

CANADA / JUDGMENT

Shaheen Custom Homes Ltd. v. Brennan

2022 BCSC 716

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 716 Shaheen Custom Homes Ltd. v. Brennan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Shaheen Custom Homes Ltd. v. Brennan, 2022 BCSC 716 Date: 20220114 Docket: S120544 Registry: Kelowna Between: Shaheen Custom Homes Ltd. Plaintiff And William Arthur Charles Brennan and Denise Marie Brennan Defendants Before: The Honourable Mr. Justice Coval (via videoconference) Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: N.A. Mulholland Counsel for the Defendants: J.S. Arkle Place and Dates of Trial: Kelowna, B.C. April 12-16, October 13-15, 2021 and January 4, 2022 Place and Date of Judgment: Kelowna, B.C. January 14, 2022 Table of Contents Introduction.. 3 Facts. 3 The Parties. 3 The Contract 3 The Build. 7 Analysis. 10 Governing Law.. 12 Accounting under the Contract 13 Brennan Counterclaim.. 20 Conclusion.. 21

Introduction

- [1] THE COURT: This is a dispute between the homebuilder, Shaheen Custom Homes Ltd. ("Shaheen"), and its customer, the Brennans, regarding the cost of construction of their new home in the La Casa community development on the west side of Okanagan Lake.
- [2] Shaheen seeks contract damages of \$69,234.54, being the amount it claims remains outstanding under the parties' written cost-plus New Build Contract.
- [3] The Brennans deny any outstanding balance. They argue Shaheen's accounting is inaccurate and inflated by double-charges and costs not incurred for their build. They also argue for an unquantified counterclaim for certain overpayments, losses and damage.
- [4] For the reasons that follow, the Brennans are ordered to pay Shaheen \$5,150.

Facts

The Parties

- [5] Shaheen is a homebuilding company doing business in the Okanagan. It is owned and operated by Mr. Mohammed Hussain.
- [6] Mr. Brennan is a semi-retired long-haul truck driver.

- [7] Mrs. Brennan has not worked since the onset of the COVID-19 pandemic. Over her career, she worked in the accounting department for a Calgary homebuilder and then for over 30 years as a bookkeeper and accounts manager in the transportation industry. The Contract
- [8] In preparation for their retirement in the Okanagan, the Brennans sold their Alberta home in February 2016, though they remained in possession of it until around July. They purchased their lot in La Casa and hoped to have their new home built and ready by early 2017.
- [9] Mr. Hussain and the Brennans met in mid-2016 through a realtor's introduction, Shaheen being one of the development's approved builders. The Brennans had purchased Lot 252, also known as 6741 La Palma Drive, and Mr. Hussain lived just down the street at 6705 La Palma.
- [10] Through the second half of 2016, Mr. Hussain assisted the Brennans in having an architect prepare the plans for their new home. He was very helpful and spent much unpaid time ensuring the design was exactly as they wanted. Unfortunately, architectural error regarding the layout caused delay of around five months. But by the end of the year, they had completed the design of their modest retirement house of around 1,075 sq. ft. with a lake view.
- [11] On January 17, 2017, the building plans being finalized, the parties signed Shaheen's standard form cost-plus contract ("Contract"), with a construction budget of \$267,890 all-in. The Brennans being handy and cost-conscious, the Contract contemplated them doing some of the work themselves, as specified in Schedule C of the Contract.
- [12] The negotiations' only sticking point was the contractual completion date. Mr. Hussain's original draft estimated construction time of one year. For the Brennans, that was too long to wait and they told Mr. Hussain it was a deal-breaker. Mr. Hussain responded that he could not agree to less than a six-month estimate in the Contract, but that he would do his best to get them in by May 2017. The Brennans agreed and they arranged to reside in an RV campground until May 2017.
- [13] Under the Contract, Shaheen was to build the home according to the plans already prepared. Work was to start as soon as reasonably possible, with an estimated start time of February 2017 and the estimated six months from start of work to completion.
- [14] Section 3 of the Contract says the following regarding the project schedule:

3. Project Schedule

- (a) The Builder will commence the Work as soon as reasonably possible as may be permitted by the schedules of both the Owner and the Builder. From the date of commencement of the Work, the Builder estimates that completion will occur within _ 6 _ months. Estimated start date is Feb 2017. Any project schedule provided by the Builder is intended to be used as a guide only and shall not be construed as a promise of performance on behalf of the Builder.

Owner may request updated timelines as reasonably required. The Builder will communicate regularly by email and regularly verbally to keep the owner apprised of project schedule.

- (b) The Owner understands that the project schedule is subject to a variety of factors, including the availability, vision, and decision making of the Owner. The Owner agrees that if items chosen by them, including but not limited to floor coverings, tile, plumbing fixtures, bricks or countertops, are not chosen in time or are not available for installation in time for the Builder's scheduled installation date, or the Builder is delayed in its performance by an act or omission of the Owner or anyone employed or engaged by them, the completion date shall be extended and the Builder shall be reimbursed by the Owner for reasonable costs incurred as a result of such delay as a Change to the Work.
- (c) The project schedule is also subject to change due to written changes, verbal instructions to subcontractors or workers on site, unforeseen problems, or for reasons beyond the Builder's reasonable control. (ie. without limitation, delays caused by work undertaken by the owner, his contractors, agents or servants, labor disputes, lack of supply materials, fire, weather, natural disaster, injunction or other judicial process, or any other causes beyond the reasonable control of the Builder). Any delay by Owner of processing proposed changes or making payments as required under the Contract Documents will delay the Work
- (d) The Builder and Owner agree that the Builder not be able to commence work within a period of thirty (30) days from the estimated start date due to causes beyond its control, such as but not limited to, the inability to obtain a building permit, failure of the Owner to qualify for financing or failure to comply with provincial or municipal statutes, then the Builder or the Owner may cancel this Agreement on written notice mailed to or delivered to the address shown on the front page of this Agreement. If this Agreement is cancelled by the Builder, the Builder's liability to the owner shall be limited to the refund of any monies paid by the Owner to the Builder less any direct expenses or costs, incurred by the Builder, and less the Builder's overhead and lost profit on the project. [Emphasis in original.]

[15] As a cost-plus contract, the building price was cost of all materials, labour, and services, plus an 18% fee to Shaheen as Builder. Section 4 says:

4. Price

- (a) The amount payable by the Owner to the Builder for the Work ("The Contract Price") shall be calculated on the following basis:
 - (i) The cost of the work as defined in Schedule B to this Agreement (the "Cost of the Work"); (ii) Plus a percentage fee of 18% of the Cost of the Work (the "Fee"); (iii) Plus applicable Taxes (GST/PST).

- (b) Any estimate or budget provided by the Builder shall not be a guarantee of a determined price, but is an estimate. The actual amount required to be paid by the Owner to the Builder for the Work in accordance with this Contract will depend on actual hours and material costs, as well as requested changes to the Project by the Owner, during the course of the Project.
 - (c) The Builder represents and warrants that there will be no financial kick-backs from any sub-trade engaged by the Builder to perform work on the Project. All trade discounts and rebates applicable to the Work shall accrue to the Owner.
- [16] Schedule B of the Contract set out the allowable payment to subcontractors and suppliers and hourly rates for Shaheen's employees.
- [17] Under s. 20, the Brennans were entitled to copies of all costs incurred within 30 days of request. It said in part: Upon request by the Owner, the Builder shall provide copies of all cost [sic] incurred in the construction of the improvements within 30 days of the Date of Request.
- [18] Under s. 5, Shaheen was to issue interim accounts that were due when rendered, with 12% interest on any part of the Contract Price unpaid when due.
- [19] Under s. 14, Shaheen was to have uninterrupted access to the building and lands:
14. Access to Lands
- (a) The Owner covenants and agrees to give free uninterrupted access to the Builder of the Land including, but not limited to, the right to any tests deemed necessary by the Builder from the date of this Agreement until the Builder has completed the Work.
 - (b) The Owner shall have the right of inspection at all reasonable times as long as they do not interrupt or interfere with the work of the Builder or anyone gaining access under such Builder.
 - (c) The Owner agrees that the site will have restricted access due to WCB and general liability conditions and that tours by anyone not directly involved with the construction will be required to be escorted by senior representatives of the Builder and will be at their sole discretion.
 - (d) The Owner shall remove all personal items from the work area and any other areas required for access by the Builder. Unless otherwise specified, the Builder shall hold no responsibility for items left by the Owner in any areas that are affected by the Work, including access points and traffic through house.
 - (e) Unless otherwise specified, the Owner shall remove and preserve any landscaping items or materials (i.e. plants, bushes, edging, pavers, and so on) to be saved or replanted, from the areas designated for extraction and storing of backfill materials prior to commencement of the Work.

- (f) Reasonable effort will be taken to protect any existing driveway. However, heavy equipment, waste bits and/or trucks may cause damage to the driveway. All repairs to the driveway, other than as the result of the Builder's gross negligence, will be the responsibility of the Owner and will be charged as an extra to the Contract.
- [20] Occupancy by the Brennans before completion was deemed acceptance of the house in the state in which they found it under s. 16(c), which says: If the Owner occupies the house prior to the notice given by the Builder, or after completion without having completed the inspection referred to herein or prior to payment of all monies due the Builder, the Owner shall be deemed to have accepted the house in the state in which they find it and shall be deemed to have waived all right to object or complain about any defects in workmanship, materials or construction of any kind. The Build
- [21] Construction began in mid-February 2017.
- [22] By May 2017, the Brennans were impatient to move in and pushing Mr. Hussain for a completion date. Busy season having arrived in the campgrounds, they were having difficulty finding space and were moving from RV park to RV park. In early June, the Brennans wanted to move in by July 1.
- [23] Under the Contract, Mr. Brennan was to install the flooring. He took time off work and did this from July 1 to 9. He had hoped to do it earlier, but Mr. Hussain had postponed it.
- [24] By this point in early July, the flooring, drywall, and electrical were all complete. On July 8 or 9, the parties met at the house and Mr. Hussain advised that the trades were backlogged and he needed another couple of weeks before he would be ready for them. The Brennans advised they would travel and return on July 21.
- [25] On July 21, 2017, the Brennans returned. They were disappointed with the lack of progress since July 9, and how much still remained to be done. Mrs. Brennan described her heart sinking when she saw the state of the house.
- [26] But having nowhere else to go, they were willing to move in while the work finished around them. The unfinished work included the water connections, washrooms, countertops, safety railings, some electrical work, painting, flooring, drywall, and doors.
- [27] From July 21 to 29, the contractors worked around the Brennans, and by July 29, Mr. Brennan felt he had a fully functioning house, though both the plumbing and electrical features still needed connecting.
- [28] On August 8, 2017, Shaheen sent a further draw request for \$26,789.
- [29] Up to this point, the Brennans had paid every draw request without issue, totalling over \$214,000, but now they had some concerns.

- [30] The draw seemed high to them given that the only work remaining was on the driveway, back patio and railings. They were also concerned that the budget document, which Shaheen updated against actual costs from time to time, showed cost overruns for certain items that seemed high such as: HVAC costing \$25,000 rather than the \$16,000 budgeted; painting of \$8,000; trades of \$42,000; and other amounts that seemed high to them for framing, windows, doors, and cleanup. The Brennans were also concerned they might be getting charged for work on Shaheen's two or three concurrent projects at La Casa through inadvertence or otherwise.
- [31] For all these reasons, they wanted to review copies of the contractors' invoices and Shaheen's charges for its own employees -- in other words, details of what costs had been incurred under the Contract -- and then meet with Mr. Hussain to go over the accounting.
- [32] By email of August 9, Mrs. Brennan requested copies of the cheques Shaheen had paid so far to its contractors plus its own billings. Mr. Brennan also left a voicemail message requesting the same thing. Mr. Hussain responded that he was compiling them, but usually did not do so until the end of the job.
- [33] On August 17, 2017, Shaheen provided an updated spreadsheet of expenses, but without any of the costing backup Mrs. Brennan requested. As Mrs. Brennan testified, this budget gave her no visibility into what specifically had been invoiced or paid for vendors, suppliers, subcontractors, or trades or any breakdown of Shaheen's own charges. It contained as well the charges described above which the Brennans questioned and wished to discuss.
- [34] On August 18, Mr. Brennan told Mr. Hussain over the phone that he wanted the invoices and a meeting to discuss the accounting before the draw request would be paid.
- [35] On August 19, Mr. Hussain advised that Shaheen was stopping work. On August 24, Shaheen terminated the Brennans' access to the budget spreadsheet.
- [36] On August 25, Mr. Hussain emailed the Brennans that gathering of the invoices would take a few weeks. Mr. Hussain never agreed to a meeting.
- [37] The Brennans finished the remaining work on their home. On September 26, 2017, the regional district inspector identified certain requisite work to the deck and stairs but advised the Brennans could stay in the house while this was completed. The Brennans nevertheless moved back into their camper for some of September and October while this work was completed. They then had a successful final inspection from the regional district and the strata council refunded their construction deposit.
- [38] On October 6, 2017, without any notice, Shaheen filed a lien on the Brennans' home for \$59,479.14. As Mr. Hussain acknowledged at trial, the amount that he certified in support of the lien was materially incorrect because it included the amount of a final invoice that was not actually delivered to the Brennans until November 6, 2017. In fact, the Brennans had received no further invoices or requests for funds since the August 2017 draw request of \$26,789. Nor had they received any of the supporting invoices, cheques or accounting of

actual costs. Mr. Hussain explained that he scrambled to file the lien at the last minute because he understood the deadline was imminent.

- [39] In March 2018, Shaheen sent the Brennans a revised budget spreadsheet with new numbers, but still no actual accounting of costs or the backup invoices or cheques.
- [40] In November 2019, 27 months after Shaheen stopped working and just before examinations for discovery, Shaheen finally produced the costing backup for its invoicing. It produced hundreds of pages of invoices and cheques, but no accounting of them. It produced more invoices in January 2020. In September 2020, by court order, it produced hundreds of additional pages again with much overlap, but including, for the first time, email backup from its employees. These productions were each marked as exhibits at trial.

Analysis

- [41] There was much evidence and argument at trial about whether Shaheen agreed to the Brennans moving in before completion, whether the Brennans interfered with Shaheen's workers, and which party repudiated the Contract.
- [42] In the end, as I believe both parties agreed in final argument, these issues were irrelevant to the damages that need to be assessed, except perhaps Shaheen's claim to contractual interest. This is because the financial disputes are limited to the cost of the actual work performed, rather than Shaheen's lost profits from work not performed or the Brennans' excess costs for doing such work themselves.
- [43] Regarding repudiation, it was also uncontested that neither party gave the other formal notice of default under the default and repudiation provisions in s. 19 of the Contract. I therefore find that neither party was contractually entitled to treat the other as having repudiated.
- [44] Although the Brennans were refusing to pay the final draw request until they received the cost documents and had a meeting, I find that was not the expression of an intention not to be bound by the contract. To the contrary, it was a commitment to pay what was properly owed.
- [45] I also find the Brennans did not interfere with worker access to their home after the move-in, as alleged by Shaheen during the trial. The only such delay on the evidence was an installer who had to wait an hour or two when Mrs. Brennan was out of reach.
- [46] Regarding the Brennans' early move-in, Mr. Hussain did write on June 26, 2017, that he could not allow it because the house was not ready. But the evidence was clear that, when the Brennans returned in July, he relented and cooperated with their early move-in. He then worked around them for almost a full month until his draw request went unpaid and Shaheen withdrew from the job.

- [47] Fortunately, there are no deficiency issues to resolve because the Brennans had new home warranty insurance which dealt with all such things. Mrs. Brennan did raise a complaint about drill holes in her kitchen door, but I find it was not established on the evidence that this work fell below the standard required in s. 10 of the Contract. In addition, there is the issue of pre-occupancy acceptance of the house under s. 16(c) of the Contract. Governing Law
- [48] The obligation to keep proper accounts and records on a contractor such as Shaheen, seeking payment under a cost-plus contract, is described in *Hugh's Contracting Ltd. v. Stevens*, 2014 BCSC 1904, appeal allowed in part at 2015 BCCA 491, but not on this point.
- [49] The court stated that such accounts and records are "necessary in order for the contractor to establish its entitlement, but are also essential to ensuring that the homeowner understands what she is paying for" (at para 120).
- [50] The court described the reasoning for this obligation as follows:
- [119] In *G.T. Parmenter Construction Ltd. v. Sanders*, [1947] O.J. No. 568 (HCJ), a case cited by Ms. Stevens, the court noted the importance of a contractor keeping proper accounts: Before dealing with the evidence I think it would be helpful to state the position of a contractor who seeks payment for material supplied and for work done under a cost-plus contract. The contractor in such cases is in a favourable position. In undertaking the work he takes no risk of incurring any loss. He is assured payment of his costs and fee and is not under the anxiety of watching every item of expense closely in order to keep within the limit of his estimate, which he has to do when he is building for a firm price. However, the responsibility he cannot escape is that he must keep proper accounts. This is a duty which the law imposes upon all persons in such a position that external parties have a legal interest in the payroll and records of materials used. Furthermore, in this case there is a definite contractual obligation to keep proper accounts. The onus is of course upon the plaintiff to prove his claim by a preponderance of evidence. In a case where a contractor is seeking to recover on a cost-plus basis this burden is a particularly heavy one. He prima facie satisfies this onus by filing an itemized statement of his account, by producing his books and records to support his account, by showing that he kept an account of the materials used, and the cost thereof supported by invoices, by producing receipts for labour, services and subcontracts and by swearing to the accuracy of all these things (at para. 10).
- [51] See also *Citta Construction v. E. Lane Holdings*, 2003 BCSC 1929, at para. 19. Accounting under the Contract
- [52] The parties agree that the Brennans have thus far paid Shaheen \$233,349.20.

- [53] Shaheen began the trial with a spreadsheet suggesting the Brennans owed over \$84,000. Having altered this accounting throughout the trial, by the end of final argument Shaheen sought \$69,234.54 under s. 4 of the Contract. This was constituted by \$45,486.97 in principal and \$23,748.57 in contractual interest to January 4, 2022. It sought interest per day going forward of \$14.95.
- [54] The Brennans' position is that they have overpaid by \$2,388.26, plus they counterclaim for certain unquantified items mentioned in Mrs. Brennan's testimony, but not covered in any detail in their written submissions or final argument, which I have tried to capture below.
- [55] As Mrs. Brennan testified, when Shaheen's cost-record documents were finally produced in this litigation, they were not organized in date order, or by vendor, or otherwise organized in any helpful way. The various voluminous production of invoices and cheques were all somewhat different, but included much overlap. There was no itemized statement of account to match the production. She described Shaheen's accounting as "a mess" and I am afraid I must agree with that characterization.
- [56] In his evidence, Mr. Hussain did not assist with this accounting or reconcile the various spreadsheet budgets with the cost records that Shaheen had eventually produced. He provided no accounting of the actual costs of the build under the Contract.
- [57] Mr. Hussain was forthright that he could not recall specifics regarding particular invoices or other details, much of which he said was handled by others. His general explanation for why some third-party invoices charged to the Brennans showed lot numbers for the other projects Shaheen (or its related companies) was building at the time, or why the timing of the invoice did not fit with when that work was done for the Brennans, was that sometimes contractors got the lot numbers wrong or were late with invoicing. He admitted that his own workers did not keep timesheets.
- [58] I find that Mr. Hussain did not have specific, reliable recollections regarding virtually any of the accounting disputes specifically raised by the Brennans. I also find that Shaheen failed to provide any reasonably adequate accounting of the building costs until it filed Exhibit 2 near the end of trial, well after it had closed its own case. As described below, even that accounting contained errors conceded by Shaheen in final argument. In sum, Shaheen's accounting, until at least the end of trial, fell woefully short of the obligations described in Hugh's Contracting quoted above.
- [59] This is to be contrasted with the accounting efforts of Mrs. Brennan provided in her testimony, which I generally accept as accurate. I found her accounting evidence to be precise, reasonable, and persuasive. She was specific about the errors and objections she raised. She was precise about the invoices and cheques that supported her objections and she volunteered numerous and reasonable concessions regarding work done and acceptance of charges even where backup was still lacking.

- [60] Mrs. Brennan described the accounting exercise as difficult due to Shaheen's poor record-keeping and unwillingness to communicate. She described the challenges as including not just the lack of any organized reconciliation of the third-party invoices, but also: lack of timesheets from Shaheen's labourers or any invoices from Shaheen for their work; invoices showing lot numbers from Shaheen's other projects; bills addressed to companies other than Shaheen; illegible bills; charges for more doors than the house actually had; timing issues such as bills for pressure treatment and painting in August when only drywall work was being done at that time; or for footings and wood the day after the contract was signed, but while other Shaheen projects were at that stage of work at La Casa. All of these concerns were compounded by Mr. Hussain's refusal to meet to discuss the accounting.
- [61] I accept the apparent double-charges, erroneous allocations to Lot 252, and the other errors Mrs. Brennan identified in her evidence regarding Exhibit 2. Although, as Mr. Hussain said, it may be that contractors used the wrong lot numbers and on occasion overrated or were late in their billing, neither his own involvement nor Shaheen's accounting system provided a basis for him to know if that was actually the case rather than just a possible explanation.
- [62] I also accept the Brennans' evidence of the effect of this case on their lives. Mrs. Brennan testified that the lawsuit and the problematic accounting has consumed her and her husband's lives in the first stage of their retirement. Mr. Brennan testified that Shaheen's performance and attitude destroyed the beginning of his retirement as he had to keep working to pay the legal fees greater than the cost of his house.
- [63] I do not find that the numerous double-countings or overcharges were intentional by Mr. Hussain or Shaheen. Although the Brennans had some suspicions about that, they did not push the point. Rather, these errors arose because of an imperfect accounting system and juggling two other jobs in La Casa with the same trades and employees, being Lot 301 that started just before Lot 252 and Lot 447 which started in May or June 2017.
- [64] I have indicated the amounts that I find should be excluded from the Brennans' costs in the following table that was provided to counsel this morning and forms part of these reasons.
- [65] The table follows the order of items in Exhibit 2. It indicates those amounts charged by Shaheen which I find should be subtracted from the final Contract Price under s. 4 of the Contract because Mrs. Brennan's evidence either refuted these items as proper charges or else cast enough doubt on them that Shaheen has not proven them on a balance of probabilities.
- [66] Where items are noted as "conceded" Shaheen conceded in final argument that these amounts should be removed. In final argument, as I understood counsel for Shaheen, he removed these conceded amounts from Shaheen's accounting in reaching its final principal amount due of \$45,486.97. Therefore, I am not subtracting these conceded amounts again. I will leave it to counsel to confirm this accounting of the concessions is correct. Subtracted from Contract Price Finding Cite \$39.20 Not this job. Date and description (Oct 10, 2017; notarization of New Home Warranty) don't match this build T189 P214 \$1,550.59 For Lot 301

(see invoice) and double-counting. Lot 252 amount is only \$764.14 T189 P199 \$1,500 Double-counted Payment receipt at Tab 189, p. 6 T189 P6,7 \$2,680.84 Double-counted Payment receipt included in invoicing, Tab 189, pp. 8,9,10 T189 P11 \$2,712.95 For Lot 301 (see invoice) Jan 18, 2017, Lot 301 in progress but Lot 252 only just signed contract previous day T189 PP22-23 \$8,558.82 CONCEDED Double-counted Receipt for payment pp. 24-28 T189 P29 \$150 CONCEDED For Lot 301 (see invoice) \$116 for Lot 252 T189 P40 41 \$420.79 Illegible invoice and product T189 P41 \$1,373.12 Receipt unclear Ex 1 suggests for multiple properties. Lot 252 has only two steel doors, separately invoiced. T189 P82 \$47.03 Not for Lot 252 No key pad lock on property T189 P124 \$270.34 For Lot 301, not Lot 252 See invoice Only \$370.69 for 252 T189 P132 \$378.94 CONCEDED For Lot 447, not 252 Pressure treatment was Feb not May T189 T169 \$4,229.18 For Lot 301 See invoice Only \$240 for 252 T189 P92,93 (Pl. Tab 147) \$1,360 CONCEDED For Lot 447 See invoice Only \$220.75 for Lot 252 T189 P144,145 \$4,493 Double-counting Partial payment of \$18,663.75 already charged Tab 189 P6,120,122 \$1,721.48 Double-counting Partial payment of \$18,663.75 already charged Tab 189 P122,123 6,120 \$637.50 No matching invoice for Lot 252 and not timing of its door purchase. \$150 accepted by 252 T189 P113 \$550 Dated after work terminated and does not match Lot 252's work. No invoice. Brennans did this work themselves T189 P205 \$5,240 \$2,080 for Lot 252 Balance for other Lots (Shaheen redacted lot numbers on employee's email of hours) T189 P109 (Tab 147, PP19,20) \$708.72 CONCEDED For Lot 301 (see invoice) Only \$467.25 for Lot 252 T189 P61 \$2,401.50 No supporting records showing work or charges. This would pay Ben approx. \$2,400 more than Andre, which suggests this work was not for Lot 252, because they worked together on Lot 252. T196 P64 \$2,780 CONCEDED \$1,240 double-counted Rest to Lot 447 T189 P109,118 \$249.32 Double-counted with Lot 301 Not painting at 252 in May T189 P166,168 \$19.60 Lot 447 (see invoice) T189 P170 \$18.37 Only \$109.72 for Lot 252 See invoice T189 P173 \$1,764.10 CONCEDED Double-counted This is balance due on P.104 T189 P104,135 \$50 CONCEDED Boat charge Ms. Hussein has boat. Plaintiffs do not. T189 P148 \$1,422.57 \$1,251.43 for Lot 252. No bills for rest and work not for Lot 252 T189 P128 TOTAL: \$15,750.58 CONCEDED \$31,577.38 UNCONCEDED

- [67] The total unconceded amount, to be subtracted from Shaheen's accounting of the principal amount due, is \$31,577.38 plus its 18% fee on these costs for a total of \$37,261.31. This leaves \$8,167 owing to Shaheen.
- [68] Regarding outstanding contractual interest, I find Shaheen is not entitled to charge this interest to the Brennans due to the fundamental breach of its accounting obligations. In my view, it would make no commercial sense, and so be an unreasonable interpretation of the interest provision in the Contract, were this high rate of interest payable despite Shaheen's failing to provide a reasonable accounting of what was actually due owed until well into the trial.
- [69] For the same reason, I find it is inappropriate for Shaheen to receive statutory pre-judgment interest. Brennan Counterclaim

- [70] I award the Brennans \$1,858 for extra window costs. I accept Mrs. Brennan's evidence regarding the window issues, as her recollections were very specific and, as indicated above, I have accepted her overall reliability and credibility on these issues. I find that Shaheen measured the windows wrongly such that the middle window did not fit its framing, and the other windows were measured too narrowly for the lake view. I accept Mrs. Brennan's evidence that Mr. Hussain acknowledged this as Shaheen's responsibility and agreed the Brennans would be credited for these additional costs but were not. I also accept her evidence that Shaheen kept the middle window and the Brennans donated the other three to charity.
- [71] I award the Brennans \$735 for extra survey costs due to Shaheen refusing to release the original survey despite the Brennans having paid for it. I find Shaheen had no basis to refuse to release it, and Shaheen has not established on a balance of probabilities its assertion that the Brennans would have required their additional survey in any event.
- [72] I award the Brennans \$200 as the estimated value of the garage door opener that Shaheen gave to its trades, but was not returned.
- [73] Finally, I award them \$224.10 for base cabinets which were lost and so paid for twice.
- [74] The balance of the counterclaim is dismissed. I find that the Brennans did not establish the alleged \$170 extra cost of lockup due to Shaheen. The lost hot-water pan and lockset pan seem the type of thing which inevitably occurs in construction and for which a general contractor should not be liable.
- [75] As mentioned above, I do not find the Brennans established, on a balance of probabilities, that any of the work was performed below the standard required in s. 10 of the Contract.
- [76] Finally, I do not see on what basis Shaheen is responsible for the Brennans' campground and gas costs in September and October 2017, while final inspection work was done. The evidence suggests the Brennans did not have to move out for this work but chose to do so. In any event, it is a cost that was incurred because they insisted on moving in before the house was finished.
- [77] The Brennans are therefore awarded a total of \$3,017 for their counterclaim.

Conclusion

- [78] Setting off the counterclaim amount against the amount outstanding under the contract, the Brennans owe Shaheen \$5,150, being the difference between the \$8,167 due and owing under the contract and the \$3,017 awarded to the Brennans for their counterclaim. The balance of the claims and counterclaims are dismissed.
- [79] Shaheen's lien is invalid and must be cancelled forthwith by Shaheen at its sole cost.

- [80] Subject to hearing from the parties on costs within 30 days, I order that neither party is entitled to its costs by reference to Supreme Court Civil Rule 14-10(10).
- [81] Finally, though I think it goes without saying, if necessary, the parties are at liberty to raise with me any arithmetic errors they believe may have occurred in these Reasons which they are not able to work out between themselves.
- [82] All right. Counsel and the parties, thank you for your patience. Those are the reasons. Anything arising? Sorry, Mr. Mulholland, I think you are on mute.
- [83] CNSL N. MULHOLLAND: Nothing arising, My Lord.
- [84] THE COURT: Thank you. Mr. Arkle?
- [85] CNSL J. ARKLE: No, thank you, My Lord. I guess with respect to being in touch within 30 days of any submissions regarding costs, in light of -- what would the court recommend as being the best manner of contacting?
- [86] THE COURT: Well, if there is an issue you want to raise, if you can agree to it in writing, that is fine. You can agree as between counsel how to do it. If you cannot reach agreement or if you want an actual hearing, you can do that just through the registry.
- [87] CNSL J. ARKLE: Thank you, My Lord.
- [88] THE COURT: All right, counsel, thank you very much for your assistance and we will adjourn. "Coval J."

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