IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KYUSUP HWANG and KEUMJOO HWANG,	)	
Plaintiffs,	)	
	)	C.A. No. CPU4-14-003609
v.	)	
ROBERT S. COSSEY,	)	
Defendant.	)	

Submitted: May 7, 2015
Decided: May 27, 2015

Kyusup and Keumjoo Hwang
192 Ridge Drive
Pompton Lakes, NJ 07457
Plaintiffs, Pro se

Robert S. Cossey
105 Glenville Road
Churchville, MD 21028
Defendant, Pro se

DECISION AFTER TRIAL

The instant matter comes before the Court on Plaintiffs Kyusup Hwang ("Ke. Hwang") and Keumjoo Hwang's ("Ky. Hwang", collectively, "Plaintiffs") action for breach of contract. The matter stems from an agreement to purchase Plaintiffs' real estate at 149 Cornwell Drive ("Cornwell") in Bear, DE. Pursuant to the agreement, Defendant Robert S. Cossey ("Cossey") deposited a down payment of $3,000.00 with Plaintiffs' realtor, Patterson Schwartz. Subsequently, the agreement fell through, and the transfer of Cornwell did not occur. Plaintiff seeks the $3,000.00 down payment as relief, alleging that the opposition materially breached the contract for sale.

Trial in the above-captioned matter took place on May 7, 2015. Following the receipt of evidence and testimony, the Court took the matter under advisement. This is the Court's Final Decision and Order.

FACTS

Plaintiffs contracted with Mija Song ("Song") to place Cornwell on the real estate market for sale.[1] In order to take advantage of the peak of the real estate season, Cornwell was listed for sale in early May 2014. On June 13, 2014, Cossey signed a contract to purchase Cornwell for $365,000.00.[2] A condition of the agreement was that Cossey would deposit $3,000.00 into a non-interest bearing escrow account with the listing broker, Patterson Schwartz.[3] Cossey made the down payment, and ordered a pre-closing inspection of the house.[4] The pre-inspection report called for Plaintiffs to repair or replace loose or missing shingles; repair any broken window sash cords located in the house; repair an area of the subfloor observed to have damage; and repair of the stained garage wall.[5] On June 14, 2014, the parties signed an addendum documenting the agreed-upon repairs.[6] The parties agreed to repair or replace the following: (1) loose or missing roof shingles; (2) replace the chimney vent cap; (3) replace window sash cords and window clips; (4) repair windows with broken shields; (5) repair the subfloor in the living room; and (6) repair window sheeting in the garage.[7]

Plaintiffs contracted with Nehemiah Interior ("Nehemiah") to perform the repairs.[8] Nehemiah replaced the missing shingles, repaired the broken sash cords and broken window clips, replaced the broken window seals, removed the moisture from the living room subfloor,

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[1] Song testified on behalf of Plaintiffs. Song testified that Cossey requested repairs. After the inspection was performed, and the repairs made, Cossey did not request additional repairs.
[2] Complaint, Ex. 1.
[3] Compl., Ex. 1, ¶3.
[4] Def.'s Ex. 5.
[5] *Id.*
[6] Def.'s Ex. 1.
[7] *Id.*
[8] Ke. Hwang testified to this information. He testified that after the initial work was performed, if Cossey still had issues with the work, Plaintiffs were more than willing to accommodate. According to Ke. Hwang, Cossey did not make any further requests.

and replaced the window sheeting in the garage.[9] Nehemiah noted that there was a broken seal on the chimney vent cap, and that it was sealed with silicon.[10] On June 18, 2014, Cossey was approved for a loan covering the remaining balance of the purchase price for Cornwell. Closing was scheduled for July 31, 2014. In light of the rapidly approaching closing date, Plaintiffs contracted to purchase a house in New Jersey, and made arrangements to have Cornwell ready by the date of closing. Plaintiffs were scheduled to relocate to their New Jersey residence on July 26, 2014. On July 25, 2014, Cossey informed Plaintiffs that he was rescinding the agreement of sale for Cornwell, based on Plaintiffs' failure to contract a licensed professional to perform the repairs.[11]

Next, Plaintiffs contacted Song to have the deposited funds released into their custody. Song's employer, Patterson Schwartz, did not release the funds based on paragraph ten of the Agreement of Sale.[12] Plaintiffs then initiated this suit.[13]

PARTIES' CONTENTIONS

Plaintiffs contend that they are entitled to the down payment because based on Cossey's refusal to consummate the agreement, Plaintiffs were forced to pay the mortgage on Cornwell, as well as their new home in New Jersey until the property sold on November 6, 2014, causing Plaintiffs to suffer a severe financial loss. Plaintiffs also argue that they lost the opportunity to sell Cornwell during the peak season for real estate sales.

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[9] Def.'s Ex. 2.
[10] *Id.*
[11] *See* Def.'s Ex. 4.
[12] *See* Compl. Ex. 1, ¶10(D). The agreement states that in the event that the agreement fell through, the funds will not be released until one of the parties to the transaction "files suit and the court orders the disbursement of the funds."
[13] At no point did Cossey testify, cross examine witnesses, or otherwise attempt to refute Plaintiffs' assertions.

Cossey contends that Plaintiffs failed to make the repairs according to the inspection report. He alleges that their failure to hire licensed contractors to perform the work constitutes bad faith contracting, and accordingly, he is entitled to the down payment.

DISCUSSION

To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of the evidence that: (1) a contract existed between the parties; (2) breach by defendant of an obligation imposed by the contract, and (3) plaintiff suffered damages as a result of that breach.[14]

The sole dispositive issue of this case refers to paragraph 21(a) of the agreement of sale. Paragraph 21(a) provides, in relevant part that the "[s]eller shall...agree to correct any *major defects* at seller's sole cost and, if necessary, by a licensed contractor/professional."[15] Neither party presented evidence via testimony or documenting evidence that said defects were major or material. Furthermore, the agreement of sale does not define what constitutes a "major defect." Therefore, it falls to the Court to examine the trial record and determine whether the defects complained of are indeed major, or minor.

In the context of residential property sales, Delaware case law provides little guidance on what is considered to be a major defect. The International Association of Certified Home Inspectors defines a material defect in its *Residential Standards of Practice* handbook:

> **1.2.** A **material defect** is a specific issue with a system or component of a residential property that may have a significant, adverse impact on the value of the property, or that poses an unreasonable risk to people. The fact that a system or component

[14] *Gregory v. Frazer*, 2010 WL 4262030, *1 (Del. Com. Pl. Oct. 8, 2010); *VLIW Technology, LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

[15] Compl. Ex. 1 ¶ 21(a) (emphasis added). Implicit in paragraph 21(a) is that in order for the requirement that a licensed contractor perform the repairs, the defect must be major, i.e. material in nature.

> is near, at or beyond the end of its normal useful life is not, in itself, a material defect.[16]

In the instant matter, Plaintiffs complied with all repair requests in the addendum except for the replacement of the chimney cap and replacement of the living room subflooring. Rather than replace the chimney cap, Nehemiah applied caulking silicon to seal any visible breaches in the chimney cap. In the description section documenting the repairs made, Nehemiah noted that there was a broken seal on the chimney cap, and that it was sealed with silicon, resolving the problem.[17] Cossey argues that the sealing was not enough to fix the problem, and provided pictures of the chimney cap.[18] As stated throughout the Opinion, Cossey did not provide lay testimony, or an expert opinion concerning whether this breach is material. Upon a cursory review of the chimney cap, although there is some rust present, the Court finds that the chimney cap's condition does not meet the definition of "material defect" as defined by the *Residential Standards of Practice* handbook. Furthermore, Plaintiffs provided a written statement from Kirkin Roofing, the company which performed the initial home inspection report for the Cornwell property. The letter states that in its evaluation, Kirkin Roofing found that "...[t]he chimney cap did not need to be replaced. In my findings, I did not see any damage to the chimney cap."[19] Although Kirkin Roofing noticed the rust on the chimney cap, Kirkin concluded that "rust does not warrant the need of mandatory replacement."[20]

Turning to Cossey's claim that the subflooring required replacement, Cossey again failed to provide an expert or lay opinion on whether the subflooring is considered to be a material defect. Cossey did, however, provide pictures of the defective subflooring. Upon a review of the

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[16] International Association of Certified Home Inspectors, *Residential Standards of Practice*, §1.2 (last visited May 17, 2015) <http://www.nachi.org/sop.htm>.
[17] Def.'s Ex. 2.
[18] Def.'s Ex. 6.
[19] Pl.'s Ex. 3.
[20] *Id.*

pictures, the Court finds that the condition of the subflooring also fails to meet the definition of material defect as set forth above. Moreover, Nehemiah's invoice details that the subflooring was exposed to remove moisture, and was then restored to its functional condition. Cossey presented no evidence to refute this assertion.[21] The Court finds that Plaintiffs complied with the terms of the agreement of sale, because Plaintiffs did not fail to remedy any major defects. Accordingly, the Court need not reach the question of whether Nehemiah is a "licensed contractor" within the meaning of the contract, as the defects complained of are not material.

THE LAW

Each party bears the burden of proof by a preponderance of the evidence in order to sustain their respective claims. *See e.g., Wirt v. Matthews*, 2002 C.P. Lexis 17 (January 11, 2002), Welch, J.); *Asset Recovery Services v. Process System Integration*, 2002 C.P. Lexis 55, (January 10, 2002), (Welch, J.)

ORDER

After consideration of the testimony of the parties, their respective arguments, and the evidence before the Court, finds by a preponderance of the evidence that defendant breached the instant contract and that judgment is entered in favor of Plaintiffs Kyusup Hwang and Keumjoo Hwang and against Robert S. Cossey. Plaintiffs are also awarded costs.

IT IS FURTHER ORDERED that pursuant to paragraph 10(D) of the Agreement of Sale, the Court hereby notifies by copy of this Decision and Order Patterson Schwartz by United States mail to disperse the $3,000.00 to Plaintiffs Kyusup and Keumjoo Hwang within ten (10) calendar days.

[21] Def.'s Ex. 2.

IT IS SO ORDERED this 27th day of May, 2015.

John K. Welch
Judge

cc: Ms. Tamu White, CCP Chief Civil Clerk