

Ontario Superior Court of Justice
Oshawa Small Claims Court

8420/13

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Between: Surujdai Pershad and Rajendra Pershad
Plaintiffs
and

Dan Seeraj
Defendant

And Between: Dan Seeraj
Plaintiff by Defendants Claim
and
8420/13 D1

Surujdai Pershad and Rajendra Pershad
and Holcim (Canada) Inc.
Defendants by Defendants Claim

Reasons for Judgment

This case involves a contract for outdoor construction at the plaintiff's home at 62 Peacock Court, Ajax, Ontario. The contract was verbal in nature and was entered into in or about March of 2013. The contracting parties were the plaintiff homeowners and Mr. Seeraj the defendant contractor. Holcim (Canada) Inc. otherwise known as Dufferin Concrete is a party defendant to the defendant's claim because it was the supplier of the concrete used on the job. As we will see, the type and installation of the concrete is very much in issue in this matter.

Based on the trial evidence, I have concluded that the parties contracted for the following items: the installation of walkways at the front, side and back of the house, concrete stairs leading out of the back of the house, a concrete barbeque slab, a concrete slab for a pergola and the construction of the pergola on the concrete slab. There was some controversy as to whether the front walkway was to be concrete or flagstone but I conclude that the contract did in fact call for a flagstone front walkway. The only item not in issue is the pergola itself. The contract did not include landscaping or clean up.

The defendant Dan Seeraj (hereinafter Seeraj) testified that he wanted a signed contract

as that was his normal practice but that the plaintiffs did not want the contract committed to writing. He speculated as to why that might be but it appears that he agreed to modify his normal practice and work without a written contract. Thus it was left to the court to determine the terms of the contract.

It appears to be common ground that the contract price was \$16,000.00. Seeraj was paid \$8,000.00 by cheque and given another \$4,000.00 in cash for a total of \$12,000.00. I find that the \$4,000.00 cash payment was advanced to Seeraj so that he could purchase the flagstone which I have found was part of the original contract. He was paid additional funds in cash for the installation of weeping tiles. This appears to be a separate contract and is not in issue in this proceeding.

The work commenced in late May of 2013. The areas where concrete was to be poured were dug out and gravel was poured. Although there were some complaints by the plaintiff's during this period (disposal bin removed, locates not confirmed etc.) the real problems commenced with the pouring of the concrete on May 31st, 2013. On that date at 7:15 a.m., Seeraj ordered concrete to be delivered that day to the plaintiff's residence; Seeraj says by about 11:00 a.m. and Dufferin says that Seeraj wanted it as soon as possible. Seeraj says he left it to Dufferin to tell him what type of concrete was required. Dufferin on the other hand says that his order taker Adam Atkinson told Seeraj that a 32C concrete was best for his job but that Seeraj ordered 25C because it was cheaper. Atkinson no longer works for Dufferin and was not available for trial. A written report from Atkinson to Kevin Stewart, the sales and operations manager made contemporaneously with these events was filed. Stewart testified as to his discussions with Atkinson and as to firm policy which is to advise customers as to what they should use but to ultimately give the customer what he or she wants in regard to the concrete to be purchased. Ordinarily, I would not attach great weight to a written document without the witness present but I was much impressed with Stewart's frankness and candor in the giving of his evidence and I am confident that he accurately and honestly outlined the company policy and his discussions with Atkinson at a time well before the commencement of these proceedings. On the other hand, I found Seeraj to be a most argumentative and unreliable witness who despite significant photographic and other evidence to the contrary, refused to admit even the slightest fault on his part. I accept Stewart's evidence where it conflicts with Seeraj's evidence.

Without getting into too much technical detail, the evidence as to the events of May 31st, 2013 is basically that the load of concrete was mixed at 9:39 a.m. and was on site by about 10:14 a.m. It was not off loaded until after 11:07 a.m. because Seeraj was not ready for it to be poured. Seeraj had only two workers with sub-standard wheelbarrows to unload the concrete. Normally 4 or 5 workers with proper wheelbarrows would be required to off load this amount of concrete in the limited time available before the concrete deteriorates. Seeraj himself was working in the back completing the forms and

was not available to help. The concrete was not off loaded in time (time in hot conditions such as the day in question being 2.5 hours or so); fluid and water had to be added and by the time the concrete was fully placed, at or after the four hour mark, it had effectively spoiled. This resulted in the colouring being “off”, in dusting, in honeycombing and in swirling, all significant defects. The end result was not acceptable to the plaintiffs and Mr. Stewart candidly testified that he would not have been satisfied either, had he been the homeowner. Mr. Seeraj on the other hand, first tried to convince the plaintiffs that time would right the condition and when the situation of the concrete did not improve with time (72 hours), Seeraj proceeded to blame the entire problem on Dufferin.

The second smaller pour of concrete occurred on June 5th, 2013. This pour was for the walkway at the side of the house. This pour showed poor workmanship in that the colour was not consistent, presumably because the cheaper 25C and not the 32C was used, the walkway was not straight or level and the consolidation of the concrete was poor, again significant defects.

A meeting took place between Seeraj, the plaintiffs and Dufferin. Dufferin agreed to provide free of charge proper 32C concrete for a new patio slab which Seeraj installed. Dufferin did this as a good will gesture. The workmanship was again deficient and the slab had to be removed and replaced by another contractor.

I find that Seeraj ordered the wrong concrete although he had been told by Dufferin what was required, did not have sufficient workers on site to off load the concrete on May 31st, 2013 and generally was inexperienced in coloured concrete work and did a sub-standard job of installing the concrete.

Ultimately, all of the concrete work had to be re-done. Seeraj was given ample time to rectify the job but did not and finally was asked not to return or simply did not return as of July 8th, 2013. Other contractors were retained, the concrete was removed, new concrete was poured and the work was eventually completed.

The plaintiffs are not entitled to a perfect job but to the type of job that a competent concrete contractor would perform. I find that Seeraj fell far short of this standard. He held himself out to be skilled in the type of concrete work required by the plaintiffs but in fact he appears to have had little experience with this type of work. It was not unreasonable for the plaintiffs to give up on Seeraj and hire another contractor to complete the job.

The plaintiff's damages must be based on the amount over \$16,000.00 that they were required to pay to have the job completed.

I allow damages of \$3,900.00 for the removal and replacement of the stairs, \$1,200.00 for the removal and replacement of the barbeque slab, \$2,700.00 for the repair of the pergola slab, \$4,900.00 for the repair of the side walkway and \$2,000.00 (estimate) for the completion of the flagstone walkway. I do not allow damages for grading, sodding, fencing or clean up as these items were only peripherally addressed in evidence and did not form part of the verbal contract. The invoice filed for the flagstone walkway included clean up and landscaping items. The invoice was not broken down and I have simply taken a rough estimate of the amount earmarked for the flagstone.

In the result, there will be judgment for the plaintiffs against Dan Seeraj in the amount of \$10,700.00. I calculate this by adding the above sums to the \$12,000.00 paid by the plaintiffs to Seeraj. The plaintiffs paid or will pay \$26,700.00 for a job that should have cost \$16,000.00. Thus they are entitled to the sum of \$10,700.00 to place them in the position they would have been in had Seeraj completed the work properly.


The plaintiffs are entitled to pre judgment interest from July 8th, 2013 to the date of judgment and thereafter post judgment interest both at the Courts of Justice Act rate.

The defendants claim against Holcim (Canada) Inc. and the plaintiffs is dismissed.

Dealing with costs, the plaintiffs represented by a licensed paralegal shall have costs against Seeraj fixed in the sum of \$2,000.00 inclusive of disbursements. Holcim (Canada) Inc. represented by a lawyer shall have costs against Seeraj fixed in the sum of \$2,500.00 inclusive of disbursements. If offers have been made in accordance with the rules that might materially affect these cost awards, I will accept written submission providing they are delivered to the court clerk within 30 days of the date of these reasons, failing which these cost awards will be final.

I should note that Seeraj requested an adjournment at the commencement of the second day of trial on May 8th, 2013. He filed with the court a letter of recent date from a lawyer indicating that the lawyer was not free on May 8th but would be available later. Seeraj had already been granted two trial adjournments and had asked for another on December 5th, 2014 which was the first day of this trial. I declined to grant him the adjournment on December 5th, 2014 and I declined to grant the requested May 8th, 2015 adjournment as Seeraj had five months from December 5th, 2014 to May 8th, 2015 to retain a lawyer but had obviously only tried to do so close to day two of the trial. The other parties were not advised of the adjournment request, had their witnesses in court and were ready to proceed. On this basis, I refused Seeraj's request for an adjournment and the matter proceeded.

Judgment accordingly, May 11th, 2015.



Jeffrey G. Brown
Deputy Judge