

Citation: *Robichaud v Kaye's Clean Cut Landscaping Inc.*, 2024 NBKB 228

Court File No. MC-301-2024

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

BETWEEN:

RILEY ROBICHAUD

CLAIMANT

-and-

KAYE'S CLEAN CUT LANDSCAPING INC.

DEFENDANT

DECISION

BEFORE: Justice Maya Hamou

DATE OF HEARING: November 6, 2024

DATE OF DECISION: December 16, 2024

APPEARANCES: Riley Robichaud, appearing on his own behalf
Braden Kaye, director of Kaye's Clean Cut Landscaping Inc.

OVERVIEW

1. This matter arises from an action for poor workmanship in a construction project. The Claimant, Riley Robichaud, claims the work performed by the Defendant, Kaye's Clean Cut Landscaping Inc., exhibited poor workmanship and resulted in damages. Mr. Robichaud seeks damages of \$20,000, post-judgment interest, and costs. Kaye's denies the claims of poor workmanship and counterclaims against Mr. Robichaud for an unpaid invoice in relation to the construction project.

FACTS

Agreement, Deficiencies and Breakdown of Relationship

2. By way of background, in January of 2020, Mr. Robichaud hired Kaye's to hardwood floors, bathroom and shower tiles in a new residential construction project. Kaye's estimated the cost of labour to be \$4,675.79 with the cost of materials to be paid by Mr. Robichaud. In December of 2020, Mr. Robichaud purchased materials for the total cost of \$12,900.80 and work began on the project in January of 2021.
3. Within a few weeks of the project beginning, Mr. Robichaud became concerned with the workmanship of Kaye's. Mr. Robichaud spoke with several trades people to inquire on the proper installation of hardwood floors and bathroom and shower tiles. Some of the issues observed by Mr. Robichaud included:

Hardwood flooring and tiles incorrectly cut around door jambs and casings, exhibiting rough and uneven cuts.

Hardwood flooring and tiles with jagged unfinished edges.

Uneven transitions between tiles and hardwood floors.

Uneven grout lines between tiles in the bathroom and in the shower.

Untidy finish on the shower niche and shower edge.

Excessive and uneven use of grout, around and under tiles creating uneven and misaligned tile placement.

Uneven gaps between hardwood floorboards.

4. Mr. Robichaud addressed his concerns with Braeden Kaye, the director of Kaye's. Within a few days, still unsatisfied with the workmanship of Kaye's, Mr. Robichaud asked Mr. Kaye to leave the premises.

5. By the time Kaye's was asked to leave the premises, Mr. Robichaud had made two payments: \$1,170 and \$2,570. After the breakdown of the relationship, Kaye's sent Mr. Robichaud an invoice of \$1,400.79 for the remaining amount owed on the construction project. The amount was never paid.
6. Mr. Robichaud incurred costs of \$26,223.22 to remove the work completed by Kaye's and reinstall hardwood floors, bathroom, and shower tiles.
7. Mr. Robichaud abandons recovery of amounts above the \$20,000 statutory monetary limit of the Small Claims Court (paragraph 5(1)(a) and section 7 of the *Small Claims Act*, SNB 2012 c 15 and section 3 of the *General Regulation – Small Claims Act*, NB Reg 2012-103).

Procedure on Appeal

8. Kaye's appealed the final decision of the Small Claims Court Adjudicator, seeking an appeal by way of a new hearing before the Court of King's Bench, under subsection 39(1) of the *General Regulation – Small Claims Act*.
9. Changes to the appeal provisions applicable to small claims matters in the *General Regulation – Small Claims Act*, came into effect on October 15, 2024; sections 39 to 41 were repealed while section 42.1 was enacted.
10. After October 15, 2024, appeals before the Court of King's Bench are limited to questions of law or jurisdiction (subsection 42.1(2) of the *General Regulation – Small Claims Act*). However, this appeal was filed prior to the enactment of those changes and under subsection 42.2(1) of the *General Regulation – Small Claims Act*, it must be dealt with as an appeal by way of a new hearing.

ISSUES

11. Are the comments from other contractors and letters from "experts" outlining deficiencies with the construction project admissible evidence?
12. Was the installation of hardwood flooring and tiles performed by Kaye's performed in a workmanlike manner? If not, what measure of damages can Mr. Robichaud recover? Is Kaye's entitled to recover for an unpaid invoice in relation to the construction project?
13. What costs can the successful party recover?

ANALYSIS

Hearsay and Written Statements

14. Some of the evidence provided by Mr. Robichaud contained hearsay statements. Mr. Robichaud related to the Court comments made to him in conversations with several trades people.
15. The evidence also included typewritten unsworn statements from Eddie Trevors at Eddie's Renovations (undated and unsigned), from the owner of Pasco Flooring and from Michel Melanson at Floor Coverings International. These statements included comments on the workmanship observed with the installation of the hardwood floors and the bathroom and shower tiles.
16. The admissibility of evidence before the Small Claims Court is governed by section 11 of the *Small Claims Act*. Effectively, any oral testimony, any document or any other evidence is admissible if it is relevant to the subject matter of the hearing. This is true regardless of inadmissibility in another court (except as it pertains to inadmissibility for privilege). Further, the adjudicator (and the judge on an appeal) retains the discretion to admit a document or other thing so long as satisfied of its authenticity.

Evidence

11(1) The court may admit as evidence at a hearing and act on any oral testimony and any document or other thing so long as the evidence is relevant to the subject matter of the hearing.

11(2) Subsection (1) applies whether or not the evidence is admissible in any other court.

11(3) Nothing is admissible in evidence at a hearing that would be inadmissible by reason of any privilege under the law of evidence.

11(4) A copy of a document or any other thing may be admitted as evidence at a hearing if the presiding adjudicator is satisfied as to its authenticity.

17. After all, section 3 of the *Small Claims Act*, sets out the purpose of the Small Claims Court which is to provide a simpler, expeditious, informal, and inexpensive process to resolve disputes.

Purpose

3 The purpose of this Act is to provide for the determination of small claims in a simple, expeditious, informal and inexpensive manner with opportunities for settlement at various stages of the process.

18. Justice Walsh of the Court of Queen's Bench (as it then was) issued a caution in *Burns v Allied Realty Ltd. et al.*, 2019 NBQB 173 at paragraph 9. Justice Walsh indicated that "the "relaxed rules" were never intended as a substitute for reasonably reliable evidence."
19. Mr. Robichaud, in written submissions to the Court, relied upon the decision of *R. Pollock's Home Improvement v Watson Construction, et al.*, 2020 NBQB 171 to support the admissibility of typewritten statements of purported experts. However, Justice Doyle's decision did not address this question; the decision addressed the admissibility of opinion evidence from a witness not qualified as an expert at trial.
20. The three statements provided by Mr. Robichaud were presented as expert opinions on the workmanship of the construction project undertaken by Kaye's. The authors of the statements were not called as witnesses, they were not qualified as expert witnesses, and they were not subject to cross-examination on their testimony. The statements contained technical evidence which was difficult to contextualise without oral testimony. Further, the questions addressed in the statements went to the heart of the dispute between the parties. In some cases, the typewritten statements could constitute reasonably reliable evidence. However, in this case, the Court cannot accept as evidence the undated (in some cases) and unsworn typewritten statements from purported experts. The three statements presented none of the hallmarks of reasonably reliable evidence given the reason for which their admissibility was sought.
21. With respect to the hearsay statements of trades people related to the Court by Mr. Robichaud, the comments were not attributed to any person. Again, these statements are inadmissible as no hallmarks of reasonably reliable evidence were present.

Workmanship

22. The determination of this dispute comes down to the quality of the work. In *Double Dutch Construction v Colwell*, 2012 NBQB 317 at paragraph 25, Justice Morrison explained the implied term of construction contracts whereby work would be performed in a quality and workmanlike manner.

25 [...] In the absence of any express term in the contract which specifies the manner in which work is to be done, there is an implied warranty in all

contracts for work and labour that the work will be carried out in a good and workmanlike manner (*Raynard v. O'Blenis* (1978), 21 N.B.R. (2d) 425 (N.B. C.A.); *Paul v. Urban Farmer (1993) Ltd.* (2009), 342 N.B.R. (2d) 230 (N.B. Q.B.)). **It is clear that an implied term of a contract is that the work would be carried out in a good and workmanlike manner.**

[Emphasis added]

23. The determination of the standard required for work to be performed in a good and workmanlike manner, was discussed by Justice LeBlanc in *Pavestone v Kuentzel*, 2013 NSSC 1999 at paragraphs 45 to 48. Justice LeBlanc outlined that poor quality workmanship may result in a breach of the contract depending on, among circumstances, the degree of skill expressly or implicitly professed by the contractor.

45 It is well established that "[c]ertain terms are implied in every building contract: materials must be of proper quality, the work must be performed in a good and workmanlike manner, **the materials and work, when completed, must be fit for their intended purposes**, and the work must be completed without undue delay...": *Flynn v. Halifax (Regional Municipality)*, 2005 NSCA 81 (N.S. C.A.), at para 34, citing 2003 NSSC 253 (N.S. S.C.) (varied on other grounds). In the *Manual of Construction Law* (Toronto: Carswell, looseleaf), Howard M. Wise comments, at §3.5(b)(ii), that courts will imply a term in a construction contract that the work contracted for will be completed in accordance with a certain standard. What the comparative standard is will depend on the nature of the work and the parties' expectations and may include the industry standard, a regulatory body's standards, or other acceptable standards.

46 Another term which has been implied in construction contracts is that the contractor's work be completed in a proper and workmanlike manner. **What constitutes a "proper and workmanlike manner" will seemingly depend upon the particular facts of each case.**

47 A similar phrase that is often used as an implied term in a construction contract is that the work must be of quality or suitable workmanship. If the workmanship is not of the quality that an owner could reasonably expect, the contract is in breach.

48 There is authority to the effect that in determining the appropriate standard, the court should consider "all the circumstances of the contract including the degree of skill expressly or impliedly professed by the contractor": Donald Keating, *Building Contracts*, 4th edn. (1978), at 37, cited in *Stavelly Community Centre v. L. & D. Masonry Enterprises Ltd.* (1983), 45 A.R. 375, [1983] A.J. No. 813 (Alta. Q.B.), at para. 14.

[Emphasis added]

24. The standard to be met by a contractor was also addressed by Justice Morrison in *Carpentry v Davitt*, 2018 NBQB 74 at paragraph 37. The degree of skill professed by the contractor impacts the standard to be met by the contractor.

[37] In determining whether an item fails to meet the appropriate standard, one must first determine the standard which is to be met. Mr. Johnson focused on the National Building Code (the “Code”). In his view, anything that met the Code or for which the Code provided no standard was not a deficiency. I reject that approach. As mentioned earlier, the appropriate standard is that of “good workmanship”. Mr. McLaughlin is a high quality builder of superior homes. He identified three standards:

1. His standard (exceptionally high);
2. The industry standard or what would meet the requirements of the Home Warranty Program; and
3. Handyman standard.

25. All contractors do not have the same level of experience and professionalism. Although construction projects do not require perfection, they require attention to completing the project in a workmanlike quality. Mr. Kaye testified that Kaye’s had experience primarily in landscaping and more recently in the installation of hardwood flooring, bathroom and shower tiles. Kaye’s has been in business for 13 years.

26. After hearing the testimony of the parties, the Court is satisfied that Kaye’s held themselves out to be better than handymen but less than expert contractors. However, the construction project performed by Kaye’s, objectively viewed, exhibited work below the standard of a handyman.

27. The Court rejected the purported expert evidence presented by Mr. Robichaud detailing the technical failing of the construction project undertaken by Kaye’s. However, it remains that the photographic evidence taken and submitted by Mr. Robichaud supports the descriptions of the deficiencies observed by Mr. Robichaud which include.

Hardwood flooring and tiles incorrectly cut around door jambs and casings, exhibiting rough and uneven cuts.

Hardwood flooring and tiles with jagged unfinished edges.

Uneven transitions between tiles and hardwood floors.

Uneven grout lines between tiles in the bathroom and in the shower.

Untidy finish on the shower niche and shower edge.

Excessive and uneven use of grout, around and under tiles creating uneven and misaligned tile placement.

Uneven gaps between hardwood floorboards.

28. The deficiencies raised and documented by Mr. Robichaud show significant issues with respect to the installation of the hardwood flooring and the tiles in the shower and bathroom. The Court accepts that the deficiencies evidence substandard workmanship which is observable from a distance. The Court also accepts that no expert evidence is required to see and understand the nature of the deficiencies in this case. As such, the Court concludes that Kaye's breached an implied term of the contract requiring the completion of construction project in a good and workmanlike manner.

Damages

29. After concluding that the construction project presented poor workmanship in some areas, the Court is tasked with determining the amounts owed to Mr. Robichaud.
30. As noted by Justice Walsh in *Burns v Allied Realty Ltd.* 2019 NBQB 173 (an appeal by trial de novo) assessment of damages must be made even in situations where the evidence is less than ideal.

[62] The appellants provided no evidence that would allow the Court to make the foregoing damage assessment, nor any evidence of their efforts at mitigation. The Court would be left to guess. Surprisingly, the law directs trial judges to go ahead anyway:

In *Messer v. J. Clark & Son Ltd.* (1961), 27 D.L.R. (2d) 766 (N.B.C.A.), where the trial Judge dismissed a counterclaim for damages where in his opinion the evidence was insufficient to enable him to make a proper assessment; on appeal the Court held the difficulties inherent in an assessment did not absolve the trial Judge of the responsibility of making an award. In his reasons for judgment McNair C.J.N.B. referred to *Salmond & Williams on Contracts*, 2nd, p.578 and certain passages from 11 Hals. 3rd ed., at pp. 217-8 where it is stated:

"Thus general damages are those which the law implies in every breach of contract and in every violation of a legal right. While it must be averred in general terms that such damage has been suffered, the quantification of the damage in terms of money is a matter for the jury under proper direction from the judge acting as a jury. In many cases no precise measure can be indicated, and general damages may thus often

include compensation for damage which is incapable of exact allegation, proof or evaluation in money."

And at pp. 226-7 of 11 Hals. 3rd. ed. it is stated:

"The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrongdoer of the necessity of paying damages for his breach of duty, and is no ground for awarding only nominal damages ... Thus the court, or a jury, doing the best that can be done with insufficient material, may have to form conclusions on matters on which there is no evidence, and to make allowance for contingencies even to the extent of making a pure guess."

(Preston v. Lionel & Son Ltd. (1975) 11 N.B.R. (2d) 231 (N.B.C.A.) at paras. 28-29)

[Emphasis added]

31. Granted the comments of Justice Walsh were made in the context an assessment of damages hearing, the comments appear to apply in the context of the damages sought by Mr. Robichaud in this case. Thus, the Court is required to determine, based on the evidence presented, the fair and reasonable amounts to compensate Mr. Robichaud.
32. Mr. Robichaud brought to the attention of Mr. Kaye the deficiencies observed and provided Mr. Kaye an opportunity to remedy the issues. However, Mr. Robichaud was unsatisfied with the attempts to remedy the deficiencies and proceeded with a complete overhaul of the project. All hardwood flooring and bathroom and shower tiles were removed. The Court finds the approach reasonable in the circumstances given the spread of the deficiencies across all aspects of the project.
33. Mr. Robichaud incurred costs of \$26,223.22 to remove the work completed by Kaye's and install hardwood floors, and bathroom and shower tiles.
 - Pasco Flooring demolition and installation - \$12,000
 - Tiles – \$4,093.26
 - Flooring - \$9,625.50
 - Materials from a window and trim store - \$504.46
34. Mr. Robichaud is entitled to recover the amounts for remediating the deficiencies with the installation of the hardwood flooring and bathroom and shower tiles which include the

removal of the improperly installed flooring and tiles. The Court is satisfied that Mr. Robichaud did not purchase more expensive or better materials in the remediation process.

35. Mr. Robichaud initially purchased materials for the total cost of \$12,900.80 and paid Kaye's \$1,170 and \$2,570. In addition, Mr. Robichaud paid \$26,223.22 for the remediation work. Mr. Robichaud paid \$39,124.02 for a project that was anticipated to cost \$17,576.59.
36. The Court is satisfied that the removal of the improperly performed installed of hardwood flooring and tiles and subsequent installation of new hardwood flooring and tiles was necessary and may be recovered by Mr. Robichaud in the amount of \$20,000.
37. In addition, the Court is satisfied considering the deficiencies observed that Kaye's is not entitled to payment of the outstanding invoice of \$1,400.79 issued after the breakdown of the relationship between the parties.

Costs

38. The parameters for the issuance of costs in matters before the Small Claims Court are set out in the *General Regulation – Small Claims Act*, NB Reg 2012-103 (subsection 59(1)). Generally, the successful party can recover costs from the unsuccessful party and the recoverable costs are circumscribed by the *General Regulation – Small Claims Act* (subsections 59(2) and 59(3)). The Court has no discretion with respect to the application of subsection 59(3) of the *General Regulation – Small Claims Act* which specifically outlines the recoverable costs.

59(3) For the purposes of this Regulation, costs shall consist of the following:

- (a) fees paid for filing;
- (b) reasonable and actual fees paid for service of any document;
- (c) the witness allowance paid to any witnesses by the party;
- (d) if a default judgment has been set aside, fees incurred by the party with respect to execution on the default judgment;
- (e) the fee paid for the transcript of evidence as the result of an appeal; and
- (f) the costs, if any, awarded under subsection (4).

39. Of the costs listed in subsection 59(3) of the *General Regulation – Small Claims Act*, Mr. Robichaud incurred costs of \$100 to file the Claim and costs of \$75 to serve the Claim.

40. At the hearing, Mr. Robichaud also sought prejudgment interest in accordance with section 58(2) of the *General Regulation – Small Claims Act*.

58(2) An adjudicator may award prejudgment interest for damages to the date of judgment.

41. Mr. Robichaud did not claim prejudgment interest in his pleadings. Further, in accordance with subsection 5(2) of the *Small Claims Act*, the maximum amount recoverable is inclusive of interest to the date of the judgment. Given the judgment issued has reached the statutory limit of \$20,000, no further amount may be awarded for prejudgment interest.

5(2) For the purposes of paragraph (1)(a), the amount prescribed is inclusive of interest to the date of judgment and exclusive of costs.

42. With respect to post-judgment interest, section 58(3) of the *General Regulation – Small Claims Act* provides that a judgment bears interest at the rate of 7% per year from the time it takes effect.

58(3) The rate of interest that a judgment is to bear from the time the judgment takes effect shall be 7% per year.

43. In accordance with the current small claims' regime, costs of up to \$500 can only be awarded if, in the opinion of the adjudicator, the action was brought or defended unreasonably (subsection 59(4) of the *General Regulation – Small Claims Act*).

59(4) Costs may be awarded if, in the opinion of an adjudicator or a judge of the Court of Queen's Bench or Court of Appeal, an action has been brought or defended unreasonably, but the costs ordered under this subsection shall not exceed \$500.

44. In this case, Mr. Robichaud was required to set out his claim before an adjudicator of the Small Claims Court and again before a judge of the Court of King's Bench following an appeal by Kaye's. This situation was a product of the appeal process in the *Small Claims Act* and *General Regulation – Small Claims Act*. Kaye's followed that appeal process.

DISPOSITION

45. Riley Robichaud shall have judgment against Kaye's Clean Cut Landscaping Inc. in the amount of \$20,000 and \$175 in costs. The judgment shall bear post judgment interest at the rate of 7% per year.

DATED at Moncton, New Brunswick, this 16th day of December 2024.

Justice Maya Hamou
Court of King's Bench of New Brunswick