

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SHIRLEY WILSON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 2001-09-329
)	
KLABE CONSTRUCTION COMPANY,)	
KEVIN S. KLABE,)	
)	
Defendants.)	

Date Submitted: July 17, 2003
Date Decided: July 22, 2003

Paul A. Bradley, Esquire McCarter & English, LLP Mellon Bank Center, Suite 950 919 Market Street P.O. Box 111 Wilmington, DE 19899 Attorney for Defendants	Shirley Wilson 819 Woodsdale Road Wilmington, DE 19809 Plaintiff (<i>pro-se</i>)
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**FINAL ORDER AND OPINION ON
DEFENDANT'S MOTION FOR DIRECTED VERDICT**

On July 17, 2003 the Court held a trial in this matter. The instant case is an *appeal de novo* brought pursuant to 10 *Del. C.* §9570 *et seq.* from the Magistrate's Court. At the close of plaintiff's case, the defendants moved for a directed verdict under Court of Common Pleas Civil Rule 50. The Court reserved decision on that motion. This is the Court's Final Order and Decision.

The Facts

The Court received testimony from plaintiff's case in chief as follows: Kevin S. Klabe ("Klabe") was sworn and testified as follows: Klabe contracted with the plaintiff Shirley Wilson ("Wilson") for a time and materials job at a rental property owned by Wilson and billed her every two weeks. The items were listed in a contract proposal entered into between the parties. Sean Klabe ("Sean") was in charge of the job and supervised the same. The contract proposal dated September 5, 2000 was received into evidenced as well as detailed in plaintiff's Complaint filed in this Court as an *appeal de novo*, 10 Del. C. §9570. Wilson paid in full each bill and Klabe presented testimony to the Court that at the end of the contract he gave Wilson an \$800.00 refund. The scope of the work involved replacing rotted wood because of termite damage as well as to replace a screen door and certain beams located in the rental property's basement.

Klabe agreed at trial that the contract called for "handyman type of work" but that he had qualified employees and workmen performed on the job. The parties clearly agreed to a "time and materials" payment schedule. Wilson gave Klabe \$2,500.00 for the work. Klabe indicated at trial that caulking was part of the work around the windows, as well as replacing some beams and some millwork. John Morgan was the carpenter on the job and he actually performed the work on the job site.

Plaintiff's Exhibit "A" for identification was marked. It was a January 2002 letter from Shirley Wilson herein Wilson allegedly acknowledged a meeting with Klabe.

John Morgan ("Morgan") presented testimony at trial. Exhibit "B-3" was marked and received into evidence with no objection. Morgan testified at trial that a door was taken off and replaced two times because of Wilson's request and the wood "was rotten on the old door". Morgan was asked to install the second door by Wilson. He recommended using treated wood for the replacement, but Wilson refused.

A series of photographs were marked and eventually received into evidence with no objection by defendants. Exhibit "B-9" showed the pressure treated wood in the beams, Exhibit "B-11" showed the finished door; Exhibit "B-3" showed the door with allegedly a two-inch gap; Exhibit "B-32" shows caulking around the windows.¹

Exhibit "D-3" allegedly showed termite damage around a window. Morgan testified that he offered to make a new sill with pressure treated wood but Wilson refused.

On cross-examination Morgan testified that all work was done according to plaintiff's instructions and complied with existing industry standards and was performed in a workmanlike manner.

¹ Eventually Exhibit "B" for identification with some prodding by the Court was moved into evidence as Plaintiff's Exhibit "2".

Stephen McReynolds (“McReynolds”) testified and resides at 311 Beverly Place. He investigated the Complaint in April 2000 at plaintiff Wilson’s rental property. He spent approximately two weeks at the rental property and was called in November 2002 to take a series of photographs. McReynolds noted several “retreats by termites” after the defendant’s work in plaintiff’s rental property. In April 2000, he testified that he didn’t see any active termites when defendant replaced wood, but did see termites in another location other than where the work was performed.

Thomas Laskey, Jr. (“Laskey”) was sworn and testified. He was called to plaintiff’s residential property to perform some repair work allegedly because of defendant’s deficient work. The work involved scraping and staining. Laskey advised Wilson that the previous work was done in a workmanlike manner and that he did not see any need to lagbolt or replace any of the beams installed by defendants. The total bill was for \$1,900.00 dollars. Laskey finished the work but plaintiff Wilson never paid him his final payment. Laskey testified at trial that he scraped the basement windows and did “some beam work” as requested by plaintiff Wilson. He has experience of seven years in the mobile home industry, including framing and construction work and believes that the work was done in a workmanlike manner by the Defendants.

On cross-examination, Laskey testified that he was in plaintiff’s rental property on June 10, 2001 and observed the carpentry work and

the support beams that were lag bolted. He testified at cross-examination that no deficiencies were noted by him in defendant's previous work and that the carpentry work was done according to industry standards. Ms. Wilson insisted that he take the beams down and reinstall new beams over his own recommendation.

William Krauss ("Krauss") presented testimony at trial. He spoke with plaintiff Wilson three years ago. Defendants performed a conversion of a garage attached to his home and made an entranceway into his primary residence. He is aware of Defendant's fine reputation and has friends in Westover Hills who highly recommended defendants. He presented testimony that the plaintiff came to his home to speak to him when she saw a Klabe sign and she asked several questions about defendants' work.

According to Krauss, all work done by Klabe in his residence was completed in eight months, with some extensions at his request, and was worth about \$30,000.00.

On cross-examination Krauss testified that he has an extensive background in Real Estate and construction renovation and has worked in the industry for twenty-five years. He was "completely satisfied" with Klabe's work. According to Krauss, Klabe is ranked as an excellent construction company and he was highly satisfied all the work that was done which he described as a satisfactory and workmanlike manner.

Shirley Wilson (“Wilson”) presented testimony at trial. Wilson entered into a contract with Klabe for time and materials work at her rental property. She believed the termite damage was found by Klabe and the information not related to her. After the work was completed she said she saw some termite problems. Wilson paid the \$2,500.00 deposit and all work was to be done as a time and materials job. Plaintiff’s Exhibit “4” was moved into evidence without objection which is a letter dated September 5, 2000 from Klabe. It is the proposal for the contracting work done at the rental property.

Wilson testified that the damages or liability would normally would fall on the pest control company, but she is seeking to hold Klabe liable with this lawsuit. She believes that Klabe did not follow through with the termite control on the premises and she “lost her cause of action against pest control for damages to her property.” Wilson agrees, however, that Klabe was not contracted to do pest control damage.

Wilson offered testimony to the Court about a floor refinishing job which she believes is not satisfactory, but not related to the instant lawsuit. Wilson said that the major damage to the rental property was caused by termites which reoccurred after Klabe’s beam replacement.

When questioned by the Court, she believes that Klabe “did not tell her about the termite damage.”

On cross-examination, Wilson offered to read Exhibit “4” into the record, which the Court incorporates by reference into the facts and

testimony in this decision. The last sentence indicated that \$500.00 was needed to start a new job which she didn't contract with the defendants so it would be completed.²

Discussion

At the close of plaintiff's case-in-chief, pursuant to Court of Common Pleas Civil Rule 50, Defendants have moved for a directed verdict. The basis of the motion was that there is no evidence of damages presented at trial by plaintiff Wilson and no evidence other than Klabe did satisfactory and workmanlike work according to industry construction standards. Defendants also argue that Wilson established no evidence of liability by defendants Klabe or Kevin Klabe individually. Defendants also asserts that no breach of contract occurred because the instant contract was a time and materials contract and plaintiff received the full benefit of the bargain. Finally, Defendants argue that there has no evidence presented on liability as a result of Mr. Klabe and asked for dismissal of the lawsuit against him individually.

Wilson argues that she believes that some of the windows were not properly caulked on the job site and opposes any motion for directed verdict because she believes that "she did not get what she paid for".

² As Plaintiff's case in chief, she offered a letter dated January 22, 2001 from Shirley Wilson which was marked as Exhibit "1" and received into evidence. Exhibit "2" which was formerly moved into evidence without objection by the defendants were photographs marked 1 - 34. Exhibit 3 was a contract dated June 26th. Exhibit 4 was a letter dated September 5th which was the proposal in question and Exhibit 5 was a contract retainer activity from Klobe.

The Law

The Civil Rules governing the Court of Common Pleas for a Directed Verdict Motion provide as follow:

Civil Rule 50; Motion for a Directed Verdict and for Judgment notwithstanding the Verdict.

(a) A Motion for Directed Verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence and if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for directed verdict shall state the specific grounds therefore.

The law is clear that a Motion for Directed Verdict must state the specific grounds for the basis of granting said motion. *Nather v. Voss*, Del. Super., 98 A.2d 499 (1953). A directed verdict in favor of the defendant presents a situation for the trial judge requiring the evidence to be viewed in the most favorable light to the plaintiff. *Rumble v. Lingo*, Del. Super., 147 A.2d 511 (1958). When considering a directed verdict for the defendant, the Court should be convinced that there is no substantial evidence to support a verdict for the plaintiff. *McCarthy v. Mayor of Wilmington*, Del. Super., 100 A.2d 739 (1953).

Opinion And Order

The Court has carefully reviewed the five exhibits presented by the plaintiff at trial, as well as the testimony of all six fact witnesses. The Court has also carefully reviewed the *appeal de novo* Complaint filed

against Klabe Construction Company, and Kevin S. Klabe's Answer and Affirmative Defendants. Plaintiff's Response to the Answer and Affirmative Defendants of Klabe Construction Company have also been reviewed by the Court. The Court has liberally construed plaintiff's *pro-se* Complaint and believes that it alleges broadly a breach of contract claim.

The Court finds no evidence presented at trial to find Kevin Klabe individually liable for Klabe Construction Company's contract proposal or alleged breach therein. *See, e.g., Sonne v. Sacks*, 1979 Del. Ch., Lexis 455, Brown, V.C., (June 12, 1979). Second, construing the testimony in accordance with the above caselaw, the Court finds that there is absolutely no substantial evidence to support a verdict in favor of the plaintiff. Plaintiff's own fact witnesses called to trial actually testified that Klabe's work was satisfactory and Klabe performed all work according to industry standards. Plaintiff's own testimony was she conceded the cause of action filed against defendants would normally be filed for termite damage against individual termite company. The Court agrees. In addition, the plaintiff has not set forth any evidence of the liability or damages required for a breach of contract claim against defendants. "When there is a written contract, the plain language of a contract will be given its plain meaning. *Phillips Home Builders v. The Travelers Ins. Co.*, Del. Super., 800 A.2d 127, 129 (1997). The party first guilty of material breach of contract cannot complain if other party

subsequently refuses to perform. *Hudson v. D.V. Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 170 (1969). In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract. *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, Del. Super., 251 A.2d 571, 573 (1969). Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that party would have been in had the breach not occurred. *Delaware Limousine Service, Inc. v. Royal Limousine Svc., Inc.*, 1991 Del. Super., LEXIS 130 Del. Super., C.A. No. 87 C-FE-104, Goldstein, J., 1991 WL 53449 (April 5, 1991). At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. *Lowe v. Bennett*, 1994 Del. Super., LEXIS 628, Del. Super., 1994 WL 750378, Graves, J. (December 29, 1994). Simply put, the Court concludes that plaintiff entered into a time and materials job for replacement of a door, installation of certain beams and caulking work and received the full benefit of a bargain. The Court can find no evidence of either liability or damages established in the record by plaintiff against Klabe Construction Company and/or Kevin S. Klabe.

The record also supports the Court's factual findings that defendants were not hired to do termite inspection and/or control, but performed a time and materials contract at plaintiff's request.

As the above case law indicates, based upon this record, the Court shall enter a directed verdict in accordance with Court of Common Pleas

Civil Rule 50 in favor of the defendants, both individually and as well as for Klabe Construction Company.

Each party shall bear their own costs.

IT IS SO ORDERED this 22nd day of July, 2003.

JOHN K. WELCH
ASSOCIATE JUDGE