

CITATION: New Image Kitchens Inc. v. Distinctive Kitchens and Granite Inc., 2016 ONSC 5756

DIVISIONAL COURT FILE NO.: 643/15

DATE: 20160914

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

New Image Kitchens Inc.

Respondent/Plaintiff

– and –

Distinctive Kitchens and Granite Inc.,
Michael Celebre, Conrad Tamburro,
Agostino Vitrano

Appellants/Defendants

)
)
) *Francesco Miceli*, for the
) Respondent/Plaintiff
)

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)
) *Shahzad Siddiqui*, for Distinctive Kitchens
) and Granite Inc., and Agostino Vitrano
)

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)
)
) **HEARD at Toronto:** September 14, 2016

DAMBROT J. (ORALLY)

[1] This is an appeal from the decision of Deputy Judge Davis in the Smalls Claims Court in Richmond Hill on November 10, 2015 granting judgment to the plaintiff in the amount \$11,300.00.

[2] The claim related to a dispute between a contractor and a sub-contractor over payment for cabinet work done by the sub-contractor in a residential kitchen. While there were a number of small side issues at trial, the real issue was about whether or not the plaintiff had been paid. He testified that he had not been paid while the defendants gave evidence that he had been paid in cash. No evidence was offered by the defendants of any invoice, receipt, deposit, withdrawal or other reliable documentary proof of payment. The father of one of the defendants did produce a self-serving and wholly unreliable writing in his own hand indicating payment had been made.

[3] In the end, the trial judge accepted the evidence of the plaintiff, rejected the evidence of the defendants and gave judgment as I have indicated.

[4] The case for the plaintiff was strong. The case for the defendants was weak and the trial judge's reasons were cogent and unassailable. Sadly, that is not the whole story.

[5] During the cross-examination of the plaintiff, who was the first witness in the trial, the trial judge made several troublesome interventions, albeit in brief compass. I will recite some of them:

THE COURT: I haven't seen anything here that validates why we are here in this trial today, and why you didn't settle this. This is offensive that this man put in a kitchen that still exist [sic] and he says he didn't get paid a penny. Now I wanna see proof of the payments that are alleged in paragraph 13 of the defence. Where is the proof, where is it?

COUNSEL FOR THE DEFENDANT: I'm going to call my witness.

THE COURT: In other words, you don't have it, am I correct? Do you have proof of a receipt, a cancelled cheque, what have you got to prove that thing?

COUNSEL FOR THE DEFENDANT: Payments were made in – by cash...

THE COURT: By cash, of course.

...

THE COURT: Where is the receipt for it? These are business people, somebody want [sic] to deduct something from their income tax, if Canada Revenue Agency walked in, you had a receipt, where is it? I didn't get my license this morning, and I don't like that you are here on a trial that should have been settled at the settlement conference.

...

THE COURT: ...okay. I am going to take ten minutes, and you are gonna go out and settle this case. This man put in a kitchen, you better think very carefully of where you are going with this, if you really want me to continue with this trial, because I've just

shown you two or three areas that I've got a problem with, from your end counsel.

...

THE COURT: It is offensive that this man put in a kitchen and got paid nothing, that is insulting to him and to the court, the man works is entitled to get paid, and you are to come with somebody that says, "oh, I paid him in cash."

...

THE COURT: I suggest you really, really think about where you are going with this trial, if not we'll continue, we'll take 10 minutes of recess...

[6] These interventions are very troubling. Encouraging a settlement of this case, although even if put bluntly, would not be of inordinate concern to me. These comments go much further.

[7] The trial judge in effect told the defendants before the cross-examination of the plaintiff was completed and before hearing the defence that he accepted the evidence of the plaintiff that he had not been paid, and would take a very jaundiced view of any defence evidence that payment had been made in cash. Worse still, he clearly conveyed that he was insulted by the fact that the plaintiff had not been paid.

[8] In my view, these interventions are fatal. I need refer to but one case. In *Shoppers Mortgage and Loan Corporation v. Health First Wellington Square Ltd.* (1995), 23 O.R. (3d) 362 (Ont. C.A.), Lacourciere J.A. for the Court repeated the words of Dubin J.A., as he then was, in *J.M.W. Recycling Inc. v. Canada (Attorney General)* (1982), 35 O.R. (2d) 355 at p. 362, 133 D.L.R. (3d) 363 (C.A.):

The trial judge obviously thought that there was no merit in the case [the defence], but even if a trial judge forms the view early in the proceedings that a party's case is weak, it is fundamental that every litigant have a fair trial. However well intentioned the trial judge may have been, his conduct in this case deprived the plaintiff [the defendant] of that fair trial to which it was entitled.

He continued shortly after that:

One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process.

[9] It is great shame that this simple small claims matter will have to be retried but I am satisfied that the cumulative effect of the interventions relied upon by the appellant meet the test for reasonable apprehension of bias. An informed observer viewing the matter realistically and practically would more likely than not conclude that the trial judge whether consciously or unconsciously would not decide the issues fairly.

[10] The appeal is allowed and a new trial is ordered before a different Small Claims Court judge.

COSTS

[11] I have endorsed the Appeal Book and Compendium as follows: “Appeal allowed and a new trial ordered before a different Small Claims Court Judge. Costs to the Appellant fixed in the amount of \$1,000.00 all in.”

DAMBROT J.

Date of Reasons for Judgment: September 14, 2016

Date of Release: September 16, 2016

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ORAL REASONS FOR JUDGMENT

DAMBROT J.

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