

**CITATION:** Galaxy Communities Inc. v. Chelliah, 2024 ONSC 1947  
**COURT FILE NO.:** CV-19-613944  
**DATE:** 2024 04 02

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

**B E T W E E N :** )  
)  
GALAXY COMMUNITIES INC. ) No one appearing  
)  
)  
Plaintiff / Defendant by counterclaim )  
)  
**- and -** )  
)  
)  
PRABHAHARAN CHELLIAH, ) *M. Russell, for the defendants/plaintiffs by*  
SOBITHA ARUNAKIRINATHAN and ) *counterclaim, Prabhakaran Chelliah and*  
DUCA FINANCIAL SERVICES CREDIT ) *Sobitha Arunakirinathan*  
UNION LTD. )  
) *C. Statham, for the defendant, Duca*  
) *Financial Services Credit Union Ltd.*  
Defendants / Plaintiffs by counterclaim )  
)  
)  
) **HEARD:** March 27-30, 2023

2024 ONSC 1947 (CanLII)

**REASONS FOR JUDGMENT**

**Robinson A.J.**

**I. OVERVIEW**

[1] This action arises from the construction of a new, two-storey house on a property in Highland Creek in Scarborough owned by the defendants, Prabhakaran Chelliah and Sobitha Arunakirinathan (the “Owners”). The plaintiff, Galaxy Communities Inc. (“Galaxy”), sold the property to Mr. Chelliah and was contracted to build the Owners’ house. The Owners’ family was to reside there, including the Owners, their three children, and Mr. Chelliah’s parents. The Owners wanted to upgrade into a larger house, since their family was living in a bungalow.

[2] The property was initially purchased and held in the name of Mr. Chelliah alone. Title was later transferred into the names of both of the Owners. At the time of that title transfer, the Owners re-financed the property with Duca Financial Services Credit Union Ltd. (“Duca”).

[3] Galaxy and Mr. Chelliah signed a construction contract in June 2017, which was prepared by Galaxy. Construction commenced in 2017 and continued into late 2018. The Owners’ dealings in the course of construction were primarily with Galaxy’s principal, Mayuran Maheshwaran, and Galaxy’s project manager, “Rushak”. Galaxy and the Owners ended up in a dispute over Galaxy’s work. Galaxy ultimately preserved and perfected a lien for \$112,632.15, claiming against the Owners for unpaid services and materials and claiming priority over Duca’s mortgage in accordance with the priority provisions of the *Construction Act*, RSO 1990, c C.30. The Owners disputed Galaxy’s claim on the basis of alleged delays, unapproved design changes, deficiencies, and incomplete work.

[4] In the period leading up to trial, Galaxy breached various court orders, most notably failing to serve any of the ordered trial affidavits supporting its claim. Galaxy further failed to appear for trial. It withdrew its lien on the morning that trial commenced by registering an application to delete construction lien. The Owners and Duca jointly moved at the outset of trial for non-suit against Galaxy. I granted the motion. Accordingly, only the undefended trial of the counterclaim proceeded.

[5] As pleaded, the counterclaim is advanced by both Owners. At trial, though, it was only pursued by Mr. Chelliah as the contracting party. At the conclusion of trial, I was satisfied from the evidence that Galaxy had breached the construction contract by delayed and deficient performance of its work. I was also satisfied that Mr. Chelliah had proven most of his damages, but I was not convinced that the evidence tendered fully supported the total quantum claimed. I confirmed that I would be granting judgment on the counterclaim in an amount to be quantified and for reasons to follow. I needed additional time to review and consider the evidence on damages, which included expert evidence. Regrettably, my analysis took much longer to complete than I had anticipated. In addition, this decision has been unfortunately further delayed through no fault of the Owners due to unforeseen and unexpected circumstances significantly impacting my schedule.

[6] For the reasons outlined below, I find that Mr. Chelliah has proven damages of \$288,577.10, including HST, and is entitled to judgment against Galaxy for the same amount, plus pre-judgment interest pursuant to the *Courts of Justice Act*, RSO 1990, c C.43. I further fix costs of the action and counterclaim payable by Galaxy to the Owners in the amount of \$45,282.27, including HST and disbursements.

## II. ISSUES

[7] In the counterclaim, there are four main issues to be decided, as follows:

- (a) Is the alleged deficient and incomplete work within the scope of work that Galaxy was contractually required to perform?
- (b) If so, was Galaxy’s work deficient or incomplete as alleged?

- (c) Did Galaxy breach the contract by reason of deficient work and delayed performance?
- (d) Has Mr. Chelliah proven his claimed losses and damages?

### III. ANALYSIS

[8] Mr. Chelliah's position is that Galaxy breached the contract by reason of ongoing deficient workmanship and by delayed performance. Those breaches have resulted in losses and damages that Mr. Chelliah asserts ought to be recoverable from Galaxy.

[9] Although Galaxy did not appear to defend against Mr. Chelliah's counterclaim at trial, Mr. Chelliah still has the evidentiary burden of proving Galaxy's breach of contract and Galaxy's liability for the damages alleged to flow from that breach. To meet that onus, Mr. Chelliah relies on his own evidence as well as the evidence of three other witnesses: his spouse, Sobitha Arunakirinathan; Mukunthan Kanagasabai (Ms. Arunakirinathan's brother); and a deficiency expert, Jeff Clarke, who conducted a site inspection.

#### *a. Is alleged deficient and incomplete work within Galaxy's scope of work?*

[10] The construction contract, which was drafted by Galaxy, expressly requires that the house be built per the specifications and approved drawings attached to the contract. Mr. Chelliah's counterclaim is based on those drawings, which were prepared in January 2015.

[11] Mr. Chelliah acknowledges that Galaxy submitted revised plans and drawings to the City of Toronto, which were prepared in August 2017. However, his affidavit evidence is that neither he nor his spouse, Ms. Arunakirinathan, had ever seen those revised plans prior to discovery in this action and that they had no knowledge that Galaxy had submitted them. Ms. Arunakirinathan's affidavit agrees with Mr. Chelliah's evidence. I accept that uncontested evidence. I accordingly find that the drawings prepared in January 2015, as attached to the contract and initialled by the parties, govern for considering Galaxy's scope of work and in deciding whether Galaxy's work was deficient or incomplete. Those are the drawings to which I refer in the balance of this decision.

[12] Mr. Chelliah claims damages from a total of twenty-four work items that are said to be either deficiently performed or incomplete. In his affidavit evidence-in-chief, Mr. Chelliah gives specific evidence on a number of deficiencies and incomplete work, but also adopts the Scott Schedule. He states that the Scott Schedule "accurately reflects the remaining problems my wife and I have found with the house."

[13] The Scott Schedule sets out the particulars of alleged deficiencies in Galaxy's work and non-compliance with the agreed plans and approved construction drawings. It is the basis of Mr. Chelliah's damages claim. I have re-grouped the items for ease of dealing with them. They are as follows:

- (a) Windows:
- (i) windows have been installed at differing and misaligned heights contrary to the contract drawings;
  - (ii) a front ground floor window and a front second floor window were not installed as depicted in the contract drawings, resulting in an asymmetrical appearance;
  - (iii) two side windows on the first and second storeys (toward the front of the house) were not installed as depicted in the contract drawings;
  - (iv) a basement window was not installed as depicted in the contract drawings;
  - (v) three round decorative windows above the garage were not installed as depicted in the contract drawings;
  - (vi) the living room window has not been installed with a pre-cast lintel above it, contrary to the contract drawings; and
  - (vii) the supplied and installed windows are of inferior quality.
- (b) Unapproved design changes:
- (i) a main floor laundry room was not built as depicted in the contract drawings, with the laundry machines instead being installed in the basement;
  - (ii) the furnace was installed in a different location than depicted in the contract drawings;
  - (iii) two closets that were not depicted in the contract drawings were constructed on the second floor landing, which was supposed to be an open area with a window;
  - (iv) the main floor family room fireplace was relocated from the north wall to the east wall, compromising the original concept of the family room, which was to include a large family room window;
  - (v) the height in the attic and the height of the roof elevation was changed, with roof construction being much lower than what is depicted in the contract drawings.
- (c) Poor quality workmanship:
- (i) installation and finishing throughout the master bathroom was poor quality, including water leaks from the shower door/lintel;
  - (ii) the light above the garage entry door has been installed upside down.
  - (iii) hardwood flooring was installed in the main floor living room with gaps between the hardwood and baseboard;
  - (iv) the sump pump has been installed in a manner resulting in it continuously operating;

- (v) the drainage outlet for the sump pump has been poorly installed at the front of house near the entrance and foundation;
  - (vi) many masonry joints were not constructed properly;
  - (vii) an insulation void was left within the basement rim joist at the wall adjacent to the garage, resulting in excessive draft to the space above;
  - (viii) condensate drain lines of the furnace were improperly installed and run haphazardly on the floor;
  - (ix) a poor quality 2x4 wooden retaining wall was installed at the north-east section of the property; and
  - (x) attic insulation has been installed in a manner restricting soffit ventilation.
- (d) Incomplete work:
- (i) a closet organization system was not installed in the master bedroom; and
  - (ii) a backyard deck was not constructed as agreed.

[14] With one exception, the affidavit evidence and supplementary testimony of Mr. Chelliah support that all of these items were within Galaxy's scope of work. Galaxy had the opportunity to appear at trial to dispute the Owners' evidence. It did not. Mr. Chelliah's evidence is thereby entirely unchallenged.

[15] The exception is the closet organization system. I was directed to nothing in evidence at trial supporting that it was included in the contract drawings or part of the contract scope of work. No direct evidence was given on it. It is only addressed in the Owners' Scott Schedule, which was incorporated into the evidence of each of the Owners through their affidavits. Item no. 13 states, "Plaintiff's representative (M. Maheshwaran) made oral representation to Defendants that master closet would have closet organization system installed. Not completed." However, no details about the alleged oral representation have been provided by any witness, including when and to whom the representation was made and whether any pricing was discussed. I am not satisfied that Mr. Chelliah has met his onus of proving that Galaxy agreed to supply the closet organization system.

[16] I accordingly find that all of the alleged deficient and incomplete work claimed by Mr. Chelliah, except for the closet organization system, is within Galaxy's contractual scope of work.

***b. Was Galaxy's work deficient or incomplete?***

[17] Albeit that Galaxy did not appear to defend at trial, Mr. Chelliah's claim is for unliquidated damages. He therefore still has the evidentiary burden of establishing that the work was deficient or incomplete, as alleged.

[18] Mr. Chelliah did not give direct evidence on each of the alleged deficiencies, unapproved changes, and incomplete work, but did for many. Ms. Arunakirinathan's evidence supports

Mr. Chelliah's evidence, but does not add anything new that is particularly relevant to deciding whether the work was deficient or incomplete. Jeff Clarke was qualified at trial as an expert in home construction and renovation deficiencies and costing of home construction deficiency rectification and completion work. Mr. Chelliah also relies on Mr. Clarke's evidence with respect to deficiencies and incomplete work.

*i. Windows*

[19] I have no hesitation finding that the alleged deficiencies in window installation have been made out. To say that Galaxy's window installation was a disaster is not an understatement. A simple comparison of the photographs to the drawings demonstrates clear variances from the drawings and asymmetry in window installation.

[20] The evidence at trial supports that windows are obviously misaligned from one another in the actual construction, despite the contract drawings depicting aligned windows. Mr. Chelliah gave specific evidence on that misalignment, as well as evidence supporting that the two side windows, the basement window, and the three round decorative windows above the garage were not installed. His evidence also supports that certain window lintels are missing and that there is an overall asymmetry to window installation. Mr. Chelliah also gave evidence on missing aluminum grills and sealing problems with the supplied windows. He testified specifically that the windows leaked.

[21] Mr. Clarke's expert testimony supports Mr. Chelliah's evidence. He provided greater detail on his own first-hand observations on the missing windows, misaligned windows, and window variations from the contract drawings. He testified that he suspects that the problem stems from improper window framing, but whether the problem arose from improper framing, improper window installation, improper supervision of trades, or something else, Galaxy was responsible for constructing the home in accordance with the contract drawings. The as-built windows do not conform with the drawings.

*ii. Unapproved design changes*

[22] Five unapproved design changes were advanced at trial: relocating the laundry room, relocating the furnace, redesign of the second floor landing, relocating the living room fireplace, and varying the roof design.

[23] *Laundry room relocation:* I am satisfied and find that the laundry room location does not conform with the contract drawings and relocating it was not an approved change. Mr. Chelliah's evidence is that the drawings called for a main floor laundry room, but that Galaxy installed a closet there. The laundry machines were instead put in the basement. Mayuran Maheshwaran is said to have advised toward the end of construction that "there was no room for the main floor laundry."

[24] During his testimony, Mr. Clarke pointed out the main floor "mud laundry" room on the contract drawings. He testified that it was a typical layout and confirmed that a closet was built

where the mudroom should have been. He further testified that, in his opinion, there was sufficient space for a mudroom/laundry room to be constructed in the as-built space.

[25] *Furnace relocation:* I am satisfied and find that the furnace room location does not conform with the contract drawings and relocating it was not an approved change. Mr. Chelliah's evidence is that the furnace was supposed to be installed in the centre of the basement, but was instead installed by Galaxy along the rear wall. During his testimony, Mr. Clarke pointed out the location of the furnace on the contract drawings and identified where on the rear wall it was actually installed. Mr. Chelliah's affidavit states that Galaxy moved the furnace without the Owners' agreement and that they only learned of the change after taking possession in 2018. They noticed inadequate airflow to the second floor bedrooms at the front of the house. Galaxy's project manager, "Rushak", is said to have confirmed that the furnace was too small to blow enough air to the front of the house. Mr. Chelliah's evidence is undisputed.

[26] *Second floor landing redesign:* I am satisfied and find that Galaxy changed the design of the second floor landing without approval. Photographs tendered and the evidence at trial supports that Galaxy did not comply with the contract drawings by unilaterally constructing a closet on the second floor landing in an area that was supposed to be an open space with a window (one of the windows that was not installed).

[27] *Fireplace relocation:* I am satisfied and find that the fireplace location on the main floor does not conform with the contract drawings and relocating it was not an approved change. Mr. Chelliah's evidence is that Galaxy unilaterally relocated the living room fireplace from the side yard wall to the rear yard wall in the centre of what was supposed to be the main window in the family room. His affidavit evidence is that the change has resulted in light being blocked from entering the room and that, from the outside, it looks like Galaxy partially built over a window. Having seen the photographs, that description is accurate.

[28] Since Galaxy did not appear at trial or tender any responding evidence, there is no evidence explaining the design change. The drawings clearly called for a side fireplace and a large window facing the rear yard. Mr. Chelliah's evidence, supported by Ms. Arunakirinathan, is that that Owners did not agree to or approve any change. That is undisputed. The as-built fireplace does not conform with the drawings.

[29] Mr. Clarke provided opinion evidence on potential reasons for moving the fireplace and why, in his opinion, it did not have to be moved even if a City inspector would not permit a vent on the north wall. He opined that vertical venting was possible. Although helpful during trial to understand the issue, I need not consider these hypotheticals. Galaxy has not put forward any explanation for the change. It is enough that an unapproved change was made.

[30] *Roof design changes:* I am satisfied and find that the roof design was changed from the contract drawings and that the changes were not approved. Mr. Chelliah gave evidence that the roof was not built in line with the drawings. Specifically, his evidence is that the height in the attic and the height of the roof elevation does not match the drawings and the pitch of the roof is not steep enough. Mr. Clarke's evidence comparing the contract drawings to the as-built photographs supports the variations.

### *iii. Poor quality workmanship*

[31] Poor quality workmanship is alleged in the master bathroom, installation of a garage entry door light, installation of hardwood flooring, installation of the sump pump and related drainage, mortaring of masonry joints, insulation in a garage-adjacent wall, installation of furnace condensate drain lines, construction of a retaining wall, attic installation.

[32] I find that Mr. Chelliah has proven the alleged poor quality workmanship. Both Mr. Chelliah and Mr. Clarke gave evidence, supported by the photographs tendered, confirming the following:

- (a) there are various leaks in the master bathroom;
- (b) the garage entry door light was quite evidently installed upside down;
- (c) there are gaps in the hardwood flooring requiring filling;
- (d) the sump pump runs an abnormal amount of time and the discharge hose was improperly installed above-ground outside of the house resulting in water freezing on the front walkway;
- (e) there are gaps in the mortar around the house;
- (f) insulation was not installed between the basement and the garage;
- (g) condensate lines from the furnace have been placed haphazardly and represent a trip hazard;
- (h) that a 2x4 wood retaining wall used by Galaxy across two or three fence sections to bridge a one-foot gap in grading with the neighbour's property lacked lateral restraint, was inappropriate material to sue, and is shifting; and
- (i) loose insulation was sprayed into the attic space resulting in restricted soffit venting areas and (as Mr. Clarke characterized it during his testimony) "zero soffit venting in th[e] house".

### *iv. Incomplete work*

[33] As previously noted, two items of incomplete work are alleged: installation of a closet organization system in the master bedroom and construction of a backyard deck. I have already found that Mr. Chelliah has not proven that Galaxy agreed to supply and install the closet organization system. That leaves the backyard deck. I am satisfied that there was an agreement to supply and install a backyard deck, which was not completed.

[34] A backyard deck is not reflected in the contract drawings. During his examination, Mr. Clarke reviewed the drawings and confirmed that he was mistaken when he wrote in his report that the deck was on the plans.



[35] Mr. Chelliah's uncontested evidence is that Mayuran Maheshwaran promised that Galaxy would build a deck in the backyard after the final grading was complete, but did not do so. At the time, the patio door in the kitchen was blocked off for occupancy inspection. There were not yet any stairs to the backyard. Ms. Arunakirinathan's evidence is the same: she was told by both "Rushak" and Mr. Maheshwaran that Galaxy would build the deck after grading was complete. Grading was completed in May 2021, as confirmed in an email tendered in evidence. Mr. Chelliah's evidence is that Galaxy did not return to build the deck.

*c. Did Galaxy breach the contract?*

[36] The terms of the contract are undisputed. As noted earlier in these reasons, the construction contract expressly requires that the house be built per the specifications and approved drawings attached to the contract. Per the contract, work was estimated to be completed by December 1, 2017, but contractually required to be completed by no later than February 28, 2018. It is a fixed price contract indicating that the total cost of construction was to be \$650,000, including HST, with an additional \$600,000 identified for the price of purchasing the land.

[37] The Owners' evidence on deficiencies and incomplete work is undisputed. It amply supports a failure by Galaxy to perform the work as agreed and depicted in the contract drawings, which I find was a breach of contract.

[38] The contractual completion deadline was also breached. Mr. Chelliah's evidence is that, when the February 28, 2018 deadline could not be met, Mayuran Maheshwaran told the Owners that the house would be ready for the end of April 2018. The evidentiary record supports that an occupancy permit was not issued until July 12, 2018 and that deficiency rectification work continued well after that time. Notably, hardwood flooring deficiencies continued to be rectified until November 2018, at which point the Owners were finally able to move in after the deficient flooring was replaced in October-November 2018. That evidence on delay is also undisputed. Galaxy's delays are unexplained. The uncontested evidence supports a further breach of contract for delayed performance.

[39] There is a default provision in the contract that requires Mr. Chelliah to provide written notice of default to Galaxy. The undisputed evidence before me from Mr. Chelliah is that he and Ms. Arunakirinathan had not seen the construction contract before the day they signed it, which was during a short thirty minute meeting with Mr. Maheshwaran, who told Mr. Chelliah where to sign. Mr. Chelliah's evidence tends to support that Mr. Maheshwaran did not expressly advise him about the notice clause nor was it noted. I accept the Owners' argument that, to the extent the notice provision that Galaxy drafted is an exculpatory clause, Galaxy was obliged to draw specific attention to it and did not.

[40] In any event, I also accept the Owners' alternate argument that sufficient notice was provided in the course of this litigation, particularly by way of the Scott Schedule. Galaxy preserved its lien in November 2018, which is the same month in which the Owners moved into the property. I accept that notice of the deficiencies and incomplete work could not reasonably have been given until after the Owners took occupancy, by which time Galaxy's lien had been registered. The Owners submit that providing notice in the context of this litigation is not

unreasonable and constitutes valid notice under the contract. I question that position, but Galaxy did not appear to argue against it. Absent a challenge, I accept that, on a balance of probabilities, the notice provision was factually met by giving notice of the deficiencies and incomplete work in the course of this litigation. Galaxy did not remedy its default.

[41] I accordingly find that Galaxy breached the contract both by reason of failing to comply with the contract drawings and by unreasonable and unexplained delays in its work.

***d. What alleged losses or damages have been proven?***

[42] In a home construction case such as this one, a homeowner's damages from a breach of contract by the contractor commonly include the cost to rectify deficiencies in the contractor's work, the cost to complete the work, losses or damages from delay in completing the work, and other costs incurred by the homeowner, such as borrowing costs.

[43] As set out in *Cornelius Grey Construction Inc. v. Folz*, 2018 ONSC 647, at para. 15, the court must be fair when assessing damages, keeping the objective of contractual damages in mind. That objective is to put the innocent party into the position they would have been in had the contract been fulfilled. Costs of rectifying deficiencies and completing the work must be proven to be reasonable and necessary. All damages claimed by the homeowners must be recoverable at law and must flow unavoidably from the breach of contract.

[44] During closing submissions, the quantum of judgment sought was revised to reflect certain evidence at trial. Judgment is sought based on Jeff Clarke's calculation in Section 5.2 of his report, namely \$125,380.70 as quantified, plus project management and HST, as well as a further \$100,000 for window positioning rectification work and \$50,000 as damages for the height variation of the roof. Mr. Chelliah acknowledges that there should be credits given for the amounts that Mr. Clarke conceded during examination could be saved.

[45] The evidence on damages is undisputed, but Galaxy's failure to appear at trial does not render the trial process a perfunctory rubber stamp. It remains Mr. Chelliah's onus to prove that he has suffered the claimed damages as a result of Galaxy's breach of contract.

[46] Quantification of the claim for deficiency rectification and completion costs is based on Mr. Clarke's inspection and cost estimations. Mr. Clarke relies, in part, on estimates obtained by the Owners from Ratna Renovation (for laundry room and backyard-related work) and Niva Care (for window-related work), which were considered by Mr. Clarke in his own estimation process.

[47] During his expert testimony, Mr. Clarke was taken through his "Financial Summary" in section 5.2 of his report. He reviewed each of the items, referring to photographs he had taken and discussing both the required work to remedy each item and the rationale behind his costing. I found his opinion evidence on the required work and costing to be helpful and carefully considered and assessed. They are supported by his expertise and, in some cases, by the third party estimates obtained by the Owners. Absent any cross-examination or argument disputing Mr. Clarke's assessment, I find no basis to interfere with his estimates for remediation or

completion of each line item. I thereby accept Mr. Clarke's cost estimates to complete the work, subject to a few exceptions discussed further below.

[48] I need not go through each of the twenty-four items in detail. A few examples serve to outline the manner in which Mr. Clarke approached his assessment of the work required and his estimation on costs.

[49] With respect to the mudroom, Mr. Clarke estimates the loss at \$9,500, comprised of \$11,000 less a \$1,500 credit for the existing laundry connections. In his opinion, the estimate obtained by the Owners from Rantra Renovation to complete the necessary work for \$11,000 is reasonable. He testified that a lot of plumbing work would be required, including retrofitting drains, as well as destructive work on the second floor to install plumbing vents. Electrical retrofitting would also be required.

[50] With respect to the various window deficiencies, Mr. Clarke's testimony involved explaining the process required to perform required deficiency remediation and complete outstanding work. He explained his cost estimation. That included discussing difficulties with retrofitting many of the windows and why he found the estimate by Niva Care (obtained by the Owners) to perform window-related work to be reasonable. Mr. Clarke explained the scope of work that would be required with reference to the Niva Care estimate. He further explained the required work and his own estimating for other windows not addressed in the Niva Care estimate. He was taken through each of the windows with reference to his report and discussed relevant Ontario *Building Code* requirements. I accept his evidence and quantification of the remedial and completion costs.

[51] Ultimately, Mr. Clarke testified that the window work, estimated in the range of \$95,000 to \$115,000, could be completed for \$100,000 if all windows were being done. In closing submissions, that \$100,000 figure was advanced by Mr. Chelliah.

[52] With specific respect to the missing three round decorative windows above the garage, I accept Mr. Clarke's estimate of \$21,000 to retrofit and complete those windows apart from his estimated range of \$95,000 to \$115,000 for the other windows. Mr. Clarke testified that it would be the same cost if Galaxy had performed that work itself. This was not an extra, though. The windows were identified in the contract drawings.

[53] With respect to the furnace relocation, I am satisfied that Mr. Chelliah has suffered damages from the furnace relocation. Mr. Clarke's testimony confirmed that for functional reasons a furnace should be close to the centre of a house and not at the extreme front or rear of the house. He testified that a furnace is only able to push air so far and that, although it was not a cold day when he inspected, he has never before seen ductwork like what Galaxy installed. He testified that it would be asking too much to have the installed furnace push air 50 feet across the basement and a further 15 feet up to the bedrooms, one of which is above the garage. He also gave testimony on the number of duct elbows used, which he indicated adds the equivalent of 15 feet due to the restriction in airflow velocity through the elbow.

[54] Mr. Chelliah's undisputed evidence is that there are airflow problems, particularly in the second floor bedrooms at the front of the house. That correlates with Mr. Clarke's testimony that the actual furnace installation location would impact airflow. Those airflow concerns are sufficient to support damages flowing from the improper installation. Mr. Clarke testified about the work required to reposition the furnace and his calculation of the estimate of \$7,000 for that work. I accept his evidence.

[55] Mr. Clarke's evidence for the other items followed a similar pattern. It was more than sufficient to support his assessment on each of them.

[56] Although I accept Mr. Clarke's evidence on quantification of the remedial and completion work, I nevertheless have a few concerns with Mr. Clarke's damages quantification, as follows:

- (a) During Mr. Clarke's testimony, he identified \$7,000 in costs savings if all other remedial work was being performed, specifically savings in respect of closets (\$1,500 if a window were to be installed on the second floor landing), fireplace relocation (\$3,000 in masonry costs), and mortar joint rectification (as much as \$2,500 in masonry costs);
- (b) Mr. Clarke also testified that the cost to remediate the furnace condensate drain lines (\$700 claimed) would be moot if the furnace is relocated. He stated that the existing laundry facility drain could be used for the same purpose;
- (c) I was directed to no term of the contract requiring Galaxy to install the backyard deck. I accept the evidence of Mr. Chelliah and Ms. Arunakirinathan that Mayuran Maheshwaran and "Rushak" made representations about providing it, but there is no evidence before me that Galaxy agreed to perform that work as part of the base contract price and not as a compensable extra;
- (d) Mr. Clarke confirmed that the variance in roof height from 18-inches as designed to 14-inches as-built has no functional impact whatsoever;
- (e) No evidence was given on calculation of the 18% project management fee included in Mr. Clarke's "Financial Summary"; and
- (f) Mr. Clarke confirmed that the costs of remediation and completion in his estimates would have been at least 15% lower if the work had been performed prior to the COVID-19 pandemic, which took place several years into this litigation.

[57] For the above reasons, I accept Mr. Clarke's calculation of \$125,380.70 in Section 5.2 of his report as the subtotal of deficiencies and incomplete work. I find that Galaxy is entitled to credit for the savings identified by Mr. Clarke during his examination if all remedial and completion work is done, rather than being done on a piecemeal basis, namely \$7,700 as outlined in paras. 56(a) and (b) above. I accept Mr. Clarke's evidence on the cost of rectifying the window position issues being \$100,000 if all window work is done, which is the position taken by Mr. Chelliah in closing submissions. That totals \$217,680.70.

[58] I find that Mr. Chelliah has not proven damages for the backyard deck. As noted, I accept the Owners' evidence that Galaxy represented it would be constructed, but Mr. Chelliah has not proven that Galaxy agreed to complete the work as part of the base contract scope of work. It is not part of the base contract scope of work as outlined in the contract and contract drawings. There is no evidence on any discussion on the price of performing the deck construction. Although I accept Mr. Clarke's estimates as being the reasonable cost of completing the work, there is no evidence on what the work would have cost had Galaxy performed it. I accordingly cannot find that Mr. Clarke's estimated cost to complete is any greater than what Galaxy would have been entitled to charge as an extra. Damages have not been proven.

[59] Similarly, I find that damages have not been proven for the alleged height issue with the roof. Mr. Clarke's testimony is that there is no functional concern with the height variation. Neither Mr. Chelliah nor Ms. Arunakirinathan gave any evidence on damages beyond the fact that the height does not match the drawings. For example, neither testified that they were bothered by the aesthetic variation or that they have experienced any functional concerns. In addition, neither expressed any intention to correct the height variance. In my view, the fact that an as-built condition does not strictly comply with contract documents does not itself entitle the opposite party to damages. There must be some loss occasioned by the non-conformity. There is no evidence before me of any concern with functionality or aesthetics of the roof. The record thereby does not support a finding of loss or damages from Galaxy's variation in the as-built roof height.

[60] With respect to the claim for a project management fee, as noted above, no evidence has been tendered on the 18% claimed. Mr. Clarke was not asked to explain it and does not do so in his report. I accept the closing submission that the various trades will need to be coordinated, but cannot accept 18% as an industry norm without some evidence to support it. I accordingly find that 10% is a reasonable project management fee markup to be applied.

[61] With respect to delay damages, Mr. Chelliah claims \$18,000 in rent and a further \$1,650 in motel expenses. Mr. Chelliah's evidence is that \$18,000 in rent was incurred between March 2018 and the end of November 2018. During that time, their old property had been sold and the Owners were waiting for Galaxy to finish the work. The Owners rented the basement of a house owned by Mr. Arunakirinathan's brother, Mukunthan Kanagasabai, for \$2,000 per month. That is corroborated by Mr. Kanagasabai's undisputed affidavit evidence, who also confirms payment of the \$2,000 per month. Given my finding that Galaxy breached the contract by delayed performance of the work, I find that the rental expenses incurred until the Owners' were able to move into the subject property are damages flowing from Galaxy's breach of contract.

[62] Mr. Chelliah also claims \$1,650 in motel expenses for periods in time when his parents were put up in a motel. Mr. Chelliah's undisputed evidence is that, at the material times, his parents lived with the Owners and their children. His mother has since passed away. Mr. Chelliah's affidavit evidence is that his parents were unhappy in the basement of Mr. Kanagasabai's house and, intermittently, he rented a motel for them to use at a rate of \$560 per week.

[63] The calculation of \$1,650 is unclear. No evidence was given on the specific dates for which Mr. Chelliah's parents stayed in the motel. Although they live with Mr. Chelliah and his family,

there is no evidence that they are dependents of Mr. Chelliah nor is there evidence addressing whether they can or do financially contribute to the household. I have difficulty finding that motel costs for Mr. Chelliah's parents are reasonably foreseeable damages flowing from Galaxy's delayed performance of the construction.

[64] In any event, Mr. Chelliah's evidence is that the Owners did not keep all of the receipts from the motel, but did locate one. That single receipt supports a charge of \$560 for the Maple Leaf Motel in Scarborough from October 7-13, 2018. It has not been correlated to the \$1,650 claim advanced at trial. I accordingly find that Mr. Chelliah has not met his evidentiary burden of proving the quantum of claimed motel costs or that those costs are properly damages flowing from the breach of contract.

[65] Calculating a homeowner's damages requires comparing the total cost to complete the contract against the cost that would have been incurred under the original contract: *Cornelius Grey Construction Inc.*, *supra* at para. 67. There is no evidence on the amounts paid to Galaxy under the construction contract or the state of accounts.

[66] Mr. Chelliah argues that, since Galaxy did not pursue its claim for payment, there should be no deduction from proven damages. No case law was tendered in support of that position. I have some difficulty with the argument, but acknowledge that the total base contract price for construction work was \$650,000, that Galaxy liened for only \$112,632, that the Owners disputed that claim, and that Galaxy opted not to appear to prove the claimed unpaid balance. Although the Owners have not tendered positive evidence on the state of accounts, so too have they been left with a house with substantial deficiencies requiring rectification. In my view, the equities of this case favour not overthinking defences that Galaxy could itself have advanced at trial, but has elected not to make by disengaging entirely from the litigation process.

[67] I accordingly find that the following damages have been proven:

Proven rectification and completion costs (as above)	\$ 217,680.70
Allowed project management markup (10%)	<u>21,768.07</u>
Subtotal	\$ 239,448.77
HST	<u>31,128.34</u>
Revised subtotal	\$ 270,577.11
Proven delay damages (rent paid)	<u>18,000.00</u>
<b>Total damages</b>	<b><u>\$ 288,577.10</u></b>

[68] All damages are subject to the duty to mitigate: *Cornelius Grey Construction Inc.*, *supra* at para. 68. Remedial work has not been completed. Mr. Chelliah's evidence is that the Owners have not had the ability to pay to fix the remaining issues. They went into debt to have Galaxy construct the house and have had to pay legal fees after Galaxy commenced litigation. I accept that evidence.

[69] Galaxy has not appeared to put forward any argument on how the damages could have been mitigated in these circumstances or how Mr. Chelliah failed to take reasonable steps to do so. I thereby find that Mr. Chelliah's damages could not have been mitigated, since the undisputed

evidence is that remedial and completion work could not have proceeded sooner by reason of the Owners' financial circumstances.

#### **IV. PRE-JUDGMENT INTEREST & COSTS**

[70] Mr. Chelliah seeks pre-judgment interest pursuant to the *Courts of Justice Act* from the date of the occupancy permit issuance on July 12, 2018. The Owners concede that they willingly waited for occupancy, but submit that they ought to have been able to take possession upon occupancy, which would also be the date by which most deficiencies were present. I find that position makes sense and, since it is undisputed, I am granting it.

[71] The Owners seek their costs of the action and this reference in the amount of \$34,020, plus HST and disbursements, representing partial indemnity costs of \$15,435 to the date of the Owners' offer to settle in November 2022, plus substantial indemnity costs of \$18,585 from the date of the offer to trial. The Owners offered to settle the action on payment of \$90,000 to Galaxy, with no costs payable to the Owners if accepted by November 25, 2022 and partial indemnity costs payable thereafter in an amount to be agreed or assessed. The result of trial is clearly far more favourable to the Owners than their offer to settle.

[72] I have broad discretion as to costs in s. 86 of the *Construction Act*, including discretion to award costs on a substantial indemnity basis. Given the quantum and issues in dispute, I find the hours spent, rates claimed, and disbursements incurred to be reasonable and proportionate. I do not have Galaxy's bill of costs, but have no hesitation in finding that the amounts claimed ought to be well within reasonable expectations of Galaxy for litigation of this nature, which involved six hearings for trial directions before me.

[73] I also agree with the Owners that Galaxy's conduct is a relevant factor in costs. Additional time and expense was incurred by reason of Galaxy's threat of bankruptcy, which never materialized. Galaxy repeatedly breached orders and failed to appear at trial. Galaxy had evidently abandoned its claim, but still waited until the morning of trial commencing to release its lien.

[74] Considering the factors in subrule 57.01(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and the Owners' offer to settle, I find no basis to reduce the costs claim. I accordingly fix the Owners' costs of the action and this reference in the amount of \$34,020, plus HST, plus claimed disbursements of \$6,839.67, for a total of \$45,282.27.

#### **V. DISPOSITION**

[75] For the above reasons, Mr. Chelliah shall have judgment against Galaxy for \$288,577.10, including HST, plus pre-judgment interest from July 12, 2018 pursuant to the *Courts of Justice Act*. Galaxy shall further pay to the Owners their costs of this action and the reference fixed in the amount of \$45,282.27, including HST and disbursements, payable within thirty (30) days of confirmation of my report. Report to issue accordingly.

**Released:** April 2, 2024

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**ASSOCIATE JUSTICE TODD ROBINSON**



**CITATION:** Galaxy Communities Inc. v. Chelliah, 2024 ONSC 1947  
**COURT FILE NO.:** CV-19-613944  
**DATE:** 2024 04 02

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the *Construction Act*, RSO 1990,  
c. C.30, as amended

B E T W E E N :

GALAXY COMMUNITIES INC.

Plaintiff /  
Defendant by counterclaim

- and -

PRABHAHARAN CHELLIAH, SOBITHA  
ARUNAKIRINATHAN and DUCA FINANCIAL  
SERVICES CREDIT UNION LTD.

Defendants /  
Plaintiffs by counterclaim

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**REASONS FOR JUDGMENT**

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**Associate Justice Todd Robinson**

**Released:** April 2, 2024