IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

GRANT T. DOCKETY BUILDER, INC.,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. CPU6-08-000198
	)	
WILLIAM MAHON, and	)	
KATHY MAHON,	)	
	)	
Defendants.	)	

Submitted: February 2, 2010
Decided: March 17, 2010

David J. Weidman, counsel for Plaintiff.
Stephen W. Spence, counsel for Defendants.

DECISION AFTER TRIAL

In this action, the Court is called upon to determine whether Defendants are liable to Plaintiff under a claim for breach of contract where Plaintiff contracted with the Defendants to construct a custom home in Rehoboth Beach, Delaware. In addition, the Court is asked to evaluate the merits of Defendants' Counterclaim against Plaintiff asserting damages for Plaintiff's alleged breach of contract due to unworkmanlike construction. Accordingly, this Court is asked to calculate appropriate damages for the parties. On December 9, 2009, and December 11, 2009, the Court conducted a trial and took testimony and evidence. At the conclusion of trial, the Court reserved decision in the matter and requested that counsel for the parties submit closing arguments to the Court. This is the Court's decision.

FACTS

In 2003, William and Kathy Mahon (hereinafter "Defendants" or "the Mahons") purchased a home located at 703 Bayview Street, Rehoboth Beach, Delaware 19971. While spending time at the property, the Defendants met their neighbor, Grant Dockety of Grant T. Dockety Builder, Inc. (hereinafter "Plaintiff" or "Dockety"). Dockety is a general contractor that specializes in building custom homes in Sussex County, Delaware. During the time period from May 2004 to December 2004, the parties discussed the option of demolishing the existing home on the property and constructing a new home, with Dockety serving as the builder for the project. When the Mahons expressed interest in moving forward with the project, Dockety referred the Mahons to architect Ken Backer to begin drafting plans for the home. From February 2005 to June 2005, Mr. Mahon testified that he, Mrs. Mahon, Mr. Backer and Dockety had numerous meetings to discuss what the Mahons wanted to have included in their home. In May 2005, Mr. Backer completed the architectural plans and presented a copy to all parties.

On May 21, 2005, Dockety delivered a written proposal to the Mahons to build the home for $630,000.00 based on the plans submitted by Mr. Backer. Plaintiff's Ex. 3. Thereafter, on October 1, 2005, the parties signed the proposal and entered into a contract for Dockety to construct a custom built home for the Mahons. At the time the parties entered into the contract, the Mahons were not certain about the more detailed aspects that naturally arise when building a customized home. As a result, Dockety gave allowances within the contract that would be awarded as construction on the home progressed.

The contract provided that "any alteration or deviation from plans or specifications involving extra costs would be executed only upon agreement between builder [Dockety] and owner [Mahons], and will become an extra charge over and above the estimate." Plaintiff's Ex. 3. The contract did not require that requests for extra work had to be placed in writing or that a change order form be completed. Rather, it was the testimony of Dockety and Mr. Mahon that the parties entered into a custom and practice whereby the Mahons would make verbal requests for extra work to Dockety. Subsequently, Dockety testified that he would perform the work that was requested outside of the contract and the Mahons would pay for the costs Dockety charged.

As construction on the Mahons' home continued, Dockety kept a record of the cost of each extra he performed and awarded credits on these costs. On March 1, 2007, Dockety sent the Mahons a bill listing the construction costs of the extra expenses beyond the contract price that had accumulated on the project up to that point in time. Plaintiff's Ex. 12. The detailed list itemized each extra performed and the costs associated with them. After Dockety deducted $16,000.00 for permits, demolition, and material, the total amount in extras charged to the Mahons was $53,682.00. Id. Dockety testified that Mr. Mahon tendered payment for this bill in full.

In May of 2007, Dockety and Mr. Mahon agreed that with the exception of various minor items, the construction of the Mahons' residence was nearly complete. On May 29, 2007, Dockety sent a document to the Mahons that was titled in the subject line as a, "Final invoice plus extra expenses on the house above the contract price that were incurred to

date." Plaintiff's Ex. 13. The extra expenses above the contract price totaled $37,609.00. Accordingly, the Mahons tendered payment in full for the extras performed by Dockety. In addition to the amount for extras, Dockety also requested that the Mahons submit the final draw in the amount of $30,000.00. According to the Draw Schedule, the Mahons agreed to pay Dockety $30,000.00 when the home was complete, the grounds were rough graded and a Certificate of Occupancy was issued to Owner. Plaintiff's Ex. 3.

On May 30, 2007, the Sussex County Building Code Department and Planning & Zoning Department issued the Mahons a Certificate of Occupancy for the home. Plaintiff's Ex. 11. Subsequently, Mr. Mahon testified that the Defendants immediately moved into the home that coming Memorial Day weekend

On June 5, 2007, Dockety received the final electrical extras billing from Artisan Electric, Inc. However, Dockety did not forward the bill to Mr. Mahon, and did not submit any billing statement regarding the extra electrical expenses until after Mr. Mahon paid the May 29th bill. In summary, by July 5 2007, the Mahons had tendered payment of the agreed upon base contract price of $630,000.00 and extra costs totaling $91,291.00. Plaintiff's Ex. 12 & 13.

On July 7, 2007, Dockety sent the Defendants the first request for the extras that are at issue in the case at bar. It should be noted that the subject line of the letter states, "Final Charges for Electrical Extra Expenses." Defendants' Ex. 5. In his letter, Dockety claims that the costs of framing lumber increased 30% due to the impact from Hurricane Katrina that struck the United States in late August of 2005. As a result, Dockety testified

that the lumber costs for the Mahons' home increased by $18,000.00 from the price that he estimated in the original contract. Thus, Dockety stood to absorb the entire price increase in lumber, unless he was able to renegotiate the price with the Mahons.

Due to these unanticipated increases, Dockety asked Mr. Mahon to reimburse him half of the costs at a sum of $9,000.00. Specifically, Dockety requested that the Mahons send a check for $15,790.00, consisting of $9,000.00 for the increase in lumber costs, plus the $6,790.00 for the extra electrical work and water provision to the dock. Defendants' Ex. 5. Additionally, on the second page of the letter, Dockety states that: "you [Mr. Mahon] were not charged for the additional accessories and items to the original plan causing me [Mr. Dockety] more costs, and not placed in the original contract, because at the time you did not know you were going to ask for them." Id. Moreover, immediately following a list of eleven items, Dockety calls the $7,550.00 "TOTAL EXTRAS NOT CHARGED FOR." Id.

On August 27, 2007, Dockety sent the Mahons a second bill for the extras, and again states the subject of the letter is regarding, "Final Charges for Electrical Extra Expenses." Defendants' Ex. 6. Similar to the first bill dated July 7, 2007, Dockety documents the costs of the final expenses for extra electrical work and running water to the dock at a total of $6,790.00. Id. Immediately following the amount owed, Dockety writes that he mailed "this identical bill approximately 5 weeks ago" to the Mahons, but has still not received payment. Id. On the second page, Dockety lists the same eleven items that were submitted in his Complaint, and states that the list consisted of "TOTAL EXTRAS

NOT CHARGED FOR" at an amount of $7,550.00. Id. Dockety ends the letter with the following sentence: "To conclude, essentially you owe me $6,790.00, and I expect to be paid this amount immediately." Id.

On September 5, 2007, the Mahons sent a written letter to Dockety complaining that certain items were left unfinished on the home. The Mahons' letter requested that Dockety come to the home to punch out remaining work, and that Dockety provide the Mahons with a walk though of the house. Plaintiff's Ex. 14. On September 15, 2007, Dockety responded in kind by mailing a letter to the Mahons demanding payment for the extra electrical work and water provision to the dock. Plaintiff's Ex. 15. The letter also went on to provide the same listing of eleven items that were performed on the home that totaled $7,550.00. Immediately following the list, Dockety again states that these items are, "TOTAL EXTRAS NOT CHARGED FOR." In the concluding paragraph of the letter, Dockety states that, "I would like to believe we can settle your concerns and you pay me immediately the monies owed to me, specifically the $6,790.00." Id. By way of further response, on September 18, 2007, Dockety sent a second letter to the Mahons stating that Dockety will address the Mahons' questions and concerns once payment is received for the work previously completed. Plaintiff's Ex. 16.

At this time, the relationship between Dockety and the Mahons had deteriorated to the point where Mr. Mahon felt that the parties could no longer effectively communicate. In fact, the relationship between the parties had grown so contentious that each side was expressing their dissatisfaction with the other in the local community. Thus, in response to

Dockety's letter of September 15, 2007, Mr. Mahon testified that he contacted a personal acquaintance of his, Mr. Greg Kaczmarczyk, to serve as an intermediary for the parties. Mr. Kaczmarczyk testified that he has approximately 27 years of experience in the construction business and had performed general contracting projects ranging from remodeling jobs to building new homes. On September 27, 2007, Mr. Mahon sent Dockety a letter informing him that further communication should be directed through Mr. Kaczmarczyk, and provided the necessary contact information. Defendants' Ex. 7. Additionally, Mr. Mahon states that he placed $6,790.00, representing the amount billed in the final invoice, in an escrow account with Mr. Harold Duke, Jr. of Tunnel & Raysor, P.A. Id. Mr. Mahon further testified that Mr. Dukes would release the funds to Mr. Dockety upon completion of all work and requested documentation. Id.

On October 7, 2007, Dockety sent another request for payment to the Mahons and indicates in the subject line that this document is a, "FINAL Bill 4th request." Defendants Ex. 8. Similar to the three previous bills, Dockety repeats his claim for costs of $6,790.00 regarding the extra electrical work and running water to the dock. Id. Further down the document, Dockety again repeats the list of eleven additional extras that he performed at a cost of $7,550.00. However, unlike all prior bills, Dockety now references these eleven extras as "TOTAL EXTRAS *CHARGED* FOR" (emphasis added) Id. Moreover, for the first time Dockety concludes that the Mahons owe a total of $14,340.00 for the work completed on their home. Id.

After receiving no response from the Mahons, Dockety wrote a letter to Mr. Kaczmarczyk on October 23, 2007. Plaintiff's Ex. 17. In this letter, Dockety acknowledges that he received voice mails from Mr. Kaczmarczyk related to coordinating a walk through of the Mahon residence and creating a punch list. Id. Dockety further stated that he was willing to walk through the home and address any remaining concerns once he received payment of the total bill owed for services rendered of $14,340.00. Id.

On November 3, 2007, Dockety sent the Mahons the final letter in their written correspondence. The subject line of the document provides that this is a bill for, "Final expenses for extra electrical work, running water to dock, and charges for extra work completed above the contract price." Defendants' Ex. 9. In his letter, Dockety repeats his claim of $6,790.00 for the electrical and running water extras, and again lists the eleven extras and provides that these extras are in fact charged to the Mahons at a cost of $7,550.00. Thus, Dockety testified that the letter reflected a total bill of $14,340 for the extra work completed at the Mahons' home.

During his trial testimony, Dockety stated that in December 2007 or January 2008, approximately seven months after the Mahon family had moved into the residence, he received an eight page punch list generated by the Mahons and Greg Kaczmarczyk. Plaintiff's Ex. 18. The punch list contains numerous items of alleged defects with construction work performed by Dockety and the subcontractors that contributed to the build. On June 30, 2008, Dockety filed his Complaint in this Court. In response, the Mahons filed an Answer and Counterclaim on September 19, 2008.

Accordingly, Dockety seeks damages in the amount of $14,340.00, jointly and severally for the Defendants' breach of contract with pre-judgment interest, post-judgment interest, costs and reasonable attorney's fees.

DISCUSSION

Breach of Contract

There is no dispute that the parties entered into a contract to construct a custom built home. Thus, the issue presented for this Court is whether Dockety satisfactorily performed his duties under the contract. To establish a prima facie case of breach of contract, Dockety must prove three things by a preponderance of the evidence. First, he must show that a contract existed. Second, he must establish that the Mahons breached an obligation imposed by the contract. Finally, he must prove that it suffered damages as a result of the Defendant's breach. *Coupe v. Resort Repairs Inc*., 2009 WL 3288202, at *3 (Del.Com.Pl. Oct. 14, 2009) (citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

"[C]ompliance with applicable laws and regulations is a requirement and condition of building contracts for work to be performed in this State unless the contract expressly provides for a different measure of performance." *Koval v. Peoples*, 431 A.2d 1284, 1286 (Del. Super. 1981). Here, there is no contract language showing that the parties intended the contractual obligation to depart from the requirements of the law. Thus, Dockety was contractually obligated to comply with the Sussex County Building Code. *See Bougourd v. Village Garden Homes, Inc.*, 2002 WL 32072790, at *2 (Del. Com. Pl. Dec. 31, 2002).

Dockety sets forth two counts in his Complaint. As to Count 1, Dockety alleges that the Mahons breached the contract by failing to pay Dockety $14,340.00 for the extra work and materials furnished by Dockety. During the construction of the home, the Mahons requested Dockety to perform additional work items that were not included in the original contract price. Specifically, Dockety alleges that the extra costs, for which he is entitled to be paid for, included providing running water to the Mahons' dock at a cost of $550.00, performing additional electrical work totaling $6,240.00, and eleven other miscellaneous extras totaling $7,550.00. Plaintiff's Ex. 1.

The Mahons admit to entering into a contract with Dockety, but deny that they are liable for damages or committed a breach of contract. The Mahons do not contest that Mr. Mahon requested that Dockety perform additional construction beyond the original contract. Moreover, the Mahons acknowledge that the additional electrical work and the provision of running water to the Mahons' dock were both items outside of the original contract and were completed by Dockety at their request.

In addressing the allegations of Dockety's Complaint, the Mahons discuss each of the three charges for extras individually. First, the Mahons do not dispute charges for the provision of water to the dock at a cost of $550.00 and agree that Dockety should be paid for this item. Therefore, the Court finds that Dockety is entitled to payment in the amount of $550.00 for providing running water to the Mahons' dock.

Second, the Mahons assert that payment was refused for the extra electrical charges at an amount of $6,240.00, because the work was unsupported and overbilled.

Specifically, the Mahons contend that Dockety did not account a $3,000.00 lighting allowance that they are entitled to under the contract. Mr. Mahon testified that at the time he received a bill for the electrical extras, he was not informed what work the bill included. Mr. Mahon further stated that because he did not know what work he was being charged for, he did not tender payment for those two items (water provision and electrical extras) despite receiving a bill from Dockety for a total of $6,790.00. In contrast, Dockety claims that the $3,000.00 allowance was used pursuant to the contract and that the $6,240.00 was for extras over and beyond the allowance.

After considering the testimony of Dockety and Mr. Mahon, the Court is satisfied that Dockety has established a breach of contract as to the additional expenses for electrical work. Upon cross examination, Mr. Mahon conceded that he did request the electrical extras that totaled $6,240.00. Mr. Mahon testified that he failed to timely pay Dockety for the electrical extras because he was unaware which services the bill included, but did not contest the fact that he requested the extras. Mr. Mahon only became unwilling to pay for the electrical extras once the relationship with Mr. Dockety became strained. The Court finds that Dockety's testimony that the sum of $6,240.00 for extra electrical work is in addition to the $3,000.00 allowance given in the contract.

Further, Mr. Mahon testified that he placed $6,790.00, representing the amount of the extra electrical work combined with the running water provision, in an escrow account. It follows that Mr. Mahon's conduct in placing the payment for the electrical expenses in escrow, demonstrated a sense of responsibility in paying Dockety for this particular work.

Therefore, the Court finds that Dockety is entitled to the full amount billed to the Mahons for the extra electrical expenses at $6,240.00.

The final item of contention in the Complaint are the charges of $7,550.00 for the following miscellaneous extras: (1) scalloped white siding on front of house $300.00; (2) extra floor joist for deck hot tub $450.00; (3) insulation soundproofing $1,600.00; (4) glass in garage doors $800.00; (5) plywood on entire attic floor $300.00; (6) extra floor joist for living space in attic $450.00; (7) wider vinyl J channel on exterior windows $1,200.00; (8) plumbing and drain for urinal in garage $300.00; (9)labor cost for changing spa tub $800.00; (10) extensive closet shelving $1,200.00; and (11) installation of motor for chandelier $150.00.

During his direct testimony, Mr. Mahon conceded that the $150.00 charge for the installation of the chandelier motor is a legitimate charge that he owes Dockety. Thus, the Mahons contend that all other extras that Dockety charged for were not requested by them, or they were not to be charged extra for them. The Mahons argued that Dockety never intended to charge the Mahons for these items and only billed for the work after the relationship between the parties had deteriorated. In effect, the Mahons allege that Dockety only billed for these extras in an attempt to retaliate against the Mahons. Moreover, the Mahons argued at trial that these extra items were in fact included in the overall contract price of $630,000.00 to construct the custom home, and the charges for extras totaling $91,291.00 that were previously billed by Dockety and paid by the Mahons.

The Court interprets Dockety's pattern of addressing the list of miscellaneous extras as "total extras not charged for" in numerous letters to the Mahons as a clear indication that Dockety never intended to charge the Mahons for this list of items. As previously discussed above, Dockety sent the Mahons a bill for extras on July 7, 2007, August 27, 2007, and September 15, 2007. In each bill, Dockety characterizes the eleven miscellaneous items as extras that he was not charging the Mahons for performing. It was not until after the parties' relationship had deteriorated that Dockety began describing this list as "total extras charged for" in the October 7, 2007 bill sent to the Mahons.

Ultimately, the Court is convinced that both Dockety and the Mahons considered the list of miscellaneous extras to be included in the original contract price, with the exception of the chandelier motor installation. Therefore, the Mahons are not liable to Dockety for the extra work billed in the amount of $7,400.00. By Mr. Mahon's admission, Dockety is entitled to $150.00 for installing the chandelier motor. Accordingly, Dockety is awarded the total amount of $6,940.00 for damages that occurred as a result of the Mahons' breach of the construction contract.

As to Count 2, Dockety contends that the Mahons are also liable under the theory of *quantum meruit*, because the Mahons currently enjoy the benefits provided by Dockety's labor and materials, while refusing to pay for them. Thus, it is Dockety's position that the Mahons will be unjustly enriched in the absence of recovery by Dockety for the extras totaling $7,400.00.

In the case at bar, Dockety did not prove by a preponderance of evidence that he performed the extra work items with the expectation that the Mahons would pay for them. Instead, Dockety repeatedly sent billings to the Defendants expressly stating that they in fact would not be charged for the list of miscellaneous extras. Therefore, the Court finds that the Mahons are not liable under a theory of quantum *meruit*.

COUNTERCLAIM

In addition to Dockety's Complaint, the Court is asked to determine the merit of allegations presented in the Mahons' Counterclaim against Dockety. During the trial, the Mahons' attorney noted that certain items listed in the Mahons' Counterclaim would be voluntarily withdrawn. These concessions were summarized in a written attachment to the Mahons' closing argument submitted post-trial. Specifically, the Mahons assert in their Counterclaim that they are entitled to damages incurred to repair faulty work performed by Dockety in the following amounts: (1) $3,500.00 to Shawn's Custom Cabinetry for kitchen repairs; (2) $3,200.00 to Bob Peck for work performed on the HVAC system; (3) $4,900.00 paid to After Hours Heating & Air Condition, Inc. for converting the two-zone HVAC system into a three-zone system; (4) $7,680.00 to Greg Kaczmarczyk for creating a punch list and costs to repair house siding; (5) $1,374.00 to Bob Peck for supervising repairs that Mr. Legates performed to the masonry on the porch; (6) $1,380.00 to Bob Peck to have drain moved; (7) $1,380.00 to Bob Peck to fix an opening and install flood vents; (8) $11,960.00 to Bob Peck based on his estimate for further corrective work on house siding (includes 15% fee for overseeing work); (9) $455.00 to CSI for granite counter

repair and repair of fallen sink; (10) $340.00 to Superior Screen and Glass for repairs for the window locks and cranks; and (11) $1,112.00 to Superior Screen and Glass for the installation of safety glass sashes in the bathroom. The Mahons' Counterclaim requests $37,281.00 in damages.

The Court concludes that Dockety did not breach the contract because the construction performed on the Mahons' home was completed in good quality and in a workmanlike manner. Delaware law recognizes an implied builder's warranty of good quality and workmanship. *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712, at *3 (Del. Super. June 9, 1999) (citing *Smith v. Berwin Builders, Inc.*, 287 A.2d 693, 695 (Del. Super. 1972)). This implied warranty arises by operation of law. *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. May 16, 2002). "Where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner." *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908).

In determining whether the contractor's work was performed in a workmanlike manner the standard is whether the party "displayed the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities" in performing the work. *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. Feb. 5, 1993). A "good faith attempt to perform a contract, even if the attempted

performance does not precisely meet the contractual requirement, is considered complete if the substantial purpose of the contract is accomplished." *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at *3 (Del. Com. Pl. May 9, 2007) (quoting Del. Civ. Pattern Jury Instructions § 19:18 (1998)). Therefore, if the work done is such that a reasonable person would be satisfied by it, the builder is entitled to recover despite the owner's dissatisfaction. *Shipman*, 1993 WL 54469, at *3.

In the case at bar, it is evident that Dockety held himself out to possess the requisite skill as a general contractor to competently perform the construction of a home. As a result, the Court finds that Dockety's work is covered by the implied warranty of good quality and workmanship. Therefore, the remaining issue before this Court is whether the implied warranty of good quality and workmanship was breached by Dockety.

Kitchen Cabinetry

The Defendants allege that the kitchen cabinetry design was defective as it related to the refrigerator/freezer and its location on an outside kitchen wall. Plaintiff's Exb. 18. Mr. Mahon testified that M.L. Jenkins of Atlantic Millwork & Cabinetry designed the Defendants' kitchen and cabinetry work at the recommendation of Dockety. Also following the suggestion of Dockety, Mr. Mahon testified that the kitchen appliances were purchased from Millman Appliances. Mr. Mahon further testified that he presented an associate of Millman Appliances with Mr. Jenkins' design plans, as to insure that the appliances would fit with the design.

During direct examination, Mr. Mahon explained that there is a defect with the kitchen design, because the space allotted for the refrigerator was not sufficient to accommodate the oversized refrigerator that Mr. Mahon purchased with the help of Millman Appliances. Specifically, Mr. Mahon avers that the defect is that the refrigerator's freezer door does not have enough clearance with the kitchen wall to allow the door to fully open. Mr. Mahon testified that this problem occurred as a result of a defective kitchen design by Mr. Jenkins and a failure by Millman Appliances to advise the Mahons on selecting a refrigerator that would correspond with the dimensions provided in the design.

When this issue was brought to Dockety's attention, Mr. Mahon testified that Dockety refused to take any meaningful corrective action. Moreover, Mr. Mahon stated that Dockety prevented Atlantic Cabinetry from coming back to remedy the situation, because of the payment dispute over the extra work items described above in the Complaint. As a result, Mr. Mahon stated that Atlantic Cabinetry referred him to Shawn's Custom Cabinetry to correct the alleged defects.

In rebuttal, Dockety called M.L. Jenkins of Atlantic Millwork & Cabinetry to testify. Mr. Jenkins testified that he had worked for Dockety on a number of other projects and that Dockety contacted his company in May 2005 about designing a kitchen for the Mahons. Mr. Jenkins conveyed that Dockety provided him with the floor plan drawings by the architect, Ken Backer, and instructed Mr. Jenkins that some changes needed to be made. Mr. Jenkins testified that he had several meetings with Mrs. Mahon to discuss

changes, colors, styles, and other aspects to gain input of her personal preferences for the kitchen. Incorporating this information from their meetings, Mr. Jenkins testified that he designed a kitchen reflecting the Mahons' preferences and prepared a drawing of the kitchen that included dimensions for all appliances.

On November 8, 2006, Mr. Jenkins stated that the final draft of the design was submitted to Mrs. Mahon and he received her approval for the plans. Subsequently on December 22, 2006, Mr. Jenkins ordered all the cabinetry for the kitchen. Mr. Jenkins explained that the design he created for the kitchen allowed adequate space for a standard size refrigerator, but an oversized refrigerator would not fit in the designated space. Further, Mr. Jenkins testified that Dockety never prevented him from returning to the Mahons' home to make repairs, but did instruct Mr. Jenkins to notify him if such a request was made by the Mahons.

In the case at bar, Dockety's actions in referring Mr. Jenkins of Atlantic Millwork and Millman Appliances does not constitute a breach of the implied warranty of good quality and workmanship. Further, the Court finds that the kitchen layout and cabinetry design that was created by Mr. Jenkins is not a defective design and does not constitute a breach on Dockety's behalf. Mr. Jenkins testified that throughout the planning and design process, there was never mention that the Mahons intended to install an oversized refrigerator in the kitchen. It follows that Mr. Jenkins did not design the kitchen plans accounting for the additional space that an oversize refrigerator would require because the Mahons did not provide Mr. Jenkins with that information. Therefore, Dockety is not

liable for any alleged defects in the kitchen design by Mr. Jenkins or appliance selection by Millman Appliances.

HVAC System – Two-Zone v. Three-Zone

The original contract entered by the parties calls for a three-zone central heating and air conditioning system. Plaintiff's Ex. 3. Dockety testified that the parties verbally modified the contract to install a two-zone system in the home. Dockety testified that the reason why the contract was changed was because he was not aware that the property was within a flood zone until after the framing on the house had already been completed. Due to the property being classified as a flood zone, Dockety testified that the code regulations prohibited the air handler from being installed on the first floor of the home. As a result, Dockety testified he informed the Mahons that the air handler would have to be installed on the second floor, and use an additional interior closet if they still wanted a three-zone system.

Another option suggested by Dockety was that a two-zone system could be installed in the house. In order to have a two-zone system, Dockety testified that he informed the Mahons the two-zone system would consist of one air handler for the first and second floors that would be located in a closet at the end of a hallway on the second floor. The other air handler would be located on the third floor and would allow the temperature controls to be operated independently from the other system. Dockety stated that he discussed both options with the Mahons, but the Mahons were unwilling to sacrifice the interior closet space for the air handler and elected to install a two-zone

system instead. The Mahons deny that any conversations took place to change the HVAC from a three-zone system to a two-zone system, and that they did not agree to the change.

Lou McDowell was the subcontractor hired by Dockety to install the original heating, ventilation and air conditioning system at the Mahons' home. Mr. McDowell has approximately 15 years of experience installing HVAC systems, and testified that he performed the HVAC work at the Mahons' home in a workmanlike manner. Mr. McDowell also testified that he was aware that the original contract called for a three-zone system, but that the Mahons agreed to change the HVAC to a two-zone system. On direct examination, Mr. McDowell testified that he designed and installed a two-zone system in the home to properly heat and cool the enclosed space in the original architectural plan.

At trial, Dockety explained that during construction, the Mahons decided to enclose their screened porch with Anderson windows, thereby converting it into a sun room. This alteration resulted in a difference in floor temperatures between the first and second floor, because the Mahons had to run the original HVAC system to heat and cool the extra living space. Additionally, windows do not provide the same insulation qualities as an exterior wall. Thus, Dockety concluded that the alleged temperature difference was a result of the Mahons' request for the enclosed sun room and not a defect in Dockety's construction of the HVAC system.

The trial testimony of Mr. Mahon presented the Court with a different recollection of how the HVAC issue was addressed by the parties. Mr. Mahon testified that the original contract stated that the house would have a three-zone system, because of previous

problems with temperature differences he had experienced when a HVAC system did not have an individual unit on each floor. Moreover, Mr. Mahon's testimony indicated that discussions between himself and Dockety regarding changing the number of units from two to three never took place. There was no written documentation presented at trial that showed the parties discussed the options surrounding the HVAC system and decided to install a two-zone system. Rather, Mr. Mahon testified that he did not agree to modify the contract from a three-zone to a two-zone HVAC system. Furthermore, it was Mr. Mahon's testimony that the Mahons did not discover that there was a two-zone system installed until after they had moved into the home.

After the Mahons notified Dockety of the HVAC problem, the Mahons hired Clearance Edgens, III from After Hours Heating & Air Conditioning, Inc. to convert the system to three-zones. Mr. Edgens testified that in order to create an additional zone, he installed dampers in the original ductwork to redirect air flow and control temperatures. Although Mr. Edgens testified that he observed substantial floor-to-floor temperature differences in the Defendants' home, he admitted on cross examination that he did not perform any tests on the original HVAC system to determine whether it was functioning properly, or to obtain any temperature readings on the first and second floors prior to altering the system.

After considering the conflicting testimony from the parties, the Court finds the testimony of Dockety and Mr. McDowell to be accurate. The Mahons allege that there was never a discussion between the parties regarding the number of zones for the HVAC

unit. However, the Court resolves this controversy through the credible testimony of Mr. McDowell and Dockety, that the parties discussed the issue and Mr. Mahon agreed to accept a two-zone system in order to preserve the existing interior closet space. Accordingly, Dockety did not commit a breach by unworkmanlike installation and design of the Defendants' HVAC system by installing a two-zone system, and is not liable for damages.

Masonry Work

The Mahons retained the services of Sussex County contractor Robert Peck to assist them in resolving issues with cracks forming in the seam between the brick edging and the concrete patios on the front and back porches. Serving as the Mahons' general contractor, Mr. Peck in turn hired Lawrence Legates Masonry Co., Inc. to perform the corrective masonry work. In order to repair the cracks, Mr. Legates testified that the joints on the front and back porches where cracks had formed were grinded out, and the inside block corner was adjusted.

In rebuttal, Dockety offered the testimony of Steve Millman. Mr. Millman was the subcontractor hired by Dockety to perform the original masonry work at the Mahons' home. Mr. Millman testified that he has 15 or 16 years of masonry experience and that he performed all of the work at the Mahons' home in a workmanlike manner. When asked during direct examination about the alleged problems with the masonry, Mr. Millman stated that the concrete exhibited no signs of separation or cracking when he left the job site. Mr. Millman explained that all concrete joints will eventually crack after a series of

freeze-thaw cycles, because concrete will expand and contract. Further, Mr. Millman testified that this type of cracking is not a defect in the work, but rather the cracking is simply movement that is a constant in the nature of concrete. Additionally, Mr. Millman stated that he was never asked to return to the Mahon residence to fill in any cracks along the brick edging or concrete patios.

The Court finds that the testimony of Mr. Millman is credible. Cracking that is attributed to the expansion and contraction of concrete is an anticipated outcome of using concrete and does not constitute a defect in workmanship. During his direct examination, the Mahons' contractor, Mr. Legates, testified that he merely performed the tasks that the Mahons requested whether or not he considered the repairs to be necessary. Mr. Legates further corroborated the testimony of Mr. Millman that the cracking in the concrete at the Mahons' home was normal and expected. Thus, there was insufficient evidence presented to establish that the masonry work was defective or required necessary repairs to the original work. As a result, Dockety is not responsible for any damages to the Mahons for concrete repair.

Flood Vent / Screen

In addition to the foregoing, Mr. Legates testified that he installed a flood vent in the garage at the Mahons request. Mr. Legates and Dockety gave testimony that the existing flood vent was simply a screen that did not have the ability to move up and down, but did allow water to pass through the screen. The Mahons' expert architect Mr. Rollins testified that the applicable code section for flood venting makes it clear that a proper flood

vent cannot be covered by an immovable screen. Thus, it was Mr. Rollins' conclusion that the screen installed by Dockety was a violation of the Sussex County Building Code. Upon cross examination, Mr. Rollins stated that his conclusions depended upon his interpretation of the code, and that he would defer to the Sussex County Building Code authorities for the final determination as to whether or not any particular item of work met building code requirements.

In order to rebut these code violations, Dockety presented the testimony of Sussex County Building Code inspector Charles Wheatley. Mr. Wheatley testified that a Certificate of Occupancy was issued for the Mahons' home on May 30, 2007. More fundamentally, Mr. Wheatley testified that the issuance of the Certificate signified that the home had received all necessary inspections and that there were no building code violations present. Additionally, Sussex County Flood Code inspector Dean Malloy testified that he signed the Certificate representing that there were no flood code violations on the property. It follows that the screen did not constitute a violation because there were no building code or flood code violations existing at the Mahon's home when Dockety completed the work. Therefore, Dockety installed flood vents that were deemed code compliant by Sussex County officials and the Mahons' claim is without merit.

Driveway Drain

Additionally, Mr. Peck hired Mr. Legates to relocate a drain that Dockety placed in the driveway, to a location in the grass of the Defendants' front yard. Mr. Mahon testified that he had multiple conversations with Dockety instructing him that he wanted the drain

moved into the grass. Mr. Legates and Mr. Peck testified that they saw no reason why the drain needed to be placed in the driveway and encountered no difficulty relocating the drain out of the driveway. The original drain was not located in the driveway of the existing house when the Mahons purchased the property. However, the new driveway expanded the width of the original driveway, which brought the drain within the boundaries of the new driveway.

By way of rebuttal, Dockety testified that the driveway drain was unable to be moved from its original location because the drain was in fact a cleanout. Dockety further explained that a drain covering a cleanout must be kept at its existing location in order to allow access to the "T" intersection of underground piping to clear debris that accumulates. According to Dockety's testimony, the relocation of the drain now renders the cleanout inaccessible to clear any debris from the "T" intersection, which will result in flooding.

The location of the cleanout was not an item expressed in the written contract, and there is no evidence that the placement of the cleanout constituted a breach of the contract or defective work. Further, as an experienced general contractor, Dockety's testimony that the original drain could not be moved because it served a dual purpose as a cleanout is credible and reliable. Therefore, Dockety is not liable for costs incurred by the Mahons for relocating the driveway drain.

Siding

The Mahons further allege in their Counterclaim that corrective work must be performed on the house siding, because Dockety's installation of the siding resulted in

defective work. On October 26, 2009, both parties, including their witnesses, attended an inspection of the Mahons' home to review the construction in anticipation of this litigation. At this inspection, minor defects related to the nailing and spacing of the siding were noticed by the Mahons' representatives. At trail, Mr. Kaczmarczyk testified that he was currently performing siding repairs at the home and had been doing so for some time. In addition, the Mahons' presented the testimony of Mr. Peck to describe the defects in the siding and to estimate the repair costs. Mr. Peck testified that in order to correct the deficiencies, the majority of siding would have to be removed from the house, but approximately 90% of the siding could be reused. Specifically, Mr. Peck stated that there was a gap where the siding stopped two inches short of the J-channel, and the siding was nailed improperly. Mr. Peck further testified that he reached this assessment after examining the state of the siding on the Mahon house on the morning of the second day of trial. Indeed, Mr. Peck was not aware that Mr. Kazmarczyk was in the process of making repairs to the siding when he inspected the house, and the condition of the siding had been substantially altered since Dockety's installation.

In rebuttal, Dockety presented the testimony of Christian Brauer. Mr. Brauer testified that he has experience installing Certainteed Cedar Impression siding, which is the same siding used on the Mahons' home. Mr. Brauer testified that he was present at the October 2009 inspection of the Mahons' residence, but he did not discover any defective work on siding, and determined that Dockety's installation of the siding was performed in

a workmanlike manner. Further, Mr. Brauer stated that the installation was in compliance with the manufacturers' specifications.

Additionally, during the cross examination of the Mahons' expert architect, Mr. Rollins, he stated that upon his inspection of the siding he could recall one nail being improperly placed and identified a gap between the siding and the J-channel. In consideration of these minor defects, Mr. Rollins candidly agreed that based on his inspection, Dockety's installation of the siding was performed satisfactorily.

The Court finds that the Mahons failed to meet their burden and did not establish the alleged defects in the house siding due to a contradiction in the evidence and conflicting testimony presented by the Mahons' witnesses. Mr. Peck's testimony regarding siding deficiencies is not reliable, because Mr. Peck's assessment of the siding cannot be accurate as he was unaware that Mr. Kaczmarczyk was performing on-going repair work to the siding. Further, Mr. Rollins did not identify flaws in the siding that amounted to defective work by Dockety, and admitted that he thought the siding was in good condition. Thus, the Mahons have not established that any damages resulted from a defective siding installation by Dockety. Therefore, Dockety is not liable for any alleged repair work for the siding on the Mahons' home.

Window Locks, Cranks, and Glass Installation

The Mahons hired Superior Screen and Glass to address concerns they had regarding interior and exterior doors, window hardware and two windows in the master bathroom. Joel Antonioelli, a representative of Superior, testified that his employees

examined the installation of certain windows, adjusted window locks, and replaced broken window cranks. Mr. Antonioelli noted that Superior's employees reported that interior doors and an exterior slider door needed to be adjusted as well.

The Mahons also directed Superior's attention to windows located on walls surrounding a whirlpool tub in the master bathroom. Specifically, the Mahons asserted that two full-size windows were located in an area where if anyone slipped and fell toward these windows, they could break through the glass and possibly die from a fall three stories high. The Mahons' expert witness Mr. Rollins, testified that in his professional opinion as a licensed architect, the failure to have safety glass in the window over the bath tub, and the window adjacent to the bath tub was a violation of the Sussex County Building Code.

As previously indicated above, Dockety elicited testimony from Mr. Rollins on cross examination that when Mr. Rollins was presented with an ambiguity in the code's language, he would defer to the interpretation of the Sussex County Code officials. Mr. Wheatley, a Sussex County Building Code inspector, testified that the Defendants' residence was issued a Certificate of Occupancy, because all construction was deemed code complaint. The certification process included an inspection of the bathroom windows by Sussex County officials, and a subsequent finding that there were no existing code violations. Therefore, the Court concludes that the window locks and cranks originally installed by Mr. Dockety, and the height of the bathroom windows does not constitute a code violation. Thus, Dockety is not liable for any alleged damages.

Granite Countertops and Sink

At trial, the Mahons presented Sean Powell from CSI Granite & Marble, who performed the repair work on a seam connecting the granite countertop in the kitchen. Mr. Powell testified that the Mahons complained that the granite countertop was vibrating and creating noise whenever the dishwasher was operating. Upon inspection, Mr. Powell stated that the problem was that the countertop's seam, located above a dishwasher, had begun to separate. Mr. Powell testified that he made the necessary repairs to stabilize the seam to reduce stress and vibration.

On cross examination, Mr. Powell explained that he would not have recommended that the seam be placed directly over the dishwasher, because vibration and heat generated from a dishwasher would exacerbate the existing weakness created by a seam, which could lead to additional problems. Mr. Powell further testified that his company, CSI Granite & Marble, originally installed the countertops at the Mahon's home and that this was a type of repair that would be covered under the company's warranty.

It follows that any defect in the countertop occurred as a result of CSI's decision to install the granite countertop's seam above the dishwasher. More importantly, the necessary repair work to cure the defective seam was a correction that is covered under the company's warranty policy. Accordingly, Dockety is not liable to the Mahons for the costs associated with repairing the kitchen countertop. In addition to the foregoing, the Defendants did not present any credible testimony related to damages that occurred to a kitchen sink. As a result, the Court does not find that the Defendants established any liability on Plaintiff's behalf.

CONCLUSION

As to the Plaintiff's claim for breach of contract, the Court finds that the Defendants are liable to the Plaintiff in the amount of $6,940.00 for extra work performed in providing running water to the Defendants' dock, extra electrical work requested, and the installation of a chandelier motor.

As to the Defendants' Counterclaim, the Court finds that the Defendants have failed to establish liability on the part of the Plaintiff by a preponderance of evidence. Therefore, the Court enters judgment in favor of the Plaintiff, Grant T. Dockety Builder, Inc., for $6,940.00 against the Defendants jointly and severally, with pre-judgment interest, post-judgment interest, costs and reasonable attorney's fees. Plaintiff may submit an affidavit supporting a claim for expert fees and reasonable attorney's fees within 30 days.

IT IS SO ORDERED, this ____day of March 2010.

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The Honorable Rosemary Betts Beauregard