

ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

BETWEEN:

RICHARD HAREYCHUK AND
OLGA MEKYLYTA

Plaintiffs

– and –

DEREK ZAVITSKY AND SUNUP
ESTATE SERVICES CORP.

Defendants

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) *K. Goncalves*, Paralegal for the Plaintiffs
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) *S. McEachern and J. De Mel*, Paralegals for
) the Defendants
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) **HEARD at Brampton:** July 18, 2016,
December 5, 2016 and February 21, 2017
and April 18, 2017

REASONS FOR JUDGMENT

Deputy Judge K. Twohig

- [1] The plaintiffs’ claim is in relation to two contracts, one with Sunup Estate Services Corp. (“Sunup”) for the installation of a swimming pool and the other with Rocks and Blocks, a sole proprietorship operated by Derek Zavitsky, for landscaping. After the swimming pool was installed and while the landscaping was underway, the plaintiff Richard Hareychuk and Mr. Zavitsky had an argument, following which the defendants stopped work on the contracts.
- [2] The plaintiffs allege that the defendants breached the contracts by failing to complete the work within a reasonable time, and that they incurred damages because they had to pay other contractors to complete the work, to remedy deficiencies in the work that was completed by the defendants, and to repair damage to their property that was caused by the defendants. In addition, they claim damages for loss of use of the pool for two summers and for stress and frustration. The plaintiffs’ claim is for \$10,000, reduced from the original \$25,000, as set out in the Amended Fresh as Amended Plaintiffs’ Claim filed on January 21, 2016.

[3] Mr. Zavitsky was the construction manager and agent of Sunup at the relevant time as well as being the owner and operator of Rocks and Blocks. The position of Sunup and Mr. Zavitsky (referred to together as "the defendants") is that they stopped work because of Mr. Hareychuk's unreasonable demands and his abusive conduct toward Mr. Zavitsky, his workers and his spouse, the plaintiff Olga Mekylyta. Mr. Zavitsky claims that Sunup is still owed \$2921.64 by the plaintiffs for the value of the work that it did and for which it has not received payment, and that much of the work done by other contractors subsequently hired by the plaintiffs was not required because of any failure or neglect on the part of the defendants. The defendants' position is that if they or either of them are liable to the plaintiffs for breach of contract, any award of damages should be set off by the amount owed for the work done by Sunup to the date of termination of the contract.

[4] The defendants brought a defendants' claim against Mr. Hareychuk and Ms Mekylyta (referred to together as "the plaintiffs") for \$12,458.54, consisting of \$3417.14 for services rendered by Sunup to them, \$3500 for extra charges paid by Sunup for services performed at their property in the City of Mississauga ("the City"), and \$5541.40 for services rendered by Mr. Zavitsky. At trial, the claims for \$3417.14 and \$3500 were withdrawn, and in final submissions, the defendants claimed \$2921.64 for the value of work done on the plaintiffs' property for which Sunup has not been paid.

[5] It was agreed that the plaintiffs' and defendants' claims should be heard together.

Issues

[6] The issues are whether the defendants or the plaintiffs breached either of the two contracts, and if so, how much, if anything, is owed by any of the parties to the other(s).

Evidence

[7] Ms Mekylyta and two witnesses, one from Enersource and the other from Jescan Power Inc. testified for the plaintiffs. Mr. Hareychuk did not testify, nor did he attend the trial. Mr. Zavitsky testified for the defendants.

Olga Mekylyta

[8] The contract for the pool installation was signed on July 25, 2013 by Mr. Hareychuk and Mr. Zavitsky on behalf of Sunup. The contract was for a total amount of \$34,216.40, of which \$30,794.76 has been paid. Ms Mekylyta testified that although the contract was signed only by Mr. Hareychuk because he is the property owner, she is a party to the contract and was present when the contract was signed. The contract did not provide for a start date or a completion date, but did state that the installation would take five days, with the work on each day being as follows: Day 1- dig hole; Day 2- set bottom and drop and lock pool; Day 3- backfill pool to returns; Day 4- do plumbing of pool and set up equipment; Day 5- finish backfill and start system; clean up.

[9] Ms Mekylyta believed that this work would be done on five consecutive days, although she did not ask specifically and Mr. Zavitsky did not say the days would be consecutive. The

work was to begin when the pool was available for delivery, which would be approximately four weeks after the pool was ordered.

- [10] The landscaping contract was also signed on July 25, 2013 by Mr. Hareychuk and Mr. Zavitsky carrying on business as Rocks and Blocks. The contract was for a total amount of \$9695.40, of which \$5154.31 has been paid. The contract did not provide for a start date or a completion date, but did state that that it would take approximately seven business days.
- [11] Ms Mekylyta said she thought the landscaping would be completed within seven consecutive days. She testified that Mr. Zavitsky had promised her that the work would be done within two weeks.
- [12] Mr. Hareychuck was concerned about the price of the project and wanted to be sure that there would be no additional costs, so he wrote to Mr. Zavitsky on July 26, 2013, after he had signed the contracts, to ask what was included and what was not. Mr. Zavitsky met with the plaintiffs to discuss this.
- [13] About a week after the contract had been signed, Ms Mekylyta arranged to have the utilities located. On August 22, 2013. Mr. Zavitsky and or his subcontractors or employees arrived on the site and began taking out the existing patio stones, apparently without realizing that the locations were marked on the stones. Mr. Zavitsky arranged to have the utilities "locates" re-done. This revealed that the utility cables went diagonally across the plaintiffs' lot, right down the middle of the proposed pool location.
- [14] Ms Mekylyta testified that she had no idea that moving the utilities cables would be an additional cost. She was upset by this and thought that all costs were included in the contract. Mr. Zavitsky saw this as an unanticipated problem for which he should not be responsible, but he agreed to pay the estimated \$2450 to have the electric cable moved to accommodate the pool.
- [15] After the problem with the utility cables was discovered in late August, 2013, it took time to obtain estimates for the work required to solve this problem, to obtain drawings for the re-location, to apply for and receive approval by the requisite authorities and to have the cables moved.
- [16] The construction of stairs leading from the patio to the house, which was part of the landscaping contract, had begun on or about August 23, 2013. At the trial, Ms Mekylyta testified that she did not receive drawings showing the shape and colour of the brick stairs that were to be constructed, despite numerous requests for drawings. One of Mr. Zavitsky's workers told Ms Mekylyta, after she expressed dissatisfaction with the design of the stairs, that she shouldn't worry because he just wanted to see what it would look like and he would re-do the stairs. Ms Mekylyta said that nothing more was done on the stairs in 2013.
- [17] On September 9, 2013, Mr. Zavitsky sent an e-mail to Mr. Hareychuk in which he recognized that communications were going wrong. Ms Mekylyta said they were looking at how to do things better.

- [18] There had been a miscalculation by Mr. Zavitsky as to the quantity of stone required for the patio resulting in there being too much stone, so Mr. Zavitsky agreed to build a wall for a garden at no additional charge.
- [19] Ms Mekylyta understood that Mr. Zavitsky would work on obtaining the permits to move the utility lines. Around the end of October, 2013, she asked him how things were going. He said he was still waiting for the permits and could not proceed with the pool before the end of the year. It was agreed that they would wait until the spring, but Ms Mekylyta wanted to be the first on the list for work in March or April so they could enjoy the pool in 2014.
- [20] Ms Mekylyta testified that in March, 2014, she called Mr. Zavitsky and he said it was a very cold winter and he would have to wait longer before starting work but would do it as soon as possible. When she called again in April, Mr. Zavitsky said the same thing. In May, Mr. Zavitsky said that he would get the first available date to move the cables. He later called and said it would be June.
- [21] The electric lines were moved in mid-July, 2014. The hole for the pool was dug and the pool was installed on July 24, 2014, one year after the pool contract had been signed. Ms Mekylyta testified that no landscaping was done around the pool after that, but instead, Mr. Zavitsky's workers resumed work on the stairs leading from the patio to the house for a few hours each day.
- [22] Ms Mekylyta enumerated what she believed to be the deficiencies in the work as of August, 2014. She testified that she and her husband were very disappointed as they had lost another summer and the work was still not complete.
- [23] Ms Mekylyta testified that on September 12, 2014, she was talking to Mr. Zavitsky on the telephone about the work when Mr. Hareychuk took the phone from her and proceeded to have a heated discussion with Mr. Zavitsky during which Mr. Zavitsky refused to return to the worksite. Mr. Hareychuk called Mr. Zavitsky the next day and asked him to come to a meeting to try to work things out, but Mr. Zavitsky did not wish to return. He asked to come back to pick up his equipment, but Mr. Hareychuk informed him that he would be trespassing on the property and that he could not come back.
- [24] In May 2015, the plaintiffs hired a landscaping contractor to do work, most of which Ms Mekylyta believed should have been done by Mr. Zavitsky. They also paid an inground sprinkler company for repairs to the sprinkler system which she said had been damaged by Mr. Zavitsky, and they paid a fencing company for four new wrought iron fence panels and posts which she believed to replace part of the fence that she said had been damaged by Mr. Zavitsky. Everything was finally finished in June, 2015.

Peter Vlietstra

- [25] Peter Vlietstra is the President of Jescan Power Inc. ("Jescan"), a contractor approved by Enersource for moving cables. His evidence was that Jescan was contacted by Mr. Zavitsky in early September, 2013 for a quote to re-route an electrical utility cable. On September 10, 2013 he sent an estimate to Mr. Zavitsky for \$2450 plus tax, which was on condition that a

permit be obtained and a drawing from Enersource be provided. Jescan has no involvement in obtaining the permit or preparing the drawing. He said he didn't see a drawing until April or May, 2014 and the drawing was for a much bigger job than the one on which he had quoted.

[26] Jescan had originally quoted on re-routing the cable through the back yard but the drawing that came from Enersource showed the cable going across the street and under the boulevard. Jescan re-routed the cable according to the drawing, but because the job was different than originally quoted, Jescan rendered an invoice on July 28, 2014 for \$3333.50. He said the owner of the property was not happy with the increased price, so the invoice was revised back to the original quote of \$2450.

[27] Mr. Vlietstra testified that if he had been given the drawings in November and had been asked to wait until spring to re-route the cable, he could have scheduled the work for March or April.

Michael Tobin

[28] Michael Tobin is a design technician with Enersource. He corresponded with Mr. Zavitsky beginning on September 26, 2013 about an application to re-route a cable to accommodate the installation of a swimming pool. A drawing of the property was submitted, and later, the required survey. Various other steps were taken in October, 2013 in relation to the application and on November 6, 2013, Mr. Tobin informed Mr. Zavitsky that he had obtained approval to move the utility cable. Mr. Tobin testified that at that point, the homeowner could have requested that the contractors begin work. He received no communication from Mr. Zavitsky between November 6, 2013 and May 8, 2014, following which there were changes made to the drawings. Mr. Tobin did not feel that Enersource was responsible for any delays in re-routing the cable.

Derek Zavitsky

[29] Mr. Zavitsky testified that he has been a landscape contractor for almost thirty years, and has installed swimming pools for the past twelve years. He testified that the contract with the plaintiffs for landscaping included installing paving stones from the front yard along the side of the house to the back yard, installing coping stone and a patio around the pool and installing stairs from the patio to the house. No start date was specified for the landscaping contract, but the work was to be completed within about 1.5 weeks after the pool was installed. The landscaping contract was for \$9695.40 of which \$4847.70 was paid. He said he did the work for which he was paid.

[30] The pool installation and the landscaping were dealt with in two separate contracts. Mr. Zavitsky said the pool installation contract was for \$34,216.40, of which 10%, being \$3421.64, remains unpaid. Mr. Zavitsky testified that virtually all of the work set out in the pool installation contract has been completed with the exception of some equipment testing, which would be worth about \$500 at most.

- [31] Mr. Zavitsky testified that Mr. Hareychuk signed the contracts as the property owner and that he doesn't know why Ms Mekylyta didn't sign. She wasn't there for the whole discussion before the contracts were signed. He said it seemed like the plaintiffs had a disagreement. Ms Mekylyta left the room when the contract was being discussed and Mr. Zavitsky heard her climbing the stairs. Mr Hareychuk left after a while, leaving Mr. Zavitsky in the livingroom for about twenty minutes. Mr. Hareychuk returned, and later Ms Mekylyta came in. Mr. Zavitsky said she had been crying, and he felt very uncomfortable. Ms Mekylyta was the person with whom he communicated on a regular basis during the performance of the contract.
- [32] Mr. Zavitsky had, under a separate contract, applied for the necessary permits and a minor variance in order that the pool construction could proceed. This was done before the contracts for the pool and landscaping were signed on July 25, 2013, as Mr. Zavitsky wanted to be sure the construction could proceed before agreeing to do the work.
- [33] Mr. Hareychuk wrote to Mr. Zavitsky on July 26, 2013 seeking clarification of what was included in the contract. Mr. Zavitsky confirmed in an e-mail to Mr. Hareychuk that extra costs would be for sod, electrical connections between the pool equipment and the power source and gas work, such as for the pool heater, because a licenced gas fitter was required to do that work. Mr. Zavitsky said that some homeowners have an electrician that they prefer to use for the electrical work, but if not, he would recommend one. He offered to subcontract the electrical work, but Mr. Hareychuk did not want that done.
- [34] Mr. Zavitsky said that according item #9 in Schedule A of the pool contract, he would do the rough grading and leave the yard ready for someone else to come and put down sod. He was not to supply the sod. He said that he offered to put down the sod for his cost of \$200 for the sod, without charging for labour, but this was separate from the contract.
- [35] On August 23, 2013, Mr. Zavitsky said the work to be performed had been finalized, but there were details such as colour choice for the patio stones that were left to be decided. He and Ms Mekylyta were exchanging e-mails about the colour choices at the end of August. The stair materials had already been selected and work was being done on the stairs from the back yard to the house.
- [36] The issue about the utility lines came up in late August, 2013 when the lines were located. Mr. Zavitsky testified that he had never encountered this problem before (of having to move electrical cables because they ran across the area where the pool was to be installed) and that he wouldn't know what is in a person's backyard until excavation occurs. Mr. Zavitsky made inquiries about the cost of inspection and connection fees in September, 2013. He said he could not start work on the pool until he received the necessary approvals and permits to move the hydro lines.
- [37] Mr. Zavitsky said that this was a problem that was not known or anticipated when the contracts were signed. He thought the plaintiffs "were fine" with having to move the cables. He "got the ball rolling" on the hydro relocation but left it to the plaintiffs to get the work done. He did not plan to site manage the project as he is not qualified to do so. He said that

he and Mr. Hareychuk got into a few “dust-ups” about the cost of this, but Sunup agreed to pay for it as a gesture of goodwill.

- [38] Mr. Zavitsky kept Ms Mekylyta informed about the process as evidenced by several e-mails written to her, and to others on which she was copied. She did not express any concern to him about delays in the fall of 2013 or spring of 2014.
- [39] Mr. Zavitsky didn't know if there would be a problem moving wires in the winter, but he did not consider it wise to do any excavation for the pool because if the ground were frozen and used as backfill, it would interfere with the integrity of the pool when the ground thawed. Mr. Zavitsky believed it was the right decision to delay excavation until the ground had thawed.
- [40] On May 12, 2014, Mr. Tobin wrote to Mr. Zavitsky to the effect that Jescan didn't want to be involved in discussions with Enersource. Mr. Zavitsky had thought that Enersource and Jescan were working together, but when this appeared not to be the case, he contacted Enersource to see if more paperwork or permits were required. On May 31, 2014, he sought clarification as to who does what, and received a response on June 2, 2014. On July 23, 2014 he received an e-mail from the City with a notice to commence, which indicated approval of all permits.
- [41] On August 19, 2014, Mr. Zavitsky notified the City that the pool was complete and ready for final inspection. Mr. Zavitsky testified that “completion” meant that the pool was in, the backfill and coping were complete and the equipment was installed and running. He said that the period of about twenty-seven days between City approval and pool completion was a reasonable timeline.
- [42] Mr. Zavitsky testified that by August 26, 2014, Ms Mekylyta had not yet selected the stone for the patio. She did not complain to him about delays apart from the general anxiety that it was taking a while, which he said he understood. Ms Mekylyta wrote to Mr. Zavitsky on September 6, 2014 with her choice of stone colour. Mr. Zavitsky said he could not complete the work until she had made a choice. She did not express any concern to him at that time about delays.
- [43] Mr. Zavitsky said that he had some discussions with Mr. Hareychuk on September 13, 2014 about the contract. Mr. Zavitsky testified that Ms Mekylyta called him later that evening and asked why work had not been done in the evening. Mr. Zavitsky said that during their telephone conversation, it seemed like a struggle was taking place. Mr. Hareychuk seemed to have grabbed the phone from Ms Mekylyta. Mr. Hareychuk then spoke to Mr. Zavitsky and said in a very heated tone that he “wouldn't be in this [expletive] mess if it weren't for his [expletive] wife.”
- [44] Mr. Zavitsky was concerned for Ms Mekylyta and said, “Why don't you pick on someone your own size?” Mr. Zavitsky added, “I don't want to work for an [expletive] like you”, referring to Mr. Hareychuk. Mr. Zavitsky said he would put a lien on Mr. Hareychuk's

house and then hung up. Mr. Zavitsky testified that he was upset when he had heard the plaintiffs struggling and Mr. Hareychuk grabbing the phone from Ms Mekylyta.

[45] On September 14, 2014 at 2:18 a.m., Mr. Hareychuk sent an e-mail to Mr. Zavitsky which stated, in part:

“On Friday, September 12th, I acknowledge your verbal threat of placing a lien on my property. I further acknowledge ...that you will not return to the work site....We demand that you NOT TRESPASS on our property as of Sunday, September 14th, 7 a.m.” [Emphasis in original.]

[46] Mr. Hareychuk said in the same e-mail that Mr. Zavitsky, in order to avoid litigation, should provide a new work schedule and contract in writing by September 16th at noon.

[47] Mr. Zavitsky wrote back to Mr. Hareychuk at 20:32 hours on the same date asking Mr. Hareychuk if there was anything he was dissatisfied with regarding product or installation to date, because as far as he knew, Ms Mekylyta was satisfied with the stairs and coping stone and pool. Mr. Zavitsky asked what it was that Mr. Hareychuk wanted in writing. He asked to schedule a time to pick up his tools and equipment while they tried to work out a revised arrangement.

[48] Mr. Hareychuk sent Mr. Zavitsky a response to this e-mail at 21:39 hours on September 14th, which states, in part:

“We are dissatisfied with most of what has been done....Leaving the job at this point is fine....Judging that you have dragged this out over a year, you can hardly be trusted to complete the job in a timely fashion....”

[49] Mr. Zavitsky testified that he has no issues with Ms Mekylyta, whom he described as a “nice lady.” Mr. Zavitsky said that he thought he was doing a good job. He wanted everything to be proper and legal and he kept Ms Mekylyta informed. She seemed to be happy with the work done. She told Mr. Zavitsky’s workers that she was happy with the work up until September 10, 2014.

[50] As for Mr. Hareychuk, Mr. Zavitsky testified that while he does not know Mr. Hareychuk well, but doesn’t like the way he treats women or Mr. Zavitsky’s staff. He said that beginning about a week after Ms Mekylyta made her final colour choice for the patio stones, Mr. Hareychuk would lash out at her, at him and at his workers.

[51] Mr. Zavitsky said that his workers didn’t want to go to the worksite or be exposed to Mr. Hareychuk as they didn’t like the way he treated his wife or other people. They had reported to Mr. Zavitsky that Mr. Hareychuk swore at them and created a toxic workplace, harassing and bullying them. Mr. Zavitsky said he did not witness any of this, but he believed his workers. They called him after specific incidents and Mr. Zavitsky said they have never complained about customers before or since Mr. Hareychuk. Mr. Zavitsky said he experienced similar conduct near the end of the contract, when Mr. Hareychuk would swear

at him, call him incompetent, etc. He believed he had an obligation to provide his workers with a safe and respectful workplace.

[52] Mr. Zavitsky had tools and other equipment on the plaintiffs' property that he needed for other jobs. He said he wanted to defuse the situation and get his tools back. He made arrangements with Ms Mekylyta to get his tools but was told to come alone. Mr. Zavitsky called the police out of concern for his safety given Mr. Hareychuk's hostility and the fact that he was told to come alone. When he attended the plaintiffs' property, he could not move an important and very expensive piece of equipment because the belt had been cut, but he returned another day with the police to get his equipment.

[53] On September 23, 2014 he wrote to Mr. Hareychuk to see how they might work together. He said that he found conversations with Mr. Hareychuk impossible because Mr. Hareychuk was unreasonable and used swear words when addressing him. As a result, Mr. Zavitsky wrote to inform Mr. Hareychuk that the situation was intolerable and that he would not be returning to the plaintiffs' property other than to retrieve his equipment.

Analysis and Findings

Onus of Proof

[54] The claim by both plaintiffs and defendants is for breach of contract. The claimants have the onus of proving their case on a balance of probabilities, meaning that they must satisfy me that their version of the relevant facts is more probable than not.

Credibility and Adverse Inference

[55] This case was not, for the most part, dependent on the credibility of the witnesses. The evidence of Mr. Zavitsky and Ms Mekylyta was fairly consistent except with respect to matters of opinion or interpretation. Ms Mekylyta did not dispute most of Mr. Zavitsky's testimony, including his evidence about Mr. Hareychuk's conduct toward her, Mr. Zavitsky and his workers, and his evidence that she did not complain about delays by him and that she appeared satisfied with his work up until September 10, 2014.

[56] I find it significant that Mr. Hareychuk did not testify. The plaintiffs' representative argued that Mr. Zavitsky could have summoned Mr. Hareychuk to court in order to cross-examine him, but it is Mr. Hareychuk and Ms Mekylyta who have the onus of proving their claim for breach of contract and damages on a balance of probabilities. Had Mr. Hareychuk testified at trial and his evidence been credible, it might have tipped the balance in favour of the plaintiffs' claim and discharged their onus of proof.

[57] Furthermore, Mr. Hareychuk was aware of the allegations against him in the defendants' pleadings, and could have disputed the allegations by testifying at trial. In the absence of any explanation by Ms Mekylyta as to why Mr. Hareychuk was unable to testify at trial, I exercise my discretion to draw an inference from his failure to testify that his evidence would not likely have supported either the plaintiffs' claim or his and Ms Mekylyta's defence to the defendants' claim.

Validity of Contract

- [58] The defendant argued at the end of trial that there was no contract, because the terms of both the pool and the landscaping contract were too vague and there was no real meeting of the minds. I find that there were two valid and enforceable contracts, even though some of the terms were not as detailed as they could have been. The parties intended to enter into a contractual relationship and treated the contract as binding upon them for over a year.

Completion of Contracts within Deadlines or Reasonable Time

- [59] There was no start date or completion date specified in the pool contract. It was implicit, however, that the pool installation could not start until the necessary approvals were obtained by the City and other authorities. In the absence of specific start and completion dates, it is appropriate to look to what was reasonable in all the circumstances.
- [60] Ms Mekylyta testified that the contract should have taken about two weeks and instead took two years to complete, which in her opinion was completely unreasonable. It is important to consider the reasons for the delay and the plaintiffs' conduct in the face of the delay.
- [61] The defendants did not know when the contracts were signed that there would be a problem with the location of the underground electrical cable. Neither the plaintiffs nor the defendants knew what was involved in having the cable moved once the problem was discovered. Mr. Zavitsky tried to help the plaintiffs deal with the situation by making arrangements to have the cable moved, although this was not part of either contract.
- [62] The plaintiffs could have assumed responsibility for the cables themselves, but instead they accepted Mr. Zavitsky's help, knowing that the pool construction could not begin until the cable had been re-located and the City had issued the notice of commencement. The plaintiffs did not negotiate a separate contract for this extra work as they had for the minor variance and building permit, nor did they establish a deadline by which the cable was to be re-located, failing which the contract would be terminated. They did not offer to pay Mr. Zavitsky or Sunup for the time spent in arranging the cable re-location, although this had not been anticipated and was outside the scope of the contracts. The plaintiffs appeared to be satisfied with the work Mr. Zavitsky was doing on their behalf.
- [63] I accept the evidence of Mr. Vlietstra that if Mr. Zavitsky had asked Jescan to move the cable in November or December, Jescan would likely have been able to do it. I find, however, that even if the cable had been re-located in November or December, 2013, it was reasonable for Mr. Zavitsky to postpone the pool construction until the spring of 2014, given that the construction would be compromised once the ground froze. The plaintiffs did not object to the delay of construction until the following spring.
- [64] I also accept Mr. Vlietstra's evidence that if Mr. Zavitsky had contacted Jescan at an earlier date to schedule the moving of the cable, it could have been re-located about several months sooner. Mr. Zavitsky was not aware of this at the time, however, and could not reasonably have been expected to know this as he was not familiar with Jescan's scheduling timelines, never having encountered this situation before. I find that Mr. Zavitsky was not at fault for

the delay in scheduling the moving of the cable, particularly in the circumstances where he was doing the plaintiffs a favour and did not charge them for his work in making the arrangements.

- [65] After the cable was re-located and the notice to commence was issued by the City on July 23, 2014 allowing Sunup to begin pool construction, the pool was installed within a reasonable time. The plaintiffs paid \$25,662.30 on August 6, 2014, as required by the contract with Sunup. If there was any delay that would have justified the plaintiffs terminating the contract before that date, they condoned it by deciding to proceed and paying Sunup according to the contract.
- [66] The contract for landscaping was estimated to take approximately seven working days. The work on the stairs to the rear door had begun before the pool was installed, but much of the landscaping could not have been completed until after the pool was installed. Mr. Zavitsky notified the City that the pool was complete and ready for final inspection on August 19, 2014. Seven working days from then would have been August 30, 2014.
- [67] Ms Mekylyta did not choose the colour of the patio stones until September 6, 2014. Even if there had been some delay by Mr. Zavitsky in providing samples to her, Ms Mekylyta condoned that delay by making a choice of stones and allowing Mr. Zavitsky to proceed with the contract.
- [68] Mr. Hareychuk later insisted in e-mail messages that Mr. Zavitsky had not complied with the timelines set out in the pool and landscaping contracts and that he was entitled to terminate the contracts because Mr. Zavitsky failed to complete the contracts within a reasonable time. He claimed in the e-mails, as did Ms Mekylyta in her testimony at trial, that the defendants had failed to meet numerous deadlines. There was no evidence, however, of any deadline having been mutually agreed upon, or of any deadline having been communicated by the plaintiffs to the defendants.
- [69] I accept Mr. Zavitsky's evidence that up until September 10, 2014, he had no indication that the plaintiffs held him responsible for any delays or that they were dissatisfied with the work he had done.
- [70] I find that the plaintiffs accepted the delays that had occurred and that they proceeded with the contract up until mid-September, 2014.
- [71] If the plaintiffs had concerns about the performance of the contract after September 6, 2014 (having condoned any previous delays up to that date), they should have informed Mr. Zavitsky of their concerns and given him a reasonable time in which to take corrective action and to complete the contract.
- [72] I find that the plaintiffs have failed to prove that Sunup or Mr. Zavitsky breached the contracts by failing to complete the work within a reasonable time.

Workmanship and Materials

- [73] The plaintiffs claim that the defendants breached the contracts as a result of poor workmanship and the use of poor quality materials. They called no expert evidence regarding the quality of the workmanship and Ms Mekylyta had no experience, training or expertise in construction or landscaping. The plaintiffs did not prove that the defendants' workmanship was deficient.
- [74] Ms Mekylyta testified that the coping stones were chipped and cracked and that an unnamed person at an unnamed store said the stone was damaged and looked as though it had been used. Mr. Zavitsky told Ms Mekylyta at the time of installation, and testified at trial, that the stones were a rustic style and were designed to look that way. He had provided samples to Ms Mekylyta and that was the style she had chosen. I accept Mr. Zavitsky's evidence over that of Ms Mekylyta. I completely disregard the hearsay evidence of the person at the store. The plaintiffs did not prove breach of contract due to poor quality materials.

Warranty and Remote Control

- [75] For the sake of completeness, I note that the plaintiffs pleaded that they did not receive a warranty package for their plunge pool, but there was no evidence that they tried to submit the warranty form and that the warranty was denied because it did not include the serial number of the pool. The plaintiffs also pleaded that they did not have the benefit of a one-year warranty on all products and materials under the pool contract with Sunup due to what they said was the use of an incorrect corporate name for Sunup, but at the time of trial, more than one year had passed since the installation of the pool and there was no evidence that the plaintiffs had suffered any loss as a result of this.
- [76] The plaintiffs pleaded that the remote control for pool lights was not provided in accordance with the contract, but there was no more than a passing reference to this at trial. Ms Mekylyta did not prove that this was part of the contract, nor did she provide any evidence of the value of this item. The plaintiffs did not prove breach of contract due to the failure to provide a warranty or remote controls.
- [77] For the above reasons, the plaintiffs' claim is dismissed.

Defendants' Claim

- [78] Mr. Zavitsky claims that the plaintiffs breached the contracts as a result of Mr. Hareychuk's conduct in using derogatory and insulting language in an abusive fashion in addressing him, his workers and Ms Mekylyta which created a toxic work environment, and, essentially, by Mr. Hareychuk's failure or refusal to cooperate with the defendants so they could complete the contracts.
- [79] I find that Mr. Hareychuk treated Mr. Zavitsky in a rude and disrespectful manner in September, 2014. Mr. Zavitsky gave hearsay evidence to the effect that his workers had reported instances of verbal abuse by Mr. Hareychuk toward them and Ms Mekylyta and that they did not want to return to work at the plaintiffs' property. This evidence, although

admissible under the *Rules of the Small Claims Court*, would ordinarily have been given very little weight because (i) it was not the best evidence because the workers themselves could have been called to testify about what they witnessed at the plaintiffs' property, and (ii) because the evidence could not be tested on cross-examination. I give it more weight in this case because (i) Mr. Zavitsky's evidence was credible, (ii) his evidence was not disputed by Ms Mekylyta, and (iii) I draw the inference from Mr. Hareychuk's failure to testify that his evidence would not have been favourable to the plaintiffs.

[80] I find that Mr. Hareychuk, on behalf of the plaintiffs, breached the implied term of good faith in the performance of the contracts with Sunup and Mr. Zavitsky when he treated Mr. Zavitsky and his workers in a rude and abusive manner and when he refused to give Mr. Zavitsky a reasonable opportunity to address the plaintiffs' concerns and to complete the contract. Mr. Zavitsky was justified in refusing to continue to work for Mr. Hareychuk under these conditions and in accepting the e-mails from Mr. Hareychuk of September 14, 2014 as confirmation that the contracts were at an end.

[81] For the reasons given, the defendants' claim is allowed.

Damages

[82] Mr. Zavitsky requested only that he be paid for the value of the work he performed, and I find this to be a reasonable remedy and measure of damages in the circumstances. I accept his evidence that the value of his work on the landscape contract between the plaintiffs and Rocks and Blocks is the same as the amount that he has been paid, meaning there is no claim under the landscaping contract.

[83] I also accept Mr. Zavitsky's evidence regarding the pool contract between the plaintiffs and Sunup is that everything was done according to the contract with the exception of about \$500 worth of work at the very most. Mr. Zavitsky requests the balance due under the contract, being \$3421.64, less \$500 for the maximum estimated value of work remaining to be done, for a net total of \$2921.64.

[84] The plaintiffs claimed that the value of the outstanding work to be performed under the contracts was much higher and that they should be compensated for deficient work and materials. I find that the cost of completing the landscaping was approximately \$4950 plus tax as set out in the invoice #8174 from Homeworks. This was approximately the amount unpaid on the contract with Rocks and Blocks. I find that the plaintiffs did not pay more to have the contract completed by another contractor.

[85] I make no further deduction for deficiencies, property damage or additional costs claimed by the plaintiffs, as they were unable to discharge their onus of proving any of these claims on a balance of probabilities. Mr. Zavitsky denied that any damage to the fence, wrought-iron gate or sprinkler system was caused by the defendants or that there were any deficiencies in the work or materials provided and paid for under the contracts. Ms Mekylyta's opinion is not sufficient to discharge the plaintiffs' onus of proof of deficiencies. She did not testify that she saw the defendants damage the plaintiffs' property, but even if she had so testified,

the evidence would be evenly balanced at best and she would not have discharged her onus. Finally, I find that the amounts claimed for other work were not within the scope of the contracts with either of the defendants.

Order

[86] I order that:

- a) The plaintiffs' claim is dismissed;
- b) The plaintiff by defendants' claim, Sunup Estate Services Corp., shall have judgment for \$2921.64 together with pre-judgment interest at the rate prescribed by the *Courts of Justice Act* from September 23, 2014;
- c) Further to the parties' request to make written submissions on costs, Sunup and Mr. Zavitsky shall have 30 days from the date of the release of this judgment to make brief written submissions on costs with respect to both the plaintiffs' claim and the defendants' claim, and Mr. Hareychuk and Ms Mekylta shall have 30 days from the date on which they receive the opposing parties' costs submissions in which to file their brief response. There shall be no reply without leave of the court and no extensions of time without consent of the opposing parties or leave of the court. Costs submissions and any request for leave of the court may be addressed to me at the Small Claims Court Office in Brampton and should be filed with proof of service on the opposing party.



Deputy Judge K. Twohig

Released: JUL 25 2017

COURT FILE NO.: SC-14-6583
DATE: 2017-07-18

ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

BETWEEN:

RICHARD HAREYCHUK AND
OLGA MEKYLYTA

Plaintiffs

- and -

DEREK ZAVITSKY AND SUNUP ESTATE
SERVICES CORP.

Defendants

REASONS FOR JUDGMENT

Deputy Judge K. Twohig

Released: JUL 25 2017

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