

CANADA / JUDGMENT

Van Veld Construction Limited v. Hughes

2021 NSSM 6

COURT

Nova Scotia Small Claims Court

DECIDED

15 March 2021

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Van Veld Construction Limited v. Hughes

Court

Small Claims Court

Date

2021-03-15

Citation

2021 NSSM 6

Docket

SCP 5011333

Judge/Registrar/Adjudicator

Balmanoukian, Raffi (Adjudicator)

Document Type

Decision

Decision Content

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Van Veld Construction Limited v. Hughes, 2021 NSSM 6

Date: 20210315

Claim: No. SCP 5011333

Registry: Pictou

Between:

Van Veld Construction Limited, a body corporate

CLAIMANT

(DEFENDANT BY COUNTERCLAIM)

And

Mary Hughes

DEFENDANT

(CLAIMANT BY COUNTERCLAIM)

Adjudicator:

Raffi A. Balmanoukian, Adjudicator

Heard:

February 24, 2021 (by teleconference), in New Glasgow, Nova Scotia

Counsel:

Paul Wadden, for van Veld Construction Limited

Karen MacPhee, lay representative, for Mary Hughes

Balmanoukian, Adjudicator:

- [1] The Prussian Field Marshal Helmuth von Moltke, the elder, is commonly paraphrased as saying, “no plan survives first contact with the enemy.”[1] He could just as easily have been speaking of a construction project.
- [2] Mary Hughes is a senior. She has been in her own home for decades. To facilitate this, Housing Nova Scotia provides economic assistance to those of modest means to pay for certain capital renovation and repair projects. In early 2019, Ms. Hughes availed herself of this assistance (primarily through the channel of her daughter, Karen MacPhee, who represented Ms. Hughes’ interests throughout, including at this proceeding). The project was, globally speaking, to effect certain repairs to the foundation of her home, which was leaking in places. It was indeterminate how bad this was, as the basement has a subfloor concealing at least some of the impact. As will appear, it is also indeterminate and unproven whether there is any continuing effect, and if so how much pre-existed the project.
- [3] Housing Nova Scotia approved the repair. It issued an invitation to bid, of which the Claimant was the successful candidate. As part of that, the Claimant listed certain specifications, which generally corresponded with Housing Nova Scotia’s invitation, with one change in materials that will take its proper place in this narrative. Ultimately, the scope of work changed as well, resulting in a (slightly) lower rendered account, which again I will discuss in turn.

- [4] In the result, coupled with other allegations of defects and shortcomings in the way the Claimant went about the job, the Defendant refused to sign a “confirmation of work completion” report which Housing Nova Scotia requires to disburse funds. After it became clear that the parties were at loggerheads (correspondence continued well into 2020), the Claimant sued the Defendant directly. It did so on the alternative grounds that there was a contract directly between the parties, or that the Defendant was unjustly enriched by the labour and materials expended by the Claimant.
- [5] Originally, this came to me as an application for quick judgment, which I allowed when provided with proof of service, default of defence, and uncontested affidavit evidence consistent with the above.
- [6] Ms. MacPhee promptly applied to set aside that quick judgment. It appeared, and was not contested, that she was absent for the relevant time (on business) and that it was she, not the Defendant, who had primary (one may even say near-exclusive) carriage of the matter. The Defendant admitted the promptness of the application, but not that there was a reasonable excuse or a triable issue[2]. I found in favour of the Defendant on both those counts and allowed for the filing of a Defence, pursuant to Section 23(2) of the Small Claims Court Act, RSNS 1989, c. 430, as amended. That was done by the deadline set by the Court, and in addition she filed a counterclaim for damages which, once again, will take its proper place in this decision.
- [7] The Defendant also applied to disqualify the Claimant’s law firm on the basis that a current partner therein had prepared the Defendant’s will some time ago, and because “the house is part of the will.” I decided that this was not a disqualifying conflict as the claim in question was unrelated, and there was no indication that counsel had provided any advice or direction with respect to the claim at issue.[3] I found this to be a misguided application, without merit.
- [8] I will review the evidence (verbal and documentary) of the parties in order to contextualize my analysis, findings, and disposition. The Claimant called but one witness, Brian van Veld; the Defendant, two, namely Connor MacCallum and Ken MacPhee. Neither Karen MacPhee nor the Defendant testified, although both were present at the virtual (telephone) hearing.

Brian van Veld

- [9] Mr. van Veld is the Claimant’s manager, and part-owner. The Claimant was formed in the mid-1970s. Mr. van Veld has been involved in its operations since approximately 1995, graduating to full-time participation in the business in 2001.
- [10] 95% of the Claimant’s business is or involves foundation work.

- [11] The Claimant was contacted by Ms. MacPhee in February 2019, with a view to completing the invitation to bid. The Claimant was not the only participant, but was the successful one. No other bids were placed in evidence. The invitation to bid included the specifications noted in tab two of the Claimant's book of exhibits. Upon completion, the work when approved would be submitted to Housing Nova Scotia, which would pay up to the agreed-upon sum.
- [12] The witness observed water in the basement, and noted the possibility of mould under the subfloor. He provided the initial quote, contained at tab four of the Claimant's list of exhibits. He recommended the substitution of Delta membrane for Blueskin, as he thought it to be a superior product for the task at hand. The ultimate quotation was \$8900 plus HST. This was provided to Ms. MacPhee, who in turn provided it to Housing Nova Scotia.
- [13] The specification of work (tab three) provided for excavation of 40 feet at the rear of the house and 28 feet on one end. As it turns out, the Claimant also excavated part of the front of the property. The witness testified that the Claimant did so in order to find the connection to the town utilities, and to ensure that all groundwater was drained. The bid was accepted on March 19, and this was communicated to the Claimant via Ms. MacPhee.
- [14] The Claimant conducted most of its interactions with Ms. MacPhee, with little if any participation by the owner, Ms. Hughes.
- [15] The work had to wait until at least the spring of 2019, when climatic conditions permitted. The work was actually started in July 2019, with the digging, removal of the deck, and removal of the contents on the deck. On July 22, 2019, an excavator attended at the site to excavate the foundation, remove old pipe, lay new pipe, install the Delta membrane and lay gravel. It was backfilled. Approximately 80 to 90 feet were ultimately excavated, according to Mr. van Veld. This constituted all of the side of the premises, the front up to the step, and all but a few feet of rear. The Claimant also had a plumber attend on-site to "scope" the town utility line, and to install a backwater valve. The work was finished on August 6, when the premises were backfilled and topsoil was laid. The property had to be landscaped, and stumps removed. The Claimant's witness testified that there were no major discussions at that time, and the grounds were seeded and hay laid on August 7.
- [16] When asked about the scope of work and how it changed, the Claimant testified that there was less excavation in the areas specified in the bid, but more overall.
- [17] He testified that Ms. MacPhee was not happy with the work. In particular, a clothesline was not reconnected, and later was too tight. She also complained of the week's wait between the backfill and finish, that the lawn was not properly seeded, and that there were marks on the topsoil (apparently caused by deer).
- [18] Ultimately, Housing Nova Scotia attended at the site, and appeared to be satisfied with the results. Mr. van Veld was not present for that inspection, which was conducted by one Andre d'Entremont.

- [19] The ultimate invoice to Housing Nova Scotia, dated September 12, 2019 (tab seven) was less than the quoted amount. It was for \$8600 plus HST, for a total of \$9980. Mr. van Veld testified that although they ultimately dug up more, they did not need to dig as far in the exact areas contained in the bid. They had also included an allowance for deck footing supports in their bid which as it turned out were not needed (although I will discuss the rear deck later in this decision).
- [20] At tab eight, the witness testified regarding further complaints by the owner, via Ms. MacPhee, regarding a crack on the driveway. The Claimant offered to fill in the crack and reseal the driveway to make it match its pre-existing condition. Ms. MacPhee was not satisfied with this proposed remedy, referring to it as a “band-aid solution.” The Claimant’s witness testified that the driveway was in decent shape. Although it was a few years old, it was not highly bleached by time. He admitted to a hairline crack at the rear of the driveway.
- [21] Attempts to resolve the dispute were unsuccessful, and the Defendant declined to execute the authorization for release of funds. The explanation provided was that the authorization contained a statement of satisfaction with the work, and the Defendant (as recounted by Mr. van Veld) was not prepared to attest to this. No concern was expressed to Mr. van Veld at the time with respect to the foundation work, and according to Mr. van Veld all conversation reverted to the concerns with the driveway. An offer to pressure wash and tar the driveway was not satisfactory, and as noted neither was crackfilling and re-sealing. Mr. van Veld then testified that at present (ie at the time of hearing in February 2021) no further action appears to have been taken.
- [22] On cross-examination, Ms. MacPhee’s questions concentrated on the provision in paragraph four of the invitation to bid that the work description “is not to be altered in any way without the consent of Housing Nova Scotia,” and that these changes were not so approved. Mr. van Veld testified that these changes were not submitted as they did not know what the Claimant would find in the course of the project. He also testified that they have never had an issue of this kind before, and at least by implication, this included prior transactions involving Housing Nova Scotia.
- [23] Mr. van Veld was shown photos of the membrane work around the foundation, and confirmed that the membrane ended before and not at the corner of the building. He explained that this the membrane was placed where the cracks were, and that it is poor practice to wrap this material around the corner. He admitted that this change was not approved by Housing Nova Scotia.
- [24] He further testified with respect to the photos at tab 16 of the Claimant’s list, including a type of repair done in the third last photo. He testified that cracks above the grade are plugged in this way (a type of plastic cement). Again, this change was not approved by Housing Nova Scotia.

- [25] He further admitted that although old deck supports were identified as likely to need replacement, these were not done satisfactorily, and there was a photo in evidence of a cracked piece of wood being currently in place[4]. These are at the Defendant's book of exhibits at photos 16, 17, and 22.
- [26] Ms. MacPhee further took the witness to the Claimant's tab two, paragraph seven which refers to the requirement that the contractor repair relevant damage. Mr. van Veld testified that he forgot about the clothesline, the deck was not done until later, and that with respect to the driveway, they were unable to obtain access to the premises with the excavator without going over the driveway. He ended by saying that the communication was getting "frazzled" with Ms. MacPhee and that the phone calls were "disrespectful." He did not go into detail.
- [27] On re-examination, Mr. van Veld testified that the changes did not change the nature of the work done; that the Claimant rerolled the lawn and seeded it, but that Ms. MacPhee was not satisfied with this.

Connor MacCallum

- [28] Mr. MacCallum was called by the Defendant. He is an estimator and manager with Weeks Construction, and is an engineer by trade. He attended at the premises in January 2021 (noted in the estimate in evidence as 2020, in error) and provided an estimate for 775 ft.² of driveway repair. He testified that the driveway is in good condition overall except for approximately 7 feet of cracks. He testified that recapping is not an option, as cracks could be transmitted through a recap on this particular driveway, as it had been recapped before. He estimated that this could occur within 3 to 5 years, depending on the condition of the original asphalt.
- [29] It appeared that Weeks provided a similar estimate in 2016 (prior to the van Veld work in question) for \$6200, which was updated to \$6950. There was no mention in the 2016 estimate to cracks or status thereof, but it was for essentially the same work, in Ms. MacPhee's own words, "adjusted for inflation."

Ken MacPhee

- [30] Mr. MacPhee lives near the premises in question. He testified that he has a "vested interest" in the property in question, but specified neither the nature of that "vested interest" nor his degree of relationship with the Defendant or Ms. MacPhee. This was a notable, obvious, and unexplained, omission.
- [31] On direct examination, he testified that he was present when Housing Nova Scotia inspected the Claimant's work. He said that Mr. d'Entremont did not look around the house, and was not interested in looking at very much except for the driveway. Neither was Mr. d'Entremont's "boss" who, according to Mr. MacPhee, said he was "not getting involved."

- [32] Mr. MacPhee was also present, apparently by coincidence, when Weber Brothers Paving attended at the site. It appeared that this engagement was at the instance of van Veld. It is sufficient for present purposes to say that the encounter was not an amicable one, and the company's principal and Mr. MacPhee did not have a pleasant discussion. The outcome of that was that in Weber's opinion, the driveway only needed to be recapped, and that the work "won't cost you anything." Weber ruled out repaving the driveway.
- [33] Mr. MacPhee testified that the driveway has a "couple marks on it" and that it would look new to a layman. The exceptions were the offending mark at the rear of the driveway, some "destruction" at the road end, and a couple of oil and diesel stains which he attributed to the Claimant's equipment.
- [34] He also testified the lawn was a "mess." It is, further, raised from its prior elevation. He also testified that the front of the house was not fully dug up, that the end of the driveway was "destroyed" at its edge, that the clothesline was on the ground, and that the side deck (which Mr. MacPhee built) was damaged.
- [35] Mr. MacPhee was able to testify to photograph 15 of the Defendant's documents, which is a filled crack and which was not satisfactory according to his evidence. He speculated that it would be "only a matter of time" before the crack recurred. He also attested to "scuffs" in photos 29 and 30, and a split or a crack at photo 32 which appears to have been where a backhoe bucket or blade impacted the driveway.
- [36] Mr. MacPhee re-excavated parts of the foundation this year. Again, he testified that he has a "vested interest" of an unspecified nature in the property, and has some carpentry training. He verified that the wrap stopped short of the corners, that the plastic sealant was at or only perhaps an inch above the ground surface, and that waterproofing was not done all around the property. 76 inches on the back of the property was not done and Mr. MacPhee referred to Defendant's photos four and five to verify this. He also referred to Defendant's photos 11, 12, and 13 to show that the foundation was not fully waterproofed in the relevant places. Ultimately, Mr. MacPhee testified that the house is approximately 42 feet long and 25 feet wide. When compared with the figures Mr. MacPhee gave of the areas that were excavated and not, it became clear that at least as much was excavated as the 68 feet called for in the contract. Where excavated, corresponding work was done where called for, albeit not necessarily what the Defendant was expecting - as Ms. MacPhee repeatedly emphasized.
- [37] Finally, Mr. MacPhee referred to photos 16 and 17, which showed the split shim underneath the deck.
- [38] Claimant's counsel did not cross-examine.
- [39] As noted, neither Ms. MacPhee nor Ms. Hughes testified.

Argument

- [40] The Defendant's argument centred on three major points.

- [41] First, the Defendant asserted that the Claimant's work was unprofessional overall and was not bid compliant.
- [42] Second, the Defendant complained about the deficiencies in the work and the damage caused as a consequence, which in turn formed the basis of the counterclaim.
- [43] Third, the Defendant asserted that the changes were not approved by Housing Nova Scotia, and therefore not only did the Defendant not sign the authorization, but in fact the wording precluded her from doing so. She (through Ms. MacPhee) asserts that the foundation work did not (or at least might not) have solved the problem at all, putting her back where she started. The counterclaim was for the cost of another contractor (Blaine MacLane) doing the remediation, and for Weeks Construction to re-asphalt the driveway.
- [44] The Claimant asserts, predictably, that the work was done properly, that the changes are appropriate, that there is no evidence that the work did not address the problem at hand, and that any differential between the work done and the work contracted for is adequately compensated in the fact that the invoice submitted for approval is less than the original bid. It further claims costs, and prejudgment interest.

Analysis

- [45] I accept that it would have been prudent for the Claimant to have sought and obtained the consent of both Housing Nova Scotia, and of the Defendant, for "changes in work." Or, it could have avoided at least some misunderstanding and resultant angst by having a discussion piece around these changes at the time as to why they were taking place.
- [46] I also accept that if the work was proven to be deficient in its result, that deficiency would affect the entitlement of the Claimant to compensation, or its liability to have others remedy the shortcomings. The measure of damages in contract is to put the innocent party in the position it would have been in, had the contract been performed – namely, a basement sealed in at least the rear and side and the grounds returned to the specifications noted in the bid.
- [47] Finally, I accept that where the Claimant caused loss or damage to the Defendant's property, other than on a transient or trivial basis, it is responsible for the associated cost or damage.
- [48] To put it in its simplest form, there is no evidence that the changes in work affected the outcome – that is, that the rear and side of the property are not watertight in a competent fashion and in accordance with applicable Codes. While there was some evidence that the subfloor in the premises may conceal past, present, or future water infiltration, there was no evidence that this has occurred subsequent to the work. Indeed, it was the evidence of Mr. van Veld that no complaints were brought to the fore about the foundation work itself, and despite the presence of substantial photos and complaints, none were presented of the interior of the property after the work to show any post work infiltration or damage.

- [49] While I accept that not every inch of excavation called for in the invitation to bid was carried out in the exact places specified, it was also in evidence that additional excavation was carried out in the course of the Claimant exercising due diligence. This was, in particular, in the front of the property (to examine and verify drainage through the town utility line, and that the line itself was clear). It was also in evidence that installing the membrane to and around the corner would be poor practice, and no evidence (either expert or by subsequent events) was adduced to contradict this.
- [50] There is no dispute that the Claimant was engaged to perform work. While Ms. MacPhee argued at considerable length that the agreement called for changes to be signed off by Housing Nova Scotia, that does not affect the Claimant's right to obtain compensation for the contracted work performed. This compensation is for what is contained within the scope of the contract, either in accordance with the terms of the bid, or on a quantum meruit basis where work was agreed to be done pursuant to a contract in force.
- [51] In my view, the differential between the work contained in the bid specifications and the work done is more than fairly compensated for in the difference between the bid amount (\$10,235) and the invoice ultimately rendered (\$9,890). The fact that this is agreed to be paid for by a third party does not affect this analysis. If anything, the Claimant deserves accolades for this abatement, knowing full well that it is ultimately the public that is being called upon to discharge the account. I find the argument by the Defendant that if these work differences were contained in the original bid "maybe someone else would have been selected to do the job" to be lacking in evidence or proof; and, further, does not affect the outcome of the work performed.
- [52] Turning to the counterclaim. As I have said, there is no evidence that further foundation work is required on the back or side that is the subject of the bid. As noted, neither Ms. Hughes nor Ms. MacPhee testified. I do not place any meaningful weight upon Ms. Hughes' silence, in all of the circumstances. Ms. MacPhee was clearly the contact point, and driving force throughout this transaction. Indeed, Ms. Hughes did not even respond to the claim when served.
- [53] I do not, however, have the same view with respect to Ms. MacPhee's failure to testify. Clearly she was possessed of relevant evidence. She was also in a position to speak clearly as to the interactions between she and the Claimant, the state of the property at present, and the alleged defects. I am entitled to draw an adverse inference, as clearly she not only had this wherewithal, but was obviously available to testify. Having heard Ms. MacPhee (albeit virtually by teleconference), I have no doubt that she is quite capable of expressing herself clearly and unequivocally, but she did not do so by way of giving evidence that would then be subject to challenge and cross-examination.

- [54] I find that the Claimant has made out its case for the reduced account billed, subject to any set off or counterclaim for defects. As noted, there was no evidence by which I could conclude on a balance of probabilities that there is any practical shortcoming in the work performed on the rear and side of the foundation, insofar as it pertains to leakage.
- [55] I turn now to the outside work and backfilling, and yard repair. I doubt that there is a construction project in Nova Scotia in which a homeowner has not had some type of issue with lingering or deficient cleanup, tracks on lawn, delays for various reasons (or for no justifiable reason at all), or other annoying factors. Certainly these are compensable when appropriate (subject, in this Court, to its jurisdictional limit on general damages of \$100). In the present case, however, not only did the Claimant return and go beyond the call in lawn repair, it arguably left it in a better state than at inception.
- [56] I place no weight in the change in elevation. This was probably inevitable. Adding topsoil will do that. There is no indication this is problematic, for example by grading with a negative slope.
- [57] Turning to the driveway. I find that the most likely motivation for this entire stonewalling effort was an attempt by the Defendant to obtain a new or replaced driveway. Certainly the Defendant did not deny payment because the money was coming out of her own pocket. While I accept that there was some minimal disruption to the driveway (a dent or crack from an equipment bucket and some destruction at the edges) it was also in evidence that the Defendant sought a quote on driveway work some three years before the van Veld work, and did not proceed. By Ms. MacPhee's own statement, the 2021 quote is essentially the same as that in 2016, adjusted for inflation and not for scope of work. As a result, while I find that the Claimant caused some minimal damage that goes beyond ordinary wear and tear, on Ms. MacPhee's own assertion, it did not lead to a differential in cost of repair 2016 to now. Again, the difference between the two quotes is from the passage of time and not from a difference in work required. I find the counterclaim with respect to the driveway to be opportunistic at best. It is dismissed.
- [58] Finally, I turned to what I might term a grab bag of complaints related to the deck supports, the clothesline, and general dissatisfaction with the physical state of the property at conclusion. Obviously, the Claimant is not responsible for deer coming and going on the property while the foliage re-grew and the grounds settled. They are a well-known presence in the area.
- [59] I do accept that the outside restoration was untimely, the clothesline disengaged for a period, and the deck shim unsatisfactory.
- [60] In my view, this is fairly compensated globally, within the limits of my jurisdiction, through the modalities of set-off of prejudgment interest and costs. I have discretion over both, although the limits to my authority over costs is essentially limited in this case to that of filing and service.

- [61] In my view, it was and is unreasonable for the Defendant to have deprived the Claimant of its compensation for now about a year and a half from billing. In my view, the elements of the counterclaim which I have found to have merit are fairly compensated by this passage of time. While ultimately the entity being called upon to pay the bill is Housing Nova Scotia, it would have done so long before now but for the obstruction of the Defendant. I consider it to be fair to offset these two factors, and deny the Claimant prejudgment interest. Ordinarily, I would also award costs to the successful Claimant in this instance, but given the extent of my jurisdiction over such matters, in my discretion I again consider it fair to offset this against the categories in which the Defendant raised a valid point. Taken as a whole, awardable costs and prejudgment interest – neither of which presumably would be covered by Housing Nova Scotia, and thus a direct cost to the Defendant, would amount to about \$850. I find this is reasonable compensation (as special and not general damages in excess of my jurisdiction) for these shortcomings. Indeed, it compensates the Defendant directly for an outlay that I would assume it would not be entitled to pass along to a third party payor. Setting one against the other, yields a net payable for the counterclaim, prejudgment interest, and costs at zero.
- [62] The mechanics of the appropriate remedy in this instance is problematic. Housing Nova Scotia is not a party to this proceeding. However, it is the entity that will be paying the bill, but for the lack of authorization from the Defendant. Through her failure to do so, the Defendant can be called upon as noted in the statement of claim either under contract or the doctrine of unjust enrichment, as pleaded.
- [63] I therefore order the Defendant to pay the Claimant the sum of \$9890, without interest to date or costs (these latter two being offset against the allowed aspects of the counterclaim). However, I stay this order for a period of 15 days from the date in which it is communicated to the Defendant (via Ms. MacPhee) in order to provide the Defendant a final opportunity to authorize Housing Nova Scotia to process the appropriate payment. If she does so within that timeframe, the Court is to be advised. Further, the Claimant shall have the liberty to advise the Court if there are any outstanding problems with collection.
- [64] If Ms. Hughes does not execute the authorization within that 15 day time period, the Claimant shall be at liberty to obtain the relevant order for judgment, and I will thereupon sign it.

Balmanoukian, Adj.

- [1] The actual quote is usually translated as “no plan of operations extends with certainty beyond the first encounter with the enemy’s main strength.”
- [2] The statutory test does not include a requirement for a “triable issue,” only promptness and a reasonable excuse for failure to file; nonetheless, I considered it appropriate to consider whether mounting a defence would be a hopeless endeavour. I was fully satisfied it would not.

- [3] Such as, to use an example I cited at the hearing of that application, a suggestion to enhance the value of the house by “getting a grant” during Ms. Hughes’ lifetime, or the like.
- [4] These are the shims between the support beams and the horizontal deck, as distinguished from the footing supports discussed above.
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Prepared on 27 October 2026 · Esheria