IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

RONALD GAY, d/b/a Resort Repair Co.,	)	
Plaintiff,	)	
v.	)	C.A. No. 05C-12-007-RFS
DELMARVA POLE BUILDING SUPPLY, INC.	)	
Defendant.	)	

O R D E R

Submitted: April 16, 2008
Decided: July 18, 2008

Dean A. Campbell, Esquire, Georgetown, Delaware, Attorney for Plaintiff.

John C. Andrade, Esquire, Parkowski Guerke & Swayze, P.A., Dover, Delaware, Attorney for Defendant.

STOKES, Judge

The plaintiff, Ronald Gay (hereafter "Gay") has sued the defendant, Delmarva Building Supply, Inc. (hereafter "Delmarva"), for breach of contract and other claims arising out of a contract between the parties signed on November 19, 2003. Delmarva has counterclaimed, alleging Gay breached his legal obligations to it. The following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. On November 19, 2003, Gay and Delmarva entered into a contract for the construction of a two-story pole building on land purchased by Gay in 1999 in Ocean View, Delaware (hereafter "the contract"). The total contract price was $324,000. Both Gay and Delmarva are experienced in business. Gay operated a maintenance company known as Resort Repair Company, and Delmarva constructed pole buildings.

2. Gay's land was subject to Ocean View's zoning ordinance when he acquired it.

3. Gay's land had approximately 14,688 square feet which would only support one commercial business, under the ordinance.

4. Under the ordinance, 20,000 square feet of land would be necessary for two businesses operating out of a structure.

5. Under the ordinance, a variance from those requirements could be obtained upon a showing of unnecessary hardship.

6. Before November 19, 2003, Gay had an interest in developing his land for two businesses. One would be for his company, and the other would be for another commercial use. Later, he determined the alternative use would be for his wife's beauty products business.

7. Before November 19, 2003, Gay spoke to Ocean View's Town Manager about his interest in developing the land. At that time, the manager was Robert Alexander (hereafter "Alexander").

8. Before November 19, 2003, Gay knew from his earlier contacts with Alexander that a variance would be needed for two businesses as his land was not big enough under the ordinance.

9. On November 20, 2003, Gay signed a commitment with Wilmington Savings Fund Society (WSFS) to finance the construction.

10. Under the contract, a down payment of $81,000 was required.

11. On December 22, 2003, Gay settled with WSFS and paid Delmarva $81,000.

12. Delmarva's president was Joseph Kramer (hereafter "Kramer"). At all times, Delmarva acted through him and his brother William Kramer.

13. When the contract was signed, Kramer knew Gay's intent was to have two businesses, one on each floor. The contract specifications and accompanying drawings reflect the two-story building was designed for two uses, including the

provision for two heating and electrical systems.

14. Kramer knew that Gay was obtaining financing from WSFS.

15. At Gay's request, before the contract was signed, Kramer spoke to Alexander. Alexander first told Kramer that it was possible for Kramer's land to support two businesses without complications. Kramer relayed this information to Gay that construction could proceed. The contract was then signed. Thereafter, Alexander called Kramer and advised that a variance would be required.

16. When this information was received, Gay and Alexander agreed that construction work under the contract should not begin until a variance had been obtained. Under the contact, time was not of the essence and a reasonable period for completion would be implied should a variance be obtained.

17. Paragraph 26 of the contract provided that "All permits, inspections, license fees are the responsibility of Delmarva Building Supply, Inc."

18. Under general language in the contract Gay, the purchaser, agreed "to be responsible for determining the location of the building with the placement of a stake in each corner of the building. Purchaser(s) is responsible that said location is not in conflict with any building code or zoning ordinance of the proposed location of the building."

19. When the parties fell into disagreement, Gay believed that paragraph 26 required that Delmarva would obtain a building permit to construct the

building. Further, Gay believed paragraph 26 meant Delmarva would be solely responsible for all expenses to obtain a variance, including application fees, time in attendance at variance hearings before the Ocean View Board of Adjustment, the preparation and use of drawings, and associated work necessary to obtain approval.

20. On the other hand, Delmarva understood paragraph 26 to include only the costs of a building permit and believed the expenses to obtain a variance were extras and not covered by the contract price of $324,000.

21. Further, Delmarva understood that expenses for a variance were excluded by the general language that Gay was responsible that the building's location and that the building did not conflict with Ocean View's ordinance.

22. After the contract was signed, Kramer explained to Gay that variance expenses were outside of the contract without objection from Gay at that time.

23. After the contract was signed, Kramer agreed to seek a variance from Ocean View, and Gay understood Delmarva sought to obtain a variance on Gay's behalf and expected to be paid for its effort. Gay understood that Delmarva expected to be paid for the additional services.

24. Delmarva and Gay did not agree on a price for the variance work nor did they reduce their understanding in a written contract.

25. Nevertheless, a variance application was filed by Delmarva. Delmarva employed a Dale Foxwell (hereafter "Foxwell") to help with this process. Foxwell did not have experience with Ocean View but worked with Delmarva on other projects where zoning matters were addressed.

26. A $530 fee was charged by Ocean View for the application.

27. A Board of Adjustment hearing was held on July 15, 2004. Kramer, Foxwell, and Gay participated in the proceedings. Gay explained his intended uses for his and his wife's businesses. Foxwell charged $300 to Delmarva for his services.

28. The variance was denied at the hearing, and the decision was memorialized in a letter dated July 28, 2004. The Board found Gay's hardship was self-imposed, i.e., the property was subject to the square foot limitations upon Gay's purchase, and Gay could have bought adjoining property that had more than 20,000 square feet to permit two businesses.

29. When it appeared that the variance would be denied at the hearing, an alternative plan was suggested by a realtor. The suggestion was that a conditional use application be considered for mixed residential and commercial uses.

30. The idea of a mixed residential and commercial use was a major change in direction, scope of work, and cost.

31. On August 4, 2004, Gay called Delmarva and left messages on Delmarva's answering machine. Gay demanded the return of the $81,000 deposit and informed Delmarva that he was moving on to find another contractor and considered his money lost through the WSFS financing as a bad investment.

32. Gay's call was placed to Delmarva's regular phone number and Delmarva received the message. Delmarva knew Gay had terminated and abandoned the contract. Further efforts by Delmarva to obtain a variance were futile.

33. Delmarva did not reply; thereby, it acquiesced with Gay's position.

34. Rather, on August 16, 2004, Delmarva faxed Gay revised drawings pertaining to a mixed residential and commercial use for a two-story building.

35. On August 16, 2004, Delmarva faxed interim drawings to Ocean View for the proposed apartments on the second floor. Delmarva requested Ocean View give it attention so it could price a new contract with Gay for another building.

36. From August 16, 2004 to April 8, 2005, Delmarva sought to obtain Ocean View's approval of a conditional use.

37. Delmarva and Gay did not enter into an express written or verbal contract on the cost of construction of a new residential/commercial mixed use building or for Delmarva's efforts to obtain approval of a conditional use for

Gay's benefit.

38. Nevertheless, Delmarva, with Gay's approval, sought to obtain a conditional use approval for a mixed commercial/residential use based on the drawings in the August 16, 2004, fax and as later developed.

39. On September 21, 2004, Delmarva, through Foxwell, signed a conditional use application and additional drawings had to be prepared to provide for two residential apartments on the second floor and for commercial use by Gay's company on the first floor.

40. Previously, after November 19, 2003, Delmarva retained ArchiTech, LLC (hereafter "AES") of Salisbury, Maryland to perform engineering work on the contract and to support the efforts by Delmarva to obtain a variance. AES charged Delmarva $8,250 for its work. Thereafter, on February 24, 2005, AES charged $4,710 for work associated with the conditional use.

41. Delmarva had to provide necessary information for preliminary approvals to satisfy General Business District and Conditional use requirements under the Ocean View ordinance.

42. On October 6, 2004, Foxwell invoiced Delmarva for his expenses and services, being $800 charged by Ocean View for the application and $150 for his services in connection with it.

43. On October 6, 2004, Charles McMullen (hereafter "McMullen"), Ocean View's Town Administrator, sent Gay notice that the conditional use application would be considered on October 21, 2004. Delmarva was aware of this date as well.

44. On October 13, 2004, Gay and Delmarva were advised that changes had to be made to the preliminary site plans after review by Ocean View's consultant, George, Miles and Buhr, LLC (hereafter "GMB") The revisions had to be submitted before the public hearing on October 21, 2004. Among other points, the submitted ratios for the commercial and residential areas, as compared to the lot size, did not comply with a 50/50 zoning requirement.

45. The conditional use application was not considered on October 21, 2004 because Ocean View did not have enough time to consider revised plans which were submitted in response to the GMB report.

46. On October 27, 2004, Gay was advised by Ocean View that plans needed to be submitted in advance to Board of Adjustment meetings. They were held on the 3rd Thursday of each month. Delmarva was aware of this requirement before then.

47. On November 3, 2004, Gay informed Delmarva by fax that WSFS would not extend the construction loan that was made under the contract. Gay told Delmarva to obtain approval at the next available meeting to permit

construction within 60 days thereafter to preserve his financing.

48. Gay used a surveyor named Charles Coffman (hereafter "Coffman"), to assist Delmarva with the conditional use work.

49. Coffman had prepared a topographic survey of Gay's land on November 4, 2004. It measured elevations and showed them as contours on a plot together with some additional information. However, it was not a full survey that would have included all existing and proposed conditions on a site.

50. AES required certain information from Gay and Coffman to complete the conditional use process. Among other particulars, Ocean View required information in the nature of a full survey. Delmarva and AES did not adequately communicate this more demanding need beyond a topographic survey to Gay.

51. On December 23, 2004, Delmarva informed Gay that approval was anticipated at the February Board of Adjustment hearing if "the Town don't throw another monkey wrench into it." Delmarva also advised that a sediment pond plan may have to be done which it had expected.

52. On December 24, 2004, Gay requested to meet with Delmarva during the week of January 10, 2005.

53. On January 10, 2005, AES prepared a Storm Water Management Plan which provided for discharge water into an existing ditch system.

54. On January 18, 2005, a Storm Water Management Plan Application was submitted to the Sussex County Conservation District.

55. On February 2, 2005, Delmarva filed an application for Fire Protection Plan with the State Fire Marshall for the mixed use.

56. On March 7, 2005, the Fire Marshall did not approve the plan as submitted. Scale drawings showing new and existing structures together with intended use building were required.

57. On March 23, 2005, Delmarva reviewed Ocean View's preliminary site plan checklist and a number of items needed to be finished.

58. On April 1, 2005, a Friday, Delmarva provided AES with a required list of adjoining property owners obtained from Gay and advised easement and flood zone information would be forthcoming once received from Coffman.

59. On April 1, 2005, Delmarva requested Coffman to supply easement ditch measurements.

60. On April 1, 2005, Delmarva requested current flood zone information from Coffman.

61. On April 4, 2005, the State Fire Marshall disapproved the revised plan and noted major deficiencies. In particular, scaled drawings had to be submitted indicating the location of fire hydrants, and the location and diameter of all water mains supplying fire protection water. Further, the proposed building

construction type under recognized standards had to be supplied together with a water flow test from the nearest hydrant. This test had to be conducted within the last year, and the water flow test results had to be noted on the revised plan.

62. In order to have a hearing in April, revised plans had to be resubmitted in advance of or before April 6, 2005, a Wednesday. Delmarva failed to meet the April deadline. The conditional use application was not scheduled and remained dormant.

63. On April 8, 2005, Delmarva wrote Gay and sought to cast blame on Coffman for the missed deadline. However, the letter did not report the Fire Marshall's second rejection of the fire protection plan.

64. Delmarva approached Coffman on Friday, April 1, 2005, to provide information, knowing Ocean View's deadline was the following Wednesday. It was not possible for Coffman to supply the easement and current flood datum by the deadline. A major problem at that time was the Fire Marshall's continuing rejection of the fire protection plan.

65. On April 8, 2005, Delmarva wrote Gay and requested they meet to come to an agreement on how to proceed and to come to a clear understanding about their respective obligations.

66. The letter was sent to Gay's regular address and received by him.

67. No further work on the conditional use occurred after that time.

68. Delmarva failed to perform its services within a reasonable time and in a reasonable manner.

CONCLUSIONS OF LAW

Gay argues that paragraph 26 of the contract required Delmarva to obtain a variance for the construction of a multi-commercial use building as part of the fixed $324,000 contract price. Delaware applies the objective theory of contract interpretation. Words are given their plain and ordinary meaning; these words generally establish the intent of the parties; mere disagreement between the parties over the meaning of contract terms does not create an ambiguity. *Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *5 (Del.Ch. Aprl. 24, 2008). Paragraph 26 provides in bold print that "All permits, inspections, license fees are the responsibility of Delmarva Building Supply, Inc." Gay argues permits means a building permit after a variance was approved by Ocean View authorities and that the zoning expenses for application, documents, and effort necessary to obtain a variance were included in the contact price of $324,000.

This interpretation is at odds with the applicable words used and the structure of the contract. Paragraph 26 pertains to a building permit which is simply a revocable license to build a structure for a fee. *Willis v. City of Rehoboth*, 2005 WL 1953028 at *6 (Del. Super. June 24, 2005). On the other hand, "variance" triggers a more involved administrative process whereby the strict

requirements of zoning may be adjusted to eliminate unnecessary hardship. *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1243 (Del. 1976). It is not a perfunctory payment of a fee. Under the general provisions, Gay assumed responsibility that the building's location did not conflict with zoning rules. Although this is more of a setback limitation, it supports the notion that Gay had the risk of loss should a variance not be obtained.

Looking at the structure of the contract, the $324,000 price is allocated to the construction of the building. Payments are due on a regular basis with the deposit, delivery of lumber, truss installation, upon rough inspection and upon completion. It would turn the price structure, a major contract component, on its head to find that extraordinary zoning costs were included.

From the trial, I find that Gay knew a permit and variance were separate, and Delmarva's expenses to obtain a variance would be extra costs for him to bear - not Delmarva.

Moreover, the contract contained a merger/integration clause which provided: "It is expressly agreed that no statement, arrangement or understanding, oral or written, expressed or implied, not contained herein will be recognized." Despite Gay's knowledge that a variance is different from a permit, and the failure of the contract to plainly state Delmarva was responsible for extraordinary costs to obtain a variance, the argument was pressed that Delmarva assumed this

responsibility. This conclusion is based upon alleged pre-contractual conversations between the parties.

However, under the foregoing clause, Gay contractually promised that no reliance was made on statements outside of the contract. He is bound thereby unless there was fraud. *Glouchester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, 832 A.2d 116 (Del.Ch. 2003).

In Gay's consumer fraud claim, he argues that Delmarva told him at the time the contract was signed that the two-story building with two commercial uses could be built under the Ocean View zoning code. Gay claims this is a false statement made with the intent to procure his signature on the contract and for Delmarva to obtain the $81,000 deposit. Delmarva did speak to Alexander before the contract was signed and before the $81,000 deposit was paid to Delmarva at the end of December. Alexander first told Delmarva that construction could proceed and Delmarva so advised Gay. The idea was only a usual and ordinary building permit was required. Later, Alexander changed his position and advised that a variance was necessary. Delmarva so advised Gay.

Before Delmarva's involvement, Gay had been interested in developing the land for two commercial uses. With this purpose in mind, Gay spoke to Alexander and received mixed signals. Gay knew that a variance was probably needed. In this context, there was no condition of falseness created by Delmarva which is a

predicate for a consumer fraud claim. *Ayers v. Quillen*, 2004 WL 1965866 at *5-6 (Del. Super. June 20, 2004). Given Alexander's responses to both Gay and Delmarva, Delmarva did not made any statement to Gay that it knew to be untrue or made with reckless indifference to the truth. Delmarva did not make any statement before the contract intending Gay to rely upon any alleged deception, promise or misrepresentation. Nor can there be common law fraud under these circumstances. Statutory consumer fraud is broader in scope than common law fraud; significantly, the making of misleading statements with the intent for others to rely upon them is sufficient for statutory fraud whereas common law fraud requires reliance by an injured party; if Delmarva did not commit consumer fraud, it has not committed common law fraud. *See Murphy v. Berlin Construction Co., Inc.*, 1999 WL 41633, at *n.3 (Del. Super. Jan. 22, 1999).

Looking at the conduct of the parties, they agreed that no building should occur under the contract until a variance was obtained. To this extent the contract was modified and ended when the variance was not obtained. Delmarva knew Gay desired a multi-commercial use with his business being on the second floor and his wife's on the first. Gay could not afford to carry the costs of the construction through his business alone.

While there was no express contract concerning Delmarva's services to obtain approval of a variance, there was an implied contract that Delmarva would

use its services to obtain one and Delmarva performed with the expectation that Gay would pay. *Marta v. Nepa*, 385 A.2d 724, 729 (Del. 1978). Under the circumstances, Gay knew the reasonable value of Delmarva's services included the AES engineering fee of $8,250 for the professional services incurred concerning the proposed building. Services were performed prior to the time of submission of the variance application on June 25, 2004. However, they were required to provide background for what was sought by the variance and would have been used if the variance had been granted. Further, the Town's fee of $530 and Foxwell's charge of $300 for his services are reasonable. The record does not provide a basis for determining the reasonable worth of Delmarva's time for the variance. Delmarva's payment of $15,000 to David Perrera, trading as Final Touch, was not reasonable and a breach of the modified contract. Perrera's engagement with Delmarva was to perform construction work only. Delmarva's payment of $16,200 in commissions between the Kramers was not reasonable and a breach of the modified contract. Fees premised on the fixed price for building could not have been earned until a variance had been obtained. Construction was not to have begun pending approval of a variance. Delmarva put the proverbial cart before the horse.

After the variance was denied, Gay called Delmarva on August 4, 2004 and terminated the contract. He wanted the $81,000 back and was calling it a day.

Delmarva received his call but chose not to respond or object. Its silence manifested its consent, and Delmarva agreed to terminate the contract by its conduct. *Brittingham v. Bd. of Adjustment of City of Rehoboth Beach*, 2005 WL 170690 (Del. Super. Jan. 14, 2005). Further, as stated in *Williston On Contracts* § 73:16 "An agreement to rescind or modify need not be express. Mutual assent to abandon a contract, like mutual assent to form one, may be implied from the attendant circumstances and conduct of the parties . . . It is a pure question of fact whether such an inference can be drawn."

Delmarva understood that the scope of work had changed, that a different building would have to be designed providing for two apartments on the second floor and moving Gay's business to the first floor, and that the costs were materially different. The project had to be rebid. Delmarva recognized these changed circumstances when it sent its fax on August 16th to Ocean View and confirmed this status in its April 8, 2008, letter to Gay. I conclude that the first contract was terminated and abandoned by the parties on August 16, 2005, and there was no meeting of the minds thereafter for another contract.

However, Delmarva performed its services to obtain conditional use approval for mixed residential and commercial uses of Gay's property with the expectation of being paid and Gay was well aware of it. Delmarva provided revised plans to Gay. Gay did not object to them. Delmarva applied for a

conditional use on September 21, 2004. As part of the process, Delmarva employed AES and information was submitted to Ocean View.

However, Delmarva's submissions were not sufficient to permit Ocean View to act in October of 2004. Delmarva was so advised. Although Delmarva sought to obtain approval in February of 2005, it could not do so. Delmarva did not anticipate a Sediment Control Plan. It did not obtain approval from the Fire Marshall for the fire protection plan for the new mixed use structure, twice having its submissions rejected. The last rejection resulted from major deficiencies and contributed to the failure to have a hearing in April, over six months from the application date. Delmarva did not seek to get necessary information from Gay's surveyor, Coffman, until three business days before the April deadline.

Information of this nature should have been requested nearer in time to the September application. The "monkey wrench" reference in Delmarva's December 23rd message was self-inflicted; if Delmarva had paid attention to the requirements, no unexpected surprises should have occurred. After consideration, I agree with McMullen that the time from September to April was too long even for his and Ocean View's first consideration of a mixed use request. Mr. McMullen did have zoning experience and was a neutral person.

Under these circumstances, Delmarva did not perform within a reasonable period of time and materially breached its quasi-contractual obligations with Gay.

His payment obligations are excused thereby. No recovery is awarded Delmarva on a quasi-contract basis. For purposes of clarity, no award can be entered either on an unjust enrichment basis. Delmarva did not prove Gay was unjustly enriched, that Gay secured a benefit from Delmarva's tardiness and that it would be unconscionable to allow Gay to retain a benefit. *Doukas v. Labobola Bakery and Restaurant, LLC*, 2007 WL 2318123 (Del. Super. July 30, 2007).

It must be noted that Gay's counsel submitted two letters from him as part of a three ring binder of evidence exhibits. Counsel cannot be both a witness and an advocate. In reaching this decision, the Court did not have to consider them, considering the record as a whole and the substantial hardship Gay would experience if new counsel had to be retained. For future guidance, where letters of counsel are offered as evidence, unless the subject matter is conceded, counsel must withdraw for independent trial counsel. *In Re Estate of Waters*, 647 A.2d 1091 (Del. 1994).

Considering the foregoing, judgment is entered in favor of Gay and against Delmarva in the amount of $71,920 plus interest at the legal rate from August 4, 2004, plus costs. The award represents the $81,000 deposit, less $9,080 in expenses for Foxwell, AES, and Ocean View's variance application fee. No award for loss of interest of the WSFS financing is made. Gay understood he made a bad investment, and Delmarva did not promise governmental approval of a

variance. Judgment is entered in favor of Gay and against Delmarva on its counterclaim.

No attorneys fees are awarded. Litigants bear these expenses absent a basis in contract or law to impose them which are absent here.

IT IS SO ORDERED.