

CITATION: 9382494 Canada Limited et al v. Bell, 2022 ONSC 4520
COURT FILE NO.: CV-16-0093-00
DATE: 2024-08-16

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

9384294 CANADA LIMITED o/a JMS
NORTHWESTERN CONTRACTING

Plaintiff

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)
) *Robin A. Lepere, Petrone & Partners,*
) for the Plaintiff

- and -

BRENDA BELL

Defendant

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) *Cheryl C.M. Siran, Hook Seller Lundin LLP,*
) for the Defendant

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) **HEARD:** January 22 and 23, March 4 and
) 5, 2024, at Kenora, Ontario (via Zoom)

Justice B. R. Warkentin

Reasons for Judgment

[1] This litigation began as a construction lien action. The lien was discharged when the defendant deposited the sum of \$15,000 into court. The defendant, Brenda Bell (“Bell”), has counterclaimed alleging breach of contract and failure of the plaintiff to perform the construction in a good, workmanlike and timely manner. The trial proceeded by way of affidavit evidence and cross-examination on those affidavits.

[2] The issues in this litigation are not complex, however, as with most construction lien actions there are nuances that make rendering a decision challenging. Notably, the failure of the

parties to set out their contractual relationship in writing is a significant hurdle for the claims of both parties.

[3] The construction project that gave rise to the lien, and these claims, involved demolition of existing spaces on the second and third floors of an older building to construct two apartments. The construction began in early 2016 and continued until July or August of that year.

[4] The plaintiff claims \$50,251.10 for unpaid services and materials. The defendant denies the amount claimed by the plaintiff, alleging it is excessive and more than the amount they had agreed upon. She seeks, as plaintiff by counterclaim, the sum of \$33,971.52 for the cost of remediating and completing the unfinished construction. She also claims the sum of \$85,000 for lost rental income during the period that the property was uninhabitable due to ongoing repairs after the plaintiff had been discharged.

[5] The value of the building in 2016 was between \$70,000 and \$80,000. It was sold in April 2022 after the renovations and repairs were completed for \$81,300.

[6] The failure to set out the terms of the construction project in a written contract resulted in both parties having different expectations of their contractual obligations. The result is that neither party will be successful in this litigation.

Background Facts and History of the Parties' Contractual Relationships

[7] Bell retained the plaintiff, JMS Northwestern Contracting ("JMS"), to undertake various construction projects on her property located at 78 Spruce Avenue, Vermilion Bay, Ontario (the "Property").

[8] JMS is the operating name of a construction company that was incorporated as 9384294 Canada Limited when the facts that give rise to this litigation arose. JMS was also the operating name of a different corporation, 8630500 Canada Inc. The sole officer, director and shareholder of both corporations is Rosemary Sinclair.

[9] The spouse of Rosemary Sinclair, John Stewart (“Stewart”), runs and manages all aspects of the contracting business operated by both corporations and is the face of the JMS business, in that all communication regarding construction work undertaken by JMS flows through Stewart.

[10] Stewart has been working in the construction industry for more than 30 years. He started in the roofing business and expanded to other exterior and interior construction. He has provided construction services in various provinces in Canada, however, since 2012 has been in Vermilion Bay, Ontario and provides local contracting services under the operating name of JMS.

[11] Bell purchased the Property in 2004 through her own corporation, Norwesto Communications Ltd. o/a Q104 FM for \$76,000. After the purchase in 2004, some renovations were completed, primarily to the third floor of the Property, to enable the operation of a radio station from the Property.

[12] In addition to operating a radio station, Bell, a real estate and corporate/commercial lawyer, used an office on the second floor of the Property as a satellite law office, her primary law office being in Dryden, Ontario where Bell also resided.

[13] In September of 2010, Bell sold the radio station and transferred the property into her name personally. She rented the Property to the new owner of the radio station until 2011. Bell was then using the first floor of the Property as a satellite law office.

[14] In the fall of 2014, Stewart and Bell met while JMS was engaged by the Co-Op in Vermilion Bay. The Co-Op building is next door to the Property. Bell was in the process of installing exterior siding on the Property and inquired if Stewart would be interested in replacing the roof on the Property. They exchanged contact information at that time.

[15] Bell first contacted Stewart on January 29, 2015, when one or more water pipes in the Property had frozen and then ruptured. The cause of the frozen pipes was due to the furnace in the building having stopped functioning. Bell was not in Vermilion Bay, and she asked for Stewart’s assistance in inspecting the property and ensuring the water supply to the property was turned off.

[16] During his inspection, Stewart informed Bell that a water pipe on the second floor of the Property had burst, causing substantial damage on both the first and second floors of the Property. Bell authorized Stewart to engage with the insurers of the Property to review and assess the damage and to complete first the cleanup of the damage and then to complete the repair work that had been authorized by the insurance company. The furnace repair was not part of the scope of work provided by Stewart and was completed by a furnace company.

[17] For the period between January 29 and March 2015, JMS completed the authorized work to mitigate the damage to the Property due to the water damage. Bell submitted an initial insurance claim for the clean-up portion and the insurer paid JMS the sum of \$5,751.70.

[18] Bell and Stewart then discussed the scope of the work required to repair the property damage to restore the building. Stewart's final quote of \$14,000.00 was accepted by the insurer and Bell retained Stewart to do the repairs.

[19] The repairs included demolishing most of the main floor's interior, including the ceilings and walls, as well as the kitchen and coffee area cabinetry, flooring, and some drywall on the second floor.

[20] Once the demolition was completed, Stewart and Bell discussed improvements to the property that were beyond the scope of the insurance claim. This included improving the insulation to the exterior walls. As a result, the insurance proceeds were used for the repairs and improvements to the first floor, leaving the second floor to be completed later.

[21] The insurer paid the claim as per the quote by Stewart. Bell paid Stewart for certain other charges that were over the insured amounts and the insurance claim was closed.

[22] In April 2015, Bell hired JMS to repair/replace the roof to the Property. Once on the roof, Stewart discovered that the chimney had deteriorated and needed to be reconstructed. Stewart and Bell discussed options and decided that it would be less expensive to remove the chimney rather

than undertake repairs. Bell confirmed that the furnace did not vent into the chimney. Neither Bell nor Stewart was aware that the hot water tank in the Property vented through the chimney.

[23] In the summer of 2015, Bell hired JMS to complete some work on her home, which included replacing eaves and installing an above-ground pool and deck.

[24] The roofing work on the Property in 2015 and on Bell's residence was not part of the litigation, although there are allegations by Bell that some of the insurance work on the Property was not completed in a competent manner. She also claims for the the cost to replace the hot water tank and furnace, alleging that these expenses were incurred because of JMS's incompetence. Those allegations form part of her counterclaim.

Claim, Defence and Counterclaim

Work at Issue in this Litigation

[25] In late 2015, Bell approached Stewart about finishing the second floor and adding an apartment on the third floor to the Property. During their discussions, they agreed that Stewart would build a one-bedroom apartment on part of the second floor and a larger apartment that comprised the balance of the second floor and all the third floor.

[26] Stewart testified that he informed Bell that he could not provide a fixed price for this construction because of the age of the building and the likelihood that there would be repairs and additional expenses once demolition and construction began, particularly since some of the prior work on the building was completed by unlicensed contractors and by Bell herself. He claimed this contract was based on a time and materials basis.

[27] Stewart did not discuss his hourly rate with Bell. He claimed he assumed she was aware that the hourly rate he charged was \$60.00 per hour based upon the rate he had charged for work he completed at her home in the summer of 2015.

[28] Bell alleged that when they discussed the scope of work, Stewart provided an estimate of \$17,500.00 for labour and the cost of drywall. She would cover the cost of other materials through

an account at a local hardware store. Bell also claimed that it was her understanding that the hourly rate for labour was \$40.00 per hour, because that was the rate charged by Stewart for the insurance claim. She claimed not to have been aware that he had been charging her \$60.00 per hour for work performed for her throughout 2015 that was unrelated to the insurance claim. It was her evidence that for all prior projects, the quoted price was the amount she paid; therefore, she had no reason to inquire about the hourly rate for labour.

[29] There was no written agreement or contract regarding the scope of the work. There was nothing in writing, and there was no discussion about the rates to be charged for labour. There was a handwritten document that Bell introduced that she described as notes taken during their initial conversation about the project. The document contained handwritten notes and comments by each of them.

[30] The notes have a reference to “\$17,500.00 including drywall”. Bell claimed that this was what she expected to pay because in prior dealings with Stewart, his indication of the cost of the project and the amount he charged on completion were consistent.

[31] Stewart testified that while the figure of \$17,500 including drywall might have been discussed, it was only in the form of an estimate. It was his evidence that prior to the litigation, he had not seen the portion of the note setting out the \$17,500 and that he would never have undertaken a project of this nature for a fixed price.

[32] He noted that prior projects for Bell involved written estimates while this project did not. He also noted that during the project, the scope changed as issues arose once demolition had occurred and other problems were discovered. In support of his position, he noted that the insurance work was not completed as per the quote because as that work was underway, other issues evolved that Bell considered a priority, so that the remaining insurance related work was deferred.

[33] Both parties confirmed that Bell made it known to Stewart that she was concerned about expenses and wanted to complete improvements and repairs to the Property in the most cost-effective manner possible.

[34] Bell opened an account at a local hardware store with arrangements for Stewart to purchase the necessary materials for the project at Bell's expense. This was not in dispute.

[35] Work began on the project in February 2016. By May 2016, the relationship was beginning to sour, and the relationship ended in August 2016. Stewart rendered his account for services in early September 2016 and shortly thereafter registered a Construction Lien on the Property.

[36] Between February 2016 when the project commenced and September when Stewart rendered his final account, Stewart had not provided any invoices for the ongoing construction.

[37] Stewart claimed that in May 2016 he left a voice message at Bell's Dryden office about the hours that his employees had accumulated and that he met Bell at a coffee shop where they had a brief discussion regarding the hours. Bell claimed she never received a message from Stewart and denied there was a meeting in May where they discussed the hours that had been devoted to the project.

[38] Bell was rarely at the construction site because of her home and office in Dryden, so she was unable to monitor the project's progress with any regularity.

[39] There were many issues that arose during this renovation project. There were also several deficiencies that were discovered after JMS stopped working on the project. Bell retained other contractors to complete the project and address the deficiencies that increased the cost of the renovations and forms the basis of the counterclaim, as follows:

- a) On March 16, 2026, the Electrical Safety Authority (ESA) issued a Stop Work Order against the Property due to unsafe electrical work completed by JMS during the work from the insurance claim. Because of having to rectify the issues in the Stop Work Order, a new electrical panel and upgraded wiring was required. The Stop Work Order cited that:

- i) Electrical work had been undertaken without an application for inspection;
 - ii) JMS was not licensed to perform electrical work and was not in compliance with the various regulation under the Electricity Act; and
 - iii) The defective work had to be completed by a licensed electrician and inspected by the Electrical Safety Authority.
- b) On July 6, 2016, after the drywall was completed on the second and third floors, a plumbing pressure test resulted in water leaking from six spots in the plumbing lines. It was believed that because the water had been off in the building for several weeks and due to the copper water lines' age, they had likely corroded and then began to leak. The result was that various portions of the recently constructed project had to be torn out so the water lines could be repaired.
- c) In February 2017, the Chief Building Official notified Bell that the work under the building permit had not been inspected as required by the terms of the building permit. There had been an interim inspection in May 2016, where various deficiencies were noted. The building permit for this project could not be closed because of a variety of deficiencies that were eventually resolved by other contractors. The issues requiring resolution included:
- i) There were issues with the fire doors to the apartments not having been correctly installed;
 - ii) The waterproofing to the bathtub on the second-floor apartment was not properly secured to the wall or sealed, the shower taps were not secured behind the wall and the plumbing was not secured to the studs, nor was the drywall attached to the studs;
 - iii) On the third floor, the shower unit was not properly installed or levelled, and the waterproofing panels and the shower head were not properly secured to the walls;
 - iv) The plumbing drains were backward, the floor was left floating, the floor drain was not secured, and there were beer cans and cigarette butts found under the new subfloor;
 - v) A double header/bulkhead and seven floor joists were cut for drain lines, affecting the structural integrity of the entire floor. The building inspector required all the walls and floor that had been installed by JMS to be removed to ensure structural integrity of the building. In other words, the entire third floor had to be redone; and

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- vi) In the second-floor kitchen, the cabinetry had been removed but not replaced and an uncapped toilet drain line was discovered and capped.
 - d) In March 2017, there continued to be water leaks, however, the cause and location of the leaks were difficult to ascertain. This issue was not resolved until early 2018 and then only resolved by installing new plumbing.
 - e) In June 2017, while searching for the cause and location of the water leaks, it was discovered that the gas-fired hot water tank was venting into the attic because the chimney where it had been venting had been removed in the earlier roof construction by JMS. The hot water tank was “tagged” and could not be used until a new chimney was constructed for venting, or an alternate source for hot water was installed. A new hot water tank that vented through the wall was installed because it was more cost effective than rebuilding the chimney to properly vent the existing hot water tank.
 - f) In June 2017, the furnace was found in violation due to incorrectly installed fire dampers and clogged furnace filters from drywall dust and other debris. The gas to the building was disconnected and a new furnace was installed. Bell claims the furnace failed because JMS did not use another heat source during their construction in the winter of 2016 and caused the existing furnace to run excessively to the point of failure. Bell also claimed that JMS should have been changing the furnace filters to prevent them from being clogged and that would have prevented the furnace failure.

JMS/Stewart Claim and Response to Counterclaim

[40] Stewart did not provide an accounting to Bell for any of his work until September 2016 when he rendered a final account for \$50,251.10, including HST. Stewart testified that this account was based upon the timesheets submitted by his employees and included 643.75 hours of work, together with an additional 78.25 hours that Stewart added for his work on the project. Stewart testified that he does not keep time sheets for his hours and those hours were based upon an estimate of the time he spent on the project.

[41] All the hours were billed at a rate of \$60.00 per hour, regardless of the qualification of the employee. In other words, the licensed carpenter and skilled labourers were all charged at the same \$60.00 rate.

[42] By September 2016, the relationship between Stewart and Bell was irreparably damaged and Stewart was refused entry to the Property. As a result, Stewart was not given a chance to inspect or rectify any deficiencies identified by Bell and other contractors.

[43] Stewart confirmed that he had not obtained a permit for the electrical work completed for the insurance claim. He asserted that it is common in the industry to complete electrical work without obtaining a permit because he was not installing new wiring. Stewart offered to deduct the cost of the electrical work required to rectify the issues with the first floor, however, Bell chose to hire her own electrician to complete the work needed to resolve the Stop Work Order as well as to complete any other electrical work needed for the apartment projects.

[44] Stewart denies any responsibility for the furnace issues or for the hot water tank not being properly vented. He confirmed the furnace was running heavily during the project's winter months as it would have in any winter. He claimed that Bell was aware of this circumstance and that she never suggested he use another heat source. He also noted that it was not his responsibility to maintain the furnace and alleged that Bell should have been monitoring the furnace filters herself as any homeowner would have.

[45] Stewart confirmed that the chimney was demolished in 2015 when he was replacing the roof. Stewart told Bell that the chimney was falling apart and had to be repaired or demolished. He claimed that it was Bell's decision to have the chimney demolished because she did not want the added expense of repairing/rebuilding the chimney. Stewart claimed that during the roofing work he had no access to the interior of the Property. Before demolishing the chimney, he confirmed that the furnace did not vent through the chimney, however, he did not consider the hot water tank. He alleged that it was Bell's responsibility to ensure the chimney was not used for other purposes because as the owner, only she would have known that the chimney vent was in use.

[46] Stewart claims that he is not responsible for any of the additional charges incurred by Bell to rectify and complete the renovation project. He testified that had he been informed of the

concerns and problems, he would have inspected them himself and rectified them. He also testified that many of the issues identified, such as the water leaks, were not his responsibility because Bell did not want to incur the expense of replacing the plumbing in the building, in spite of his advice that it needed to be replaced. Her repeated concern was to keep all costs to a minimum.

[47] Stewart also testified that the problems with the third floor originated with Bell who had done many of the initial renovations for the radio station herself or with other contractors. It was a significant amount of work to remove the soundproofing and other elements from the radio station. Stewart testified that Bell had instructed him not to replace the subfloor even though it was in poor repair because of the added cost to do so.

[48] Stewart claimed that his employees did not cause the structural issues on the third floor because he was told to install the new shower in the same location and use the same plumbing from a pre-existing shower that had been removed when the radio station was installed. Therefore, his work did not involve cutting floor joists or installing plumbing under the floors.

[49] When cross examined, Stewart agreed that he could not confirm that his employees were responsible for the structural issues because he was not on site for much of the renovation. He also admitted that he had not told Bell about the pre-existing shower.

Legal Issues and Discussion of the Claims

[50] In addition to the claims described above, Bell alleges that the lien was invalid as filed because JMS used a different corporate entity than the entity she had retained. Her evidence was based upon prior payments she made to JMS in the name of JMS or in the name of 8631500 Canada Limited, a company she paid and identified in WSIB insurance documents from prior projects.

[51] Bell also claimed the lien itself is invalid because it was not registered in the statutory time limit after completion of the work. She alleges that if the lien is invalid, the claim for the renovations cannot stand and must be dismissed.

[52] Stewart alleged that because he was not provided an opportunity to personally rectify the deficiencies and complete the project, that he is not responsible for the additional expenses incurred by Bell because he would have made those repairs without additional cost to Bell.

[53] As indicated at the outset, without a written contract neither party's position will succeed in its entirety. In addition to failing to negotiate a written contract, the parties also failed by not communicating with each other during the project. Stewart should have either provided interim invoices or informed Bell about the costs he was incurring as the project was underway. Bell should have been monitoring the project more diligently and insisting on regular updates, particularly as issues with the property were identified and third parties, such as the Electrical Safety inspector, became involved. While there is no legal or positive obligation for the parties to communicate with each other, it was these failures that contributed to the disputes in this litigation.

[54] I do not find that the alleged quote of \$17,500 was a binding price for this project notwithstanding that it may have been discussed at the outset. I accept Stewart's evidence that this project was to be completed based on an hourly rate because of the nature of renovating old buildings such as this; that there are always unexpected issues that arise.

[55] There was evidence from both parties that Stewart did occasionally inform Bell when he discovered certain problems in the building during the project, for example the plumbing issues and Bell was aware of the electrical issues because of the ESA stop work order. Therefore, Bell was aware that repairs and work in addition to the original scope of the project had to be completed.

[56] Bell was also experienced as both a real estate lawyer and as someone who had been involved in renovations to this older building to know that a fixed quote would not be possible. Alternatively, had she expected a fixed price, it was incumbent on her to obtain this in writing before work began on the project. As the project progressed and Bell's faith in JMS was waning, Bell asked her mother to attend at the property on a regular basis to monitor the work. Therefore, Bell was aware of the hours being devoted to this project.

[57] Regarding the validity of the lien, I find that because the lien was discharged by the parties on consent prior to trial and the action proceeded as a claim and counterclaim for damages, there is no need for me to address the limitation period as it pertains to the filing of the lien claim. Failure to file a lien in the appropriate time does not prevent a plaintiff from pursuing damages in a civil lawsuit. I will therefore address the claim and counterclaim based on the evidence at trial as a civil claim for damages.

[58] Similarly, because there was no written contract, and Bell always dealt with Stewart in her discussions, there is no merit to the argument that plaintiff-numbered company is not the company that Bell retained. In submissions, this argument appears to be rooted in a concern that Bell may be unable to collect damages from the plaintiff if the assets are in another company. I do not find that this is a valid argument in the absence of a written contract.

[59] Stewart's allegation that the counterclaim for the deficiencies should be dismissed because he was not afforded an opportunity to rectify those deficiencies is also untenable. By the time JMS ceased working on the Property, the relationship between Stewart and Bell was irreparably damaged. Bell no longer had trust in Stewart and there is no legal obligation for Bell to continue with a relationship with JMS in the circumstances.

[60] Counsel for the parties set out in a Scott Schedule an itemized list of their claims and the value of those claims. As indicated at the outset, this trial proceeded by way of affidavit evidence with cross-examination on the affidavits. Both counsel alleged that portions of the affidavits should be struck as hearsay or unsupported expert opinion evidence. Neither party called expert evidence.

[61] It is unnecessary for me to set out the portions of the affidavit evidence in question. There was nothing in the challenged sections of the affidavits that influenced my decision in this trial.

[62] Because of my findings above, the resolution of this trial is an evaluation of the plaintiff's claim for the work completed and a set off for deficiencies as set out in the counterclaim.

Evaluation of Claims

Plaintiff's Claim

[63] JMS claims the sum of \$44,470.00 plus HST of \$5,781.10. JMS's account was dated September 5, 2016 and outlines the scope of work, the hours spent on the project and other charges for windows and the building permit. JMS claimed there were 722 hours spent on this project by those hired by JMS, including himself. The hourly rate was \$60.00.

[64] Bell argued that this account should be reduced by the cost resulting from the ESA Stop Work Order. She claims a reduction of \$12,005.84 for the cost of replacing the electrical panel as required before the ESA would authorize electrical power to be reconnected to the property.

[65] Bell also contended that the hourly rate should be reduced to \$40.00 per hour because that is the hourly rate she was quoted for the insurance repair work, and that the hours charged should be reduced as being excessive or unproven based upon discrepancies in the time sheets produced.

[66] I have already accepted JMS's evidence that the \$17,500 was an estimate, that the project was a time and materials project, and that the scope of work changed as the demolition of the interior was undertaken. For example, it was discovered that the windows required replacing, plumbing was problematic in locations because of old copper pipes and other issues that arose.

[67] In considering the evidence of both parties, I find that JMS tried to follow the direction from Bell to complete the project at the lowest cost possible. This resulted in JMS cutting certain corners, such as not obtaining an electrical permit for electrical work and replacing only certain copper plumbing.

[68] I have already found that the failure by both parties to communicate during this project is a significant factor in the differences between the parties' positions. The only reference to an hourly rate of \$40.00 per hour in the documents produced at trial was an invoice from JMS to Bell in 2015, for the removal of damaged walls, carpet, insulation, etc. Except for an undated account

for pool work completed at Bell's home that in the summer of 2015, (at an hourly rate of \$60.00), no other accounts or written estimates from JMS mention an hourly rate.

[69] I also note that the estimate received by Bell for remediation work for plumbing and other repairs from All-City Landscaping and Carpentry ("All-City"), the contractor Bell retained to complete the project, did not specify an hourly rate. It only sets out the expected total cost. However, the final invoice from All-City is based upon the hours spent on the project. It is noteworthy that the charges included rates of \$100.00, \$65.00, and \$50.00 per hour, depending on the work performed. The invoice from the electrician retained by Bell, Brisson Electric, specifies an hourly rate of \$75.00 per hour.

[70] I therefore find that the hourly rate of \$60.00 per hour for a project of this nature and complexity is reasonable.

[71] However, I have reduced the hours charged by 75 hours to 647 hours. This is to account for discrepancies between certain time sheets where it is unclear if the work was for the Bell property or other properties and for 50% of the hours claimed by Stewart who only provided an estimate based on his best guess regarding the time he worked on this project. I also reduce the account for the cost of the building permit by \$50.00 to \$150.00, being the actual permit cost.

[72] I accept Stewart's explanation about the wiring completed for the insurance work in 2015. He asserted that he did not obtain an electrical permit because he was not engaging in sufficient electrical work on the property for that project. His evidence was that the only electrical work completed was to move the existing wiring and receptacle boxes prior to drywalling. He confirmed that he hired an electrician to install lighting, but that there was no other electrical work completed that would have needed an electrical permit. Whether this was an appropriate way of proceeding does not affect my decision regarding the added cost of the electrician.

[73] There is a possibility that had Stewart obtained an electrical permit during the insurance work, that the ESA would have required the electrical panel to be upgraded at that time. No expert

or other evidence was led by Bell to support her contention that it was Stewart's failure to obtain certain electrical permits that resulted in the necessity to install a new panel.

[74] I find that a new panel would have been required for this project, and the cost of an electrician to install the panel and complete the electrical work would have been incurred by Bell regardless of the issues in dispute.

[75] The invoice from Brisson Electric, the electrician hired by Bell, does not delineate the hours, or cost to rectify issues with the receptacles for the insurance work. Stewart agreed to cover that cost, and while there is no evidence to show what portion of the account was for that repair, I have further reduced the JMS account by \$3,000.00 for that expense.

[76] I therefore find for the plaintiff the sum of \$36,920.00, plus \$4,799.60 HST, for a total of \$41,719.60.

Defendant's Counterclaim

[77] In her counterclaim, Bell seeks \$33,971.52, plus \$4,416.30 HST, for a total of \$38,387.82 made up as follows:

- a) \$14,569.68 for the correction and repair of alleged deficiencies undertaken by All-City;
- b) \$12,005.84 for the services of a licensed electrician, including the installation of a new electrical panel, undertaken by Brisson Electric;
- c) \$3,322.00 for the cost of replacing the hot water tank; and
- d) \$4,074.00 for the cost of replacing the furnace.

[78] The Scott Schedule produced by the parties itemizes the claims included in the above-noted accounts. Bell seeks compensation for all expenses she incurred from these contractors.

[79] Bell also seeks compensation of \$85,800 for lost rental income for the four-year period when the Property was uninhabitable due to the ongoing construction.

All-City Landscaping and Carpentry

[80] Donald Carbert (“Carbert”), the owner of All-City, testified about the deficiencies he discovered and the repairs and work he completed on the Property. All-City was retained first to inspect the Property and provide a written report and cost estimate regarding outstanding work needed to complete the project and to identify deficiencies. He provided his written report to Bell on March 7, 2017, and was retained to complete the project in early 2018.

[81] On August 24, 2017, a building inspection report was prepared by J. Charles Tarrant, the Chief Building Official for Vermilion Bay (Municipality of Machin). This report detailed 9 items that required corrective action as follows:

- a) Handrail to stairs between first and second floors had supports over-spaced and two more supports were required;
- b) Properly complete the fire separation in mechanical and electrical rooms;
- c) Re-install fire door to one apartment to provide even margins on all sides of door to ensure the door lock properly holds door shut;
- d) Provide automatic closers to all fire doors;
- e) Properly re-install waterproofing panels to wall around bathtub in accordance with manufacturer’s specifications;
- f) Properly re-install shower unit in accordance with manufacturer’s specifications;
- g) Repair plumbing leaks in plumbing water supply system and test to ensure no leaks;
- h) Re-install top to the chimney as necessary or provide alternate vent to the gas-fired hot water heater; and
- i) Repair or replace the gas fired furnace.

[82] All-City addressed the issues a) through g) identified in the Building Inspection Report. Bell alleges that all these items were required because of JMS’s failure to complete the project in a good and workmanlike manner.

[83] Stewart argued that most of the issues identified were items that were minor and were items he would have corrected had he not been removed from the project. His position is that he cannot now be held responsible for those added costs.

[84] Before commenting on the alleged deficiencies, I again note that Bell had instructed JMS to complete the project at a minimum cost. The implication was that JMS should do no more than necessary to put the Property into a condition where Bell would be able to put it on the market for sale. For example, notwithstanding Stewart's advice to Bell that the plumbing in the Property was old and should be replaced, Bell refused to authorize that expense.

[85] I find that Bell cannot now allege that JMS is responsible for certain deficiencies given her clear direction to JMS. Conversely, it is also clear that certain deficiencies were a result of poor workmanship that are beyond minor or cosmetic issues, and Bell is entitled to compensation for those deficiencies.

[86] The significant deficiencies for which Bell may recover include the second and third floor bathroom work (absent the plumbing leaks). The evidence in the second-floor bathroom showed that shower taps were not secured to the wall, the plumbing was not secured to the studs and one was cut through entirely to run plumbing lines. I find this work to be deficient and Bell is entitled to recover the cost of this repair.

[87] The evidence in the third-floor bathroom showed that the entire bathroom was constructed deficiently and had to be completely removed and redone. During demolition, it was discovered that seven floor joists had been cut to accommodate drain lines for the shower. A Stop Work Order was issued until the structural integrity of the building was ensured.

[88] Stewart testified that his employees were not responsible for the cutting of the floor joists because there had been an old shower in that location that had been removed when the radio station was installed. Stewart claimed that he recommended to Bell that the subfloor be removed and replaced because it was not level. However, on cross-examination, he testified that Bell was unaware there had been an old shower in that location and that it was his decision to use the old,

existing plumbing and to complete the shower without lifting the subfloor. Bell's evidence was consistent with the fact that she had never been aware that there might have been a prior shower in that area. I therefore find JMS liable for the cost of the reconstruction and repair of this third-floor bathroom.

[89] The invoice from Carbert does not specify the cost to repair or complete the individual items. The Scott Schedule identifies which items completed make up a portion of the All-City account. Therefore, I am left to assess the value of the work that I find to be deficient versus the work I find to have been minor in nature or unfinished, that would have required completion by either JMS or some other contractor.

[90] I therefore award Bell the sum of \$10,000, plus \$1,300 in HST, for the repair work completed by All-City because of the deficiencies I have found to be due to poor workmanship by JMS.

Brisson Electric

[91] I have already decided that JMS is not responsible for the electrical expenses incurred by Bell to replace the electrical panel. I deducted the sum of \$3,000.00 from the JMS claim for the costs Stewart agreed to cover. Because I have found that this was a project to be charged on a time and materials basis, the cost of an electrician would have been an expense covered by Bell.

Hot Water Tank

[92] The cost to replace the hot water tank ("HWT"), was incurred because of JMS's demolition of the chimney where the gas HWT vented. The evidence was that JMS did not access the Property when replacing the roof and demolishing the chimney. The parties confirmed that Stewart asked Bell if the furnace vented into the chimney and was told it did not. Bell instructed Stewart to demolish the chimney rather than restore it to save costs. There was no evidence about the costs saved by Bell for demolishing the chimney versus repairing the chimney.

[93] The HWT was eventually tagged and turned off because it no longer had a place to vent to the outside as required and was a safety hazard. Bell chose to purchase a new HWT rather than rebuild the chimney. She claims that cost should be borne by JMS.

[94] I find that Bell is liable for this expense. She was a knowledgeable property owner and a lawyer whose practice comprised largely of real-estate transactions. When Stewart made inquiries about the furnace, Bell would have or should have known that the HWT was a gas-fired tank and that it required an outside vent. It was her responsibility, prior to deciding to demolish the chimney to ensure that demolition was safe. She also benefitted from having the chimney demolished rather than repaired. She chose to purchase a new HWT rather than rebuild the chimney, an expense she would have incurred in the first instance.

[95] I therefore deny this part of the counterclaim.

Furnace

[96] As with the HWT, I find that JMS is not responsible for the furnace issues. The entire relationship between Bell and JMS began when the furnace stopped working and plumbing pipes froze. Bell claims the furnace stopped working a second time because the filters were clogged with construction debris. Bell alleged that had JMS used an alternate heat source during the winter months and replaced the filters, the furnace would not have failed.

[97] I do not accept this position. The evidence was that the furnace would probably have continued running had the filters been replaced regularly. Bell's evidence was that she did not replace the filters regularly, and in fact did so only once every year or two.

[98] There is no evidence that Bell instructed Stewart to use an alternate heat source, nor was there evidence that Bell had any discussion with Stewart about her concerns about construction debris and the furnace filters. The responsibility for checking and changing furnace filters is the homeowner's unless there is an express agreement to the contrary.

[99] I therefore deny this portion of the counterclaim.

Lost Rental Income

[100] The claims for lost rental income stem from the ESA Stop Work Order, the plumbing, HWT and the furnace issues that required repair and inspection prior to the Property becoming inhabitable.

[101] JMS's work was completed in August 2016. The work by other contractors continued until 2018. It is not JMS's responsibility to cover the possibility of lost income because the ongoing work continued for 2 additional years. There was no satisfactory explanation regarding the length of time taken to complete the project.

[102] Because I have dismissed the counterclaims for the alleged deficiencies regarding the electrical panel and the HWT, and I have found that JMS is not liable for the plumbing issues because he was expressly told not to replace the old plumbing, the rental income claim is also dismissed.

Summary of Counterclaim

[103] Bell's counterclaim is successful for the sum of \$10,000, plus \$1,300 in HST, for a total \$11,300.00.

Conclusion

[104] The Plaintiff is awarded \$41,719.60 less a setoff for the success in the counterclaim of \$11,300.00 for a total of \$30,419.60, plus prejudgment interest. I accept the plaintiff's submission that the average prejudgment interest rate of 1.6% from 2016 to the present is the proper method of calculation for the plaintiff's claims pursuant to s. 127 of the *Courts of Justice Act*.

[105] The funds paid into court should be applied to the plaintiff's claims. Interest accrued on those funds shall be deducted from the prejudgment interest claim.

Final Comments

[106] I wish to commend counsel for their professionalism in managing this litigation. While the value of the claims was low compared to most civil lawsuits that reach trial, it was clear that this action required judicial intervention. Counsel were prepared and the issues clearly defined. They demonstrated a commitment to their clients and to best practices as advocates.

Costs

[107] If the parties are unable to agree costs, they shall provide written submissions of no more than 4 pages, together with their Bills of Costs and any relevant offers to settle no later than September 5, 2024.

“originally signed by”

Justice B. R. Warkentin

Released: August 16, 2024

CITATION: 9382494 Canada Limited et al v. Bell, 2022 ONSC 4520
COURT FILE NO.: CV-16-0093-00
DATE: 2024-08-16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

9384294 CANADA LIMITED o/a
JMS NORTHWESTERN CONTRACTING

Plaintiff

- and -

BRENDA BELL

Defendant

REASONS FOR JUDGMENT

Warkentin J.

Released: August 16, 2024