it was just over 600 square feet. Mr. Marko said he had been guessing, which is not unreasonable, given the length of time since the decks were built, but this is a further demonstration of the unreliability of his recollections in the absence of documentation.

- [57] In his email of September 15, 2008, Mr. Marko estimated the time needed to complete the project, even allowing for an extra week, at three to four weeks but the final invoice shows that estimate to be out by over 100 hours of labour. Following that email, he submitted two invoices for \$7000 and \$6000 worth of labour that were paid.
- [58] Mr. Marko's various emails are also not entirely consistent with what had and hadn't been done at certain dates. For instance an email on August 31, 2008 says the gyprock downstairs is being done and the rest of it is at the finishing stage. On September 6, he said all the gyprock was up except for the downstairs bathroom, and 2/3 of it was finished. However, in an email dated September 8 in which he listed work supposedly done in August, he said the drywall had been hung on all the walls and the upstairs was finished in that period.
- [59] Some of this may be explainable because different gyprock projects or different stages of gyprocking are being referred to but without a report it is not possible to tell. Mr. Marko's only explanation was that he may have gotten "snarky" when Ms. Cook began to question him and this might be reflected in the content of his September 8 email.
- [60] It was in this email that Mr. Marko said some work had been delayed because the plumber was two weeks late, whereas the plumber did not mention any delay. Mr. Marko also said work was held up because Ms. Cook bought the wrong fixtures. Mr. Young, the plumber, said he had no problem - he installed her fixtures and when he left everything was working. He sent an invoice for this stage of his work and has not been paid for it. Mr. Marko testified later than it was not NSD's work that was held up by the plumber but rather that of the tiler.
- [61] The painter and tile layer were hired by Mr. Marko at Ms. Cook's request. They apparently submitted invoices, although they were not put into evidence, but their accounts also show up in Mr. Marko's list attached to the November 23, 2009 invoice. While this is confusing, Ms. Cook admits that she should pay for those services since she has now learned they were not paid through Mr. Marko. It was this method of billing that apparently led to the confusion over the plumber's bill as well. Ms. Cook said she thought she was to pay it or had already paid it through Mr. Marko. Now that she has heard the plumber testify that he has not been paid for the second stage of his work, she agrees his outstanding invoice should be paid.
- [62] Ms. Cook went through the items listed in the attachment to the November 23, 2008 invoice in her evidence stating that she did not know what they were for, yet nothing was put to her to explain the notations or have her acknowledge receipt of the services or materials.
- [63] Despite the deficiencies in the plaintiff's evidence, Ms. Cook does not deny that she could owe Mr. Marko money. She simply wants him to clarify and demonstrate where the hours went and what the materials were for. It is therefore not fair to simply dismiss Mr. Marko's entire claim because he has not adequately demonstrated that the money is owing.

- [64] Counsel for Ms. Cook took the position that the amount of labour estimated in the September 15, 2008 email should be paid, and the tiler, painter and plumber should be paid. This would add up to about \$15,000. Defence says there is no evidence to justify the additional hours or the handwritten notations of total amounts owing to the suppliers without any indication of what the supplies were for.
- [65] During argument, the court suggested that the deficiencies in evidence might be handled by a reference to the registrar, although it is clearly not in the parties' interests to spend any more money on this claim. Counsel for the plaintiff was opposed to this in any event.

III

- [66] It appears that the main large jobs which were added to the initial list as the responsibility of NSD were the ripping out of all the gyprock, the installation of the vapour barrier, the additional deck work, and the breezeway into the garage. However, most of this was done fairly early and was paid for in the earlier invoices. Some of the garage work remained unfinished in October.
- [67] In any event, the issue is not whether work that was done should be paid for or whether it was included in the original contract (which was not for a fixed sum anyway) or whether extras were authorized. Ms. Cook is willing to pay for whatever she has the benefit of. She just wants to know what hours were spent doing which project and to be assured she was not being billed for hours allegedly spent on projects she had already paid for, given the confusing chronology in Mr. Marko's emails. She also wants to know what the handwritten suppliers' totals pertain to. She is entitled to know what she is paying for, and the plaintiff has the burden to prove she owes NSD money.
- [68] Whether the claim is in contract or quantum meruit, the plaintiff is entitled to be paid only for labour performed and materials used on this project.
- [69] During argument, the court asked plaintiff's counsel to assist with allocation of the hours to projects. He refused, saying it was impossible. In the absence of assistance from plaintiff's counsel, I have gone through the emails for October to try to understand what might be covered by the unpaid invoices. On October 1, Mr. Marko said they were in finishing mode - finishing the floor upstairs, installing gyprock and cement board in the upstairs bathroom, a project apparently delayed by the plumber, although the plumber as already mentioned, did not testify to any delays on his part.
- [70] On October 14, Mr. Marko said the downstairs floor and stair panelling were finished. They were going to do the baseboard and casings the next day; the tiles were being done by the tiler (a separate invoice and a separate supplier) that day and the next. The finishing on the stairs and the trim had to be done. Mr. Marko said they were close to being finished inside the house.

- [71] The railing on the deck was to be done and a garage wall was to be finished. In a later email of October 30, Mr. Marko said those items were completed but did not say when they had been done or how much time they took. Mr. Marko testified that Ms. Cook left the style of the deck and railings up to him. He ordered the wood from a place in Hazelton, B.C. It was billed to Ms. Cook in October and paid for in November. The wood was unfinished. Ms. Cook questions the use of unfinished lumber which had to be finished by hand for the railings. Mr. Marko told her it would be nicer and cheaper. She suspects it was much more expensive than ready made. However, without a report showing what hours were spent on which part of the project, she cannot tell how many hours were spent on the railings and whether she ended up paying much more than she would have paid for ready-made railings.
- [72] It is clear there was some work being done in the last half of October and that Ms. Cook was aware there were things still to be done. Mr. Marko told her things were "close to finished" on October 14, and she replied with an enthusiastic email with additional instructions regarding installation of sinks and appliances, finishing the garage, and the bathroom. She testified that, although unhappy with the rate of progress, she thought a display of enthusiasm might spur Mr. Marko on to finish the job.
- [73] It is impossible to tell without some allocation of the hours whether Ms. Cook received the benefit of \$11,000 worth of labour in the month of October, which represents well over 100 hours beyond Mr. Marko's estimate given on September 15, 2008, and which follows invoices for labour of \$7,000 and \$6,000 up to October 3, 2008 that have been paid. It is also not possible to tell whether there is any overlap.
- [74] Taking into account the payment up to October 3, 2008, counsel for the defendant submitted that \$4,000 worth of labour should be accepted, based on the estimate provided by Mr. Marko for work completion of October 12, at the latest. This would cover a little over one 40 hour week for both Mr. Marko and Patrick ($40 \text{ hours} \times \$45 = \$1,800 \times 2 = \$3,600$), for the week of October 6 - 12.
- [75] There was some work going on after October 12, 2008 and the emails show that Ms. Cook was aware of it. As well, Mr. Marko told Ms. Cook there was a lot of clean-up to do, some dump runs, and some odds and ends. However, with no assistance from the plaintiff, I am unable to say that an additional \$7,600 (including the December 12, 2008 invoice) of labour is justified. Given the email of October 14 from Mr. Marko and the email of October 15 from Ms. Cook, I will allow the \$4,000 suggested by the defendant and an additional \$2,000 to cover the work that remained to be done at that time and was performed by NSD.
- [76] Mr. Marko was confused in his evidence as to whether he had already paid the painter and tiler, whether they should be paid directly, or whether he should be paid for them and then would pass it on. Fortunately for him, the defendant agrees that the tiler is clearly owed for his work (\$2,684.74), as is the painter (\$5,600). The defendant also agrees the plumber's invoice of \$3,701.53 should be paid. The filing fees of \$25.00 in respect of that claim are also payable by the defendant.

- [77] It is unfortunate, and in my view puzzling, that there was no evidence to explain how or if the large amount of \$16,000 listed as owing to Smithers Lumber Yard on the note attached to Mr. Marko's invoice of November 23, 2008 was connected to this project. The only suggestion from counsel during argument is it was for flooring, but there was no evidence to support this and what evidence there is suggests Ms. Cook paid for the flooring herself.
- [78] Mr. Marko's email of September 8, 2008 says he expects to be laying the wood in two weeks and it would take one week to do that work. Ms. Cook said the flooring was mainly done when she arrived on a surprise visit at the beginning of October, which is consistent with Mr. Marko's email, so even if the plaintiff wished to take the position that Ms. Cook did not pay for the flooring directly and that is what the \$16,000 is for, why would it be billed for in November? Even Mr. Marko testified that Ms. Cook herself ordered the downstairs flooring online, so why would less than 1000 square feet of flooring for the upstairs cost so much? If Ms. Cook did not pay for the flooring directly when she picked it out, despite having done so with all other finishing supplies, was the invoice sent to Mr. Marko instead? Did he pay it or does he seek to collect it on behalf of Smithers Lumber Yard? If Mr. Marko paid it, where is the receipt? None of these questions, which could have been cleared up, were addressed.
- [79] If Smithers Lumber Yard has a descriptive invoice for materials supplied to this project which has not been paid, perhaps they can submit it to Ms. Cook, but I am unable to determine what this handwritten amount is for.
- [80] The other smaller listed amounts were never explained either. What are they for? Who is Airco Serve? Why is there an amount alleged to be owing to another plumber? Were these amounts paid for by NSD or do they remain outstanding to the suppliers themselves? If NSD paid them, where are the receipts? These legitimate questions were simply not addressed. There is a handwritten note attached to the December 12, 2008 invoice listing \$7.99 to Smithers Lumber Yard and an unattributed \$563.00. There was no evidence to explain what those amounts were for.
- [81] It would have been a simple matter, it seems to me, to provide the evidence that would allow determination of whether these supplies had been used for this project and what they were for. All that is before the court are the handwritten lists of amounts attached to NSD's invoice of November 23, 2008 and December 12, 2008, with no additional information other than Mr. Marko's statement that this money was spent. In the absence of evidence to show that these invoices relate to materials supplied to this project, the court is unable to grant judgment to NSD for these amounts.

COUNTERCLAIM

- [82] The defendant counterclaimed for unfinished work. There was some stucco work left to be completed, as well as some tiling. Ms. Cook has had this work done now - the total cost is about \$1,450. A quote of \$1,000 was obtained to finish off some work outside. I am not satisfied that this was work for which Ms. Cook was billed by Mr. Marko as his practice was

to submit invoices for work that had been done, not that was anticipated (except for the one advance). Mr. Marko's email of October 30, 2008 says the tub surround was yet to be done, and the pictures taken at a later date by the realtor show deficiencies in the stucco. Although it is difficult to tell what has been billed for, there does not appear to be an invoice from Mr. Marko for stucco work.

- [83] The counterclaim also says Mr. Marko was responsible for getting appropriate permits. The parties dispute who was responsible for getting building permits. At the end of the day, nothing seemed to turn on this in practical terms. The counterclaim is dismissed.

LIEN OUT OF TIME

- [84] Section 20(2) of the Builders Lien Act, S.B.C. 1997, c. 45, provides for a lien to be filed within 45 days of (a) completion or abandonment of the head contract, or (b) of an improvement if (a) does not apply. Section 1(2) provides that a head contract or contract is substantially performed if the remaining work is not more than 3% of the first \$500,000. Section 1(3) provides that an improvement is completed "if the improvement or a substantial part of it is ready for use or is being used for the purpose intended."
- [85] The arrangement here does not involve a head contract, although counsel in argument referred to both s. 20(a) and (b). However, whether this agreement falls under s. 20(2)(a) or (b), on October 30, Mr. Marko said he was finished except for installing the kitchen fan and installing the washer and dryer and venting the dryer. This still remained to be done as of his November 16, 2008 email, but the house was either ready for use or substantially completed by then.
- [86] Mr. Marko suggested that Ms. Cook expected him to do more work on the exterior of the house, apparently to show he was still involved in this project for some time. Ms. Cook said she had no idea what Mr. Marko was referring to and did not intend to give him any more work. In any event, there is no evidence that Mr. Marko ever worked on the house after October 30, 2008. The lien was filed on January 9, 2009. Even taking November 16 as the date of substantial completion, the lien is out of time.
- [87] Counsel for the plaintiff's only submission was that the Act should be given a fair, large and liberal interpretation to allow the lien to stand.
- [88] The time limit is clear. The lien was out of time. Counsel for the defendant refers to s. 19 of the Act which allows for damages to flow as a result of wrongful filing of a lien. Here, apparently Ms. Cook was prevented from refinancing as a result of the lien. Damages are not quantified but her counsel takes the position that the plaintiff should be precluded from obtaining interest on the amount of the judgment because of that. However, in the absence of evidence that damages were actually incurred, in my view interest should follow in the normal course.

RESULT

[89] Mr. Marko agreed that \$800 was to come off the final invoice because he had sold Ms. Cook's washer and dryer for that amount, which he kept. The amount of the judgment, then, in favour of NSD, is:

\$6,000 for labour

(less \$800 for the washer and dryer)

\$2,684.78 for the tiler

\$5,600 for the painter

[90] The judgment on the small claims action brought by Young's Plumbing is:

\$3,776.53 (including filing fee)

[91] Pre-judgment interest will follow in the normal course.

COSTS

[92] Counsel for the defendant asked for leave to address costs after judgment was rendered. If the parties cannot agree to bear their own costs, which seems appropriate in this case given the divided success, they may arrange to address the issue through the registry. If the matter is to be argued, counsel may wish to look at the recent case of *Gradek v. Daimler Chrysler Financial Services Canada Inc. and Fletcher*, 2011 BCCA 136 on the issue of recovery of costs when the amount of the judgment is within Small Claims limits.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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Prepared on 28 October 2026 · Esheria