SUPERIOR COURT
of the
STATE OF DELAWARE

Susan C. Del Pesco
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Submitted: November 30, 2007
Decided: December 7, 2007

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Re: *MAA Real Estate LLC v. Nagin Patel*
C.A. No. 06C-02-249

Decision after Non-Jury Trial

Dear Counsel:

The plaintiff seeks compensation on a theory of breach of contract or, in the alternative, unjust enrichment. The subject of the dispute is an abandoned automobile repair shop which was to be converted into a gas station and mini-mart.

There are three elements in a breach of contract case: the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff.[1] The plaintiff has the burden of proving his claim.

Summary of the Evidence

[1] *Gutridge v. Iffland*, 889 A.2d 283, *4 (Del. 2005)(quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

There is no written contract between the parties. There is a document ("price statement") written by the defendant, listing in an abbreviated form the items of work to be done with an accompanying price. The total cost of these items is approximately $137,000. When presented with the price statement, the plaintiff says he agreed to pay only $115,000 for the work. That amount with the date "9-24-04" was written on the bottom of the document by the plaintiff. Neither party signed the price statement. The defendant denies that he agreed to do the work for $115,000 and claims the plaintiff inserted those notations at a later date.

The plaintiff says that he gave architectural drawings for the mini-mart to the defendant to assist him in developing a proposal. The drawings contain specifications for some of the materials to be used. The defendant denies ever seeing them. The drawings, which are in evidence, are not for the property in question. Plaintiff describes them as a "generic" design for a mini-mart; they are labeled with a property address in Newton, Massachusetts. The defendant testified that he understood his obligation to create a store with the same quality materials as those used at a Sunoco station in Rising Sun, Maryland, a site which was shown to the plaintiff before work commenced. The quality of the materials used at the Rising Sun station was not developed at trial.

From October 2004 to December 2004, the defendant was paid in three installments totaling $113,500. Expert testimony and photographs show that significant work on the building still remains to be completed. Although most of the problems are cosmetic, plumbing work, including the installation of a sink, remains incomplete.

The workmanship performed by the defendant throughout the store is very poor. The most significant problem relates to the tile floor. The parties agree that the installed tile was to

be non-skid. The tile installed is not non-skid, creating a safety hazard for the mini-mart customers.

The other major problem relates to the cabinetry. The cabinets installed are of a poor quality. The plaintiff's expert testified that they are below contractor-grade quality. The problem is aggravated by the plaintiff's poor carpentry and installation work. Photographs reveal that the cabinets are not level, at least one drawer is missing, some of the pulls are missing, and the alignment is poor.

The plaintiff seeks to recover $37,100 which will allow him to remove the unsatisfactory materials and install the agreed upon materials with quality workmanship.

The defendant claims that he has provided the services he agreed to provide. This was the first tile floor the defendant has installed in the United States. Before this job, the last tile floor he installed was in Kenya nearly nine years ago. The defendant's spoken English skills are very limited. He can write some English, and he can read some as well. It was difficult to understand a good bit of his testimony. He acknowledges that he left some of the renovations unfinished. He explained that he did not return to the job site because the plaintiff insulted him in their native language. The defendant became very emotional when he described his last encounter with the plaintiff. He explained that because of that encounter and the plaintiff's threat not to make further payments, he did not return to finish the work.

Discussion

A contract is a legally binding agreement between two or more parties. For a legally binding contract to exist there must be: (1) an offer of a contract by one party; (2) an acceptance of that offer by the other party; (3) consideration for the offer and acceptance; and (4)

sufficiently specific terms that determine the obligations of each party.[2] A legally binding contract requires that the parties manifest or show mutual assent to the contract's terms. Mutual assent is not a subjective or personal understanding of the terms by either party. Rather, mutual assent must be shown by words or acts of the parties in a way that represents a mutually understood intent.[3]

The plaintiff has not proven by a preponderance of the evidence that there was mutual assent to each item on the price statement. There could not have been. The price statement does not state the specific materials required to complete the renovation. The general notion that the defendant was directed to construct the mini-mart in accordance to the Rising Sun store is belied by the fact that the Rising Sun store does not have tile flooring.

The plaintiff visited the project site often enough to observe the poor quality of the work being completed. It appears that he was seeking an inexpensive solution to his construction needs. The defendant was not highly-skilled in construction, nor was he experienced in customary business practices. The plaintiff was required to submit a statement to his bank to obtain advances against his construction loan. The defendant's overall business incompetence was demonstrated by his inability to personally generate such a statement. The plaintiff has not proven that he bargained for a high standard of workmanship, and he is not entitled to recover for it now.

The flooring is a different matter. There was mutual assent as to the installation of the tile floor. The defendant presented several samples of tile to the plaintiff. He represented to the plaintiff that each of those tile samples were non-skid. The plaintiff chose one. The plaintiff testified that the installed tile is not the same as the sample he chose. The plaintiff's expert

[2] *Industrial America, Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971).
[3] *George & Lynch Co. v. State*, 197 A.2d 734, 736 (Del. 1964).

testified that the installed tile is not non-skid. By failing to provide non-skid tile, I find that the defendant breached an oral contract specific to that work.

The proper measure of damages for a breach of contract involving improvements to real property is the amount required to remedy the defect by replacement or repair unless that amount is disproportionate to the probable loss in value or it constitutes economic waste.[4] If the remedy is disproportionate to the probable loss in value or if it constitutes economic waste, then the proper measure of damages may be diminution in value.[5] The cost of replacement and repair is the proper remedy in this case. I accept the testimony of the plaintiff's expert that the cost of removing the current tile and replacing it with the proper non-skid tile is $11,695.[6]

The record regarding the cabinets is insufficient to permit an award. The plaintiff does not assert that any particular type or quality of cabinet was contemplated. His expert says that the standard in the industry would require that he receive at least construction-grade quality. I cannot accept that conclusion. The plaintiff knew or should have known that the defendant did not have either the skill or the experience to be compared to contractors working in the general construction industry in Delaware. An award to replace the cabinets is not warranted.

The plaintiff's alternate theory of recovery is unjust enrichment. The elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law.[7]

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[4] *Shipman v. Hudson*, 1995 WL 109009 *5 (Del. Super. 1995); *Council of Unit Owners of Sea Colony East v. Freeman Assoc.*, 564 A.2d 357, 361 (Del. Super. 1989).
[5] *Id*.
[6] The following items from the plaintiff's expert estimate comprise the amount awarded: Repair tile at step from sink area, $405; Remove and replace tile in retail area, $10,775; Re-tile step up to back room, $340; Install transition at 6´ entry door for tile, $175. Plaintiff's Ex. 6.
[7] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1056 (Del. Super. 2001)(citing *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)).

The plaintiff bought a boarded up automobile repair facility. He intended to convert it into a gas station with a mini-mart. In spite of the inadequacy of the defendant's work, the business has opened. The sum of $113,500 was paid to the defendant for the work done to renovate the property and make it operational. The evidence at trial did not focus on the nature or extent of the work that the defendant accomplished; it focused on the mostly-cosmetic deficiencies. The plaintiff has secured a recovery at law on part of the business relationship where a meeting of the minds could be proven. There is insufficient evidence to permit additional equitable relief.

Conclusion

Judgment in the amount of $11,695 is entered against defendant Nagin Patel.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

Original to Prothonotary