

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

OCTAVIA C. DRYDEN,)
KENNETH DRYDEN,)
)
Defendants Below/Appellants,) C.A. No. 10A-05-012 MMJ
)
v.)
)
JANG'S LANDSCAPING, INC.,)
)
Plaintiff Below/Appellee.)

Submitted: February 14, 2011

Decided: April 26, 2011

Upon Appeal of a Decision of the Court of Common Pleas
AFFIRMED

MEMORANDUM OPINION

Kester I. H. Crosse, Esquire, Williams & Crosse, Wilmington, Delaware,
Attorney for Appellants

Gary A. Bryde, Esquire, Hockessin, Delaware, Attorney for Appellee

JOHNSTON, J.

Defendants-Appellants Octavia Dryden and Kenneth Dryden (together, the “Drydens”) have appealed the April 20, 2010 decision of the Court of Common Pleas. The decision awarded \$6,100 to Plaintiff-Appellee Jang’s Landscaping, Inc. for the construction of a patio at the Drydens’ residence.

The Drydens contend that the Court of Common Pleas’ decision constituted legal error and was not supported by substantial evidence.

FACTUAL AND PROCEDURAL CONTEXT

In April 2006, the Drydens contracted with Jang’s to construct a “hardscape brick patio” at their residence. The contract provided little detail regarding the dimensions of the patio. It did, however, contain a rough sketch, which included a landing and three steps that descended from the rear of the Drydens’ home. The contract did not reference any code or regulation, include a date for completion, or describe the type of materials to be used. The parties agreed on the price of \$14,000; the Drydens paid \$6,750 up front.

Shortly thereafter, Jang’s began construction. Notable is its installation of the landing and three steps. The landing extended less than 36 inches from the rear of the Drydens’ home. The first step is 7.5 inches high,

the second step is 9 inches high, and the third step is 7.5 inches high. Jang's used pavers for the patio's surface.

Upon completion, Jang's charged the Drydens' credit card \$7,250, the balance due. Octavia believed that there was insufficient sand under the patio and that some of the pavers incorrectly settled. She requested that Jang's inspect the patio. The Court of Common Pleas found that it is unclear whether Jang's inspected the patio. Octavia placed a stop-payment on the \$7,250 charge.

Subsequently, Jang's agreed that, on May 4, 2006, it would inspect the patio. However, Jang's did not show.

On September 13, 2007, Jang's filed a complaint against the Drydens, seeking the balance pursuant to the contract. The Drydens counterclaimed, alleging that Jang's workmanship was poor. On March 18, 2010, the parties proceeded to trial.

The Trial

Jang's called expert witness Jeffrey Campbell, a hardscape installer who is certified by the International Concrete Pavers Institute and has seventeen years experience in the business. Campbell inspected the patio on April 28, 2008. He opined that Jang's did a "great job," only identifying slight erosion and settlement problems with the pavers. He estimated that

these issues could be corrected for \$350 to \$400. Campbell explained that New Castle County Building Code (“NCC Code”) does not require a permit or inspection before the construction of hardscape patios. He opined that the steps were not a safety hazard, but noted that steps should uniformly be 7.5 inches in height.

The Drydens called expert witness Stephen Wentzell, a New Castle County certified building plans examiner with eight years experience. Wentzell did not personally examine the Drydens’ patio, but reviewed several photographs. He explained that NCC Code has adopted the International Residential Building Code (“International Code”). Wentzell testified that, pursuant to the International Code, stairs exiting a residence must have a landing that extends at least 36 inches in the direction of travel. Further, he explained that the International code requires that stairs with more than two steps can be no higher than 8 inches per step, and the difference in height among each step must be no more than 3/8 of an inch. Therefore, the hardscape patio did not conform to the International Code and consequently, NCC Code. Wentzell agreed with Campbell that a permit was not required for the construction, but opined that the nonconformance of the landing and the steps may have an adverse impact on the value of the Drydens’ home.

The Drydens also called expert witness Barri White, who has received training and certifications from the International Concrete Pavers Institute since 1996. White twice inspected the Drydens' patio. He opined that the construction did not meet the NCC Code because the landing is too short and the height of the steps is not uniform. White testified that the drainage system is problematic, which may have caused some pavers to improperly settle and may, in the future, produce mold in the Drydens' basement. He explained that he does not perform repair work because of the potential liability involved, and therefore, opined that the patio must be completely replaced at an estimated cost of \$15,000.

The Court of Common Pleas' Decision

By opinion dated April 20, 2010, the Court of Common Pleas awarded Jang's \$6,100. The Court explained that it must determine whether the Drydens' breached the agreement by placing a stop-payment on the charge and also determine whether Jang's breached by installing a patio that did not meet NCC Code. To recover damages for breach of contract, a party must show that it substantially complied with the contract.¹

¹ *A & A Air Serv.'s, Inc. v. Jane Richardson*, 2006 WL 2382433, at *5 (Del. Com. Pl.) (citing *Emmett Hickman v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571 (Del. Super. 1969)).

The Court of Common Pleas explained that Delaware recognizes an implied builder's warranty of good quality and workmanship: "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 part of his contract that the work shall be done in a skillful and workmanlike manner."²

The Court of Common Pleas found that Jang's held itself out as possessing the requisite skill to construct a hardscape patio, and therefore the construction is covered by the implied warranty of good quality and workmanship. Jang's was required to exercise "the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities" in completing the construction.³

The Court of Common Pleas held that Jang's breached the implied warranty of good quality and workmanship. The court found that NCC Code applied to the landing and the steps because they were a means of egress from the rear of the Drydens' home. Although a permit was not required to construct the patio, the court held that Jang's failed to establish by a preponderance of the evidence that it constructed the patio consistent

² *Quality Builders, Inc. v. Macknett*, 2007 WL 3231600, at *2 (Del. Com. Pl.) (citing *George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908)).

³ *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super.).

with NCC Code. The landing does not extend 36 inches and the steps differ by more than 3/8 of an inch. Further, some pavers settled incorrectly. The court also noted that the Drydens were willing to discuss their concerns with Jang's, but Jang's disregarded the Drydens' requests. For these reasons, the court held that Jang's breached the contract.

Accordingly, the Court of Common Pleas held that the Drydens are entitled to some relief. However, the court also found that, because they "failed to pay or offer to pay some part of the balance due for the good portion of work done," the Drydens breached the contract. The court held that expectation damages are appropriate, "measured by the amount that would place the non-breaching party in the same position as if the breaching part had performed the contract."⁴

The Court of Common Pleas found that Campbell's testimony was credible, and held that the Drydens are entitled to \$400 to fix the pavers that incorrectly settled. The court found White's opinion—that the patio must be torn out and reconstructed—to be "draconian." The court explained that a "less radical result is dictated." The court awarded the Drydens an additional \$750 to bring the landing and the steps up to code.

⁴ *Duncan v. Thera Tx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

The Court of Common Pleas held that Jang’s is entitled to relief, measured as the balance of contract—\$7,250—less offsets. Therefore, the court entered judgment in favor of Jang’s in the amount of \$6,100 (\$7,250 less \$400 and \$750).

STANDARD OF REVIEW

In considering appeals from the Court of Common Pleas to the Superior Court, factual issues are reviewed on the record and are not tried *de novo*.⁵ This Court’s role is to correct errors of law and to review the factual findings of the court below to determine if such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process.⁶ Questions of law are reviewed *de novo*.⁷

PARTIES’ CONTENTIONS

The Drydens argue that the Court of Common Pleas’ decision constituted legal error and was not supported by substantial evidence. They claim that the court did not consider White’s testimony that the construction compromised the foundation of the Drydens’ home, which may be problematic if the Drydens decide to sell their home. The Drydens contend that the court erred when it “totally rejected” White’s suggestion that the

⁵ 11 *Del. C.* § 5301.

⁶ *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

⁷ *Ensminger v. Merrit Marine Const. Inc.*, 597 A.2d 854, 855 (Del. Super. 1988).

entire construction must be removed and rebuilt. The Drydens assert that White “appeared to be a more highly qualified witness, had visited the project, made measurements and knew of the requirements of the [NCC] Code.”

Jang’s responds that the Court of Common Pleas’ decision is supported by substantial evidence and is the product of an orderly and logical deductive process. Jang’s asserts that the Drydens produced White, who insisted that an entire reconstruction is necessary, and failed to produce evidence regarding the cost of repairing the patio. Jang’s argues that the court has discretion to accept or reject expert testimony. As a result, Jang’s contends, the Drydens failed to show that they were entitled to more than \$1,150.

ANALYSIS

The Court of Common Pleas heard expert testimony from Campbell, Wentzell, and White. Campbell estimated that it would cost \$350 to \$400 to repair the pavers. Wentzell did not provide an estimated cost of repair. White would not give his opinion regarding the cost of repair, insisting that reconstruction is necessary. The court found Campbell credible and awarded damages consistent with his testimony to address the settled pavers. The court found that White was not credible. The parties did not present the

court with evidence regarding the cost to repair the landing and the steps, but the court nonetheless awarded \$750 to the Drydens. Because the court considered conflicting expert testimony—and weighed credibility—in concluding that the Drydens are entitled to \$1,150, this Court reviews to determine whether the decision is supported by substantial evidence and is the product of an orderly and logical deductive process. It is well-settled that a trial judge has broad discretion to weigh evidence and assess witness credibility.⁸

The Court finds that the Court of Common Pleas’ decision to award the Drydens \$400 to correct the pavers is supported by substantial evidence and is the product of an orderly and logical deductive process. Campbell provided the sole opinion as to the cost of repairing the pavers. White believed that the entire patio must be reconstructed. Campbell and White both have substantial knowledge and experience in the industry. The Court of Common Pleas, however, determined that Campbell’s testimony was more credible, and awarded \$400 to correct the pavers. The court found that reconstructing the entire patio was “draconian.” Discounting White’s testimony was within the court’s discretion.

⁸ *Younger v. State*, 496 A.2d 546, 549 (Del. 1985) (citing *Barks v. Herzberg*, 206 A.2d 507 (Del. 1965)).

The Court also finds that the Court of Common Pleas' decision to award the Drydens \$750 to fix the landing and the steps is supported by substantial evidence and is the product of an orderly and logical deductive process. The Court of Common Pleas considered White's opinion to be excessive, and, within its discretion, disregarded it. Because the Drydens did not otherwise produce evidence as to the cost of repairing the landing and the steps, the court could have denied recovery for the landing and the steps altogether, finding that the Drydens failed to meet their burden of proof. Instead, the court awarded \$750 to the Drydens. Considering the totality of the circumstances, this Court finds that amount to be reasonable.

The Drydens assert, in their papers, that the Court of Common Pleas' decision constituted legal error. However, the Drydens neither identify nor make specific arguments concerning a legal error. Therefore, the Court need not consider this argument.

CONCLUSION

The Court of Common Pleas' decision to award the Drydens offsets of \$400 to correct the pavers and \$750 to fix the landing and steps, resulting in an award to Jang's in the amount of \$6,100, is supported by substantial evidence and is the product of an orderly and logical deductive process.

THEREFORE, the Court hereby **AFFIRMS** the Court of Common Pleas' April 20, 2010 Decision After Trial in its entirety.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston