

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

FIRST STATE EXTERIORS, LLC, a)	
Delaware limited liability company,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N12L-06-003 EMD
)	
FREDERICK W. SCHWEIGER and)	
PAMELA SCHWEIGER,)	<i>SCIRE FACIAS SUR</i>
)	<i>MECHANICS LIEN</i>
Defendants.)	
)	

DECISION AFTER TRIAL

The Court held a three day trial in this civil action on September 23-25, 2013 (the “Trial”). The Court then had the parties submit their closing arguments in written form, receiving the final post-trial paper on October 16, 2013.

The case involves various claims and counterclaims between Plaintiff and Counterclaim Defendant First State Exteriors, LLC (“First State”) and Defendants and Counterclaim Plaintiffs Frederick W. Schweiger and Pamela Schweiger. This is the Court’s decision after trial, including the findings of fact and conclusions of law from the Trial.

BACKGROUND

WITNESSES:

During the Trial, the Court heard from and considered testimony from the following witnesses:

Alan Mazzetti, an employee and part owner of First State;

Brian Sorg, an employee of First State;

Christopher Vidro, M&V Builders and a roofing subcontractor of First State;

Peppe Longato, CEM Enterprises, Inc. and a vinyl siding subcontractor of First State;

Michael Fox, New Castle County Inspector;
Larry Hughes, expert witness provided at trial by the Schweigers;
Pamela Schweiger; and
Frederick Schweiger (“Freddy Schweiger”), son of the Schweigers.

As an initial point, the Court finds that Freddy Schweiger was the most helpful and credible witness produced during the Trial. The Court makes this finding based on Freddy Schweiger’s means of knowledge, strength of memory and opportunity to observe. The Court does find other witnesses to be credible – *e.g.*, Mr. Fox and, to a lesser degree, Mr. Vidro, Mr. Longato and Ms. Schweiger, but not to the extent that Freddy Schweiger was during his testimony at the Trial. The Court understands that Freddy Schweiger has bias in favor of the Schweigers (his parents); however, the Court makes its finding and conclusion due to Freddy Schweigers’ demeanor on the stand, the fact that he was the one witness who seemed to best remember the events and was the one witness who appeared present during most of the events relevant to this civil action.

EXHIBITS:

The parties entered numerous exhibits for the Court to consider in determining the various claims. First State had the following exhibits admitted:

- Pl. Ex. 1 – NCC Board of Adjustment Drawing supporting variance request;
- Pl. Ex. 2 – Open-End Mortgage dated Nov.29, 2011 with Frederick and Pamela Schweiger as mortgagors and Manufacturers & Traders Trust Company as mortgagee;
- Pl. Ex. 3 – Agreement between the Schwigers and First State dated Oct. 18, 2011 (as amended on Nov. 25, 2011, the “Contract”);
- Pl. Ex. 4 – First State: Schweiger Job Notes;
- Pl. Ex. 5 – First State “Amendment” dated Nov. 25, 2011;
- Pl. Ex. 6 – NCC Dept. of Land Use Building Permit issued Nov. 30, 2011 (roofing);
- Pl. Ex. 7 – NCC Dept. of Land Use Building Permit issued Dec. 6, 2011 (ramp);

Pl. Ex. 8 – First State Invoice dated Dec. 21, 2011;

Pl. Ex. 9 – Letter from William J. Rhodunda, Jr., Esq., to Alan Mazzetti dated Dec. 30, 2011;

Pl. Ex. 10 – omitted;

Pl. Ex. 11 – Letter from Sadie Killman, GAF Contractor Servs., to Frederick and Pamela Schweiger dated January 10, 2012;

Pl. Ex. 12 – E-mails between Phillip M. Finestrauss, Esq., and William J. Rhodunda, Jr., Esq.;

Pl. Ex. 13 – Letter from Tom Basso, Lancing Building Products, to Brian Sorg (facsimile date line of Feb. 17, 2012);

Pl. Ex. 14 – Letter, dated Jan. 1, 2012, from Peppe Longato, CEM Enterprise., Inc.;

Pl. Ex. 15 – NCC Dept. of Land Use Violation Notice issued to First State Contractors Inc. dated March 5, 2012;

Pl. Ex. 16 – Letter from Pamela G. Schweiger and Frederick W. Schweiger dated May 14, 2012;

Pl. Ex. 17 – Letter from George O. Haggerty, NCC Dept. of Land Use, to First State Contractors, Inc. and Frederick Schweiger dated June 15, 2012;

Pl. Ex. 18 – E-mail with attachment from Charles Hoppe to fschweiger1 dated June 25, 2012;

Pl. Ex. 19 – E-mail from Alan Mazzetti to “All” dated June 25, 2012;

Pl. Ex. 20 – E-mail from Michael Fox to numerous parties dated June 9, 2012;

Pl. Ex. 21 – E-mail from Michael Fox to numerous parties dated June 11, 2012;

Pl. Ex. 22 – E-mail from William J. Rhodunda, Jr., Esq., to Richard Abbott, Esq., dated July 17, 2012;

Pl. Ex. 23 – Letter from George O. Haggerty, NCC County of Land Use, to First State Contractors, Inc. and Frederick Schweiger dated July 18, 2012;

Pl. Ex. 24 – omitted;

Pl. Ex. 25 – Letter of Compliance from George O. Haggerty, NCC Dept. of Land Use, to Frederick Schweiger and First State Contractors, Inc. dated July 31, 2012;

Pl. Ex. 26 – omitted;

Pl. Ex. 27 – omitted;

Pl. Ex. 28 – Written notes of Pamela Schweiger regarding construction work;

Pl. Ex. 29 – NCC Cert. of Occupancy for Roofing Permit issued on Nov. 31, 2011 and final on Dec. 20, 2011 (First State Contractors, Inc.);

Pl. Ex. 30 – NCC Cert. of Occupancy for Ramp Permit issued Dec. 6, 2011 and final on Dec. 21, 2011 (First State Contractors, Inc.);

Pl. Ex. 31 – omitted;

Pl. Ex. 32 – omitted;

Pl. Ex. 33 – omitted;

Pl. Ex. 34 – omitted;

Pl. Ex. 35 – omitted;

Pl. Ex. 36 – Dept. of State Div. of Professional Regulation Letter dated Feb. 14, 2012;

Pl. Ex. 37 – Dept. of State Div. of Professional Regulation Letter dated Dec. 5, 2012; and

Pl. Ex. 38 – omitted.

The Schweigers offered and admitted the following exhibits during the Trial:

D. Ex. 1 – NCC Contractor License Verification dated Nov. 30, 2011;

D. Ex. 2 – First State Job Detail dated Nov. 14, 2011;

D. Ex. 3 – C.V. of Larry J. Hughes, P.E.;

D. Ex. 4 – Letter dated Feb. 18, 2013 from Larry Hughes to William Rhodunda, Jr., Esq.;

D. Ex. 5 – Alpha Eng., Inc. Statement dated July 11, 2012;

D. Ex. 6 – Pre-Inspection Agreement dated June 14, 2012;

D. Ex. 7 – First State Roofing Agreement dated Oct. 18, 2011;

D. Ex. 8 – M&T Bank Statement period June 26 through July 25, 2012 of Robin Schweiger;

D. Ex. 9 – Photographs numbered 1 through 58;

D. Ex. 10 – American Buildings Inspectors Inspection Report dated 1/9/12;

- D. Ex. 11 – PJ Fitzpatrick, Inc. Receipt and Attachment dated Jan. 24, 2012;
- D. Ex. 12 – All American Roofing Co. Proposal dated Jan. 15, 2012;
- D. Ex. 13 – G. Fedale Roofing and Siding Contrs. Estimate dated Jan. 15, 2012;
- D. Ex. 14 – All United Exts. Invoice dated Aug. 3, 2012;
- D. Ex. 15 – James Hawthorne Consulting LLC Specification of Repairs; and
- D. Ex. 16 – M7V Home Builders LLC Invoice dated Nov. 8, 2011.

CLAIMS AND COUNTERCLAIMS:

First State’s Causes of Action --

Mechanics Lien: First State seeks the entry of an *in rem* mechanics lien judgment in the amount of \$21,150 against 107 Harding Avenue, Wilmington, Delaware 19804 (the “Property”). In order to prevail, First State carries the burden to demonstrate that it is entitled to relief under 25 *Del. C.* § 2701 *et seq.*

Breach of Contract: First State seeks damages for breach of the Contract by the Schweigers. Under this cause of action, First State seeks a judgment in the amount of \$21,150 plus interest and attorneys’ fees. Here, First State carries the burden to prove the existence of an enforceable contract; that First State performed under the contract; that the Schweigers failed to perform; and that the Schweigers failure to perform caused First State damages. *See, e.g., VLIW Tech., LLC v. Hewlett–Packard, Co.*, 840 A.2d 606, 612 (Del.2003)

Quantum Meruit & Valebant: First State seeks, in the alternative if the Court does not find that an agreement existed between First State and the Schweigers, recovery against the Schweigers through a quantum meruit and valebant claim. Under this cause of action, First State seeks a judgment in the amount of \$21,150 plus interest. On this cause of action, First State carries the burden and must prove that it performed work for the Schweigers with the understanding that First State would be compensated for the

work. First State must also show that the work performed and the materials supplied by First State improved the Property and benefited the Schweigers.

The Schweigers Causes of Action –

Breach of Contract: The Schweigers seek damages for breach of the Contract by First State. Under this cause of action, the Schweigers seek damages for costs of repair and replacement. Here, the Schweigers carry the burden to prove the existence of an enforceable contract; that the Schweigers performed under the contract; that First State failed to perform; and that First State's failure to perform caused the Schweigers damages. *See, e.g., VLIW Tech., LLC*, 840 A.2d at 612.

Intentional Misrepresentation and/or Unlawful Practice Pursuant to the Consumer Fraud Act: The Schweigers seek damages under the Consumer Fraud Act, 6 *Del. C.* § 2513. To prevail on this cause of action, the Schweigers must prove that First State intentionally misrepresented and falsely promised that First State would not use subcontractors or had not been in business since 1957; that First State knew or should have known that these misrepresentations and statements were false when made; and that First State made the misrepresentations and statements created a condition of falseness. *See, e.g., In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24 (Del. Super.), *aff'd*, 312 A.2d 632 (Del. 1973). Here, the Schweigers seek direct damages, expectation damages, incidental damages and attorneys' fees.

Negligent Misrepresentation and/or Unlawful Practice Pursuant to the Consumer Fraud Act: The Schweigers seek damages under the Consumer Fraud Act, 6 *Del. C.* § 2511, *et seq.*, for negligent misrepresentation. To prevail on this cause of action, the Schweigers must prove that First State negligently misrepresented and falsely promised that First State would not use subcontractors or had not been in business since 1957; that First State used subcontractors or had not been in business since 1957; and the negligent

misrepresentations created a condition of falseness. *See, e.g., Fulkerson v. MHC Operating Ltd., C.A.*, No. 01C-07-020, 2002 WL 320675510 (Sept. 24, 2002 Del. Super.). Here, the Schweigers seek direct damages, expectation damages, incidental damages and attorneys' fees.

Breach of Expressed Warranties: The Schweigers seek damages against First State for a breach of express warranties. The Schweigers claim that First State breached an express warranty of the Contract when First State failed to complete its work on the Property in a workmanlike manner.

Breach of Implied Warranties: The Schweigers also seek damages against First State for a breach of implied warranties of workmanship. The Schweigers claim that First State breached an implied warranty of the Contract when First State failed to complete its work on the Property in a workmanlike manner.

Breach of Good Faith and Fair Dealing. Finally, the Schweigers seek damages against First State for a breach of good faith and fair dealing. Here, the Schweigers claim that First State falsely represented that it used its own employees instead of subcontractors to complete work. Instead, the Schweigers claim that First State used subcontractors to complete the work. The Schweigers assert that First State thus perpetrated a gross fraud and this constitutes a breach of good faith and fair dealing.

Prior to the Trial, the Schweigers withdrew their warranty claims and their claim for breach of good faith and fair dealing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. First State is a Delaware limited liability company formed in May or June of 2010.
2. First State no longer operates.
3. First State has not operated and provided quality workmanship since 1957.

4. First State held itself out as being a company that provided quality workmanship since 1957.
5. First State Contractors Inc. is an affiliated entity of First State.
6. First State Contractors Inc. has operated since 1957.
7. At all times relevant to this civil action, Mr. Mazzetti and Mr. Sorg were employed by First State.
8. On or about October 18, 2011, Mr. Sorg and John Mooney, of First State, met with Mr. and Mrs. Schweiger. Also present was the Schweigers' son, Freddy Schweiger.
9. During a meeting on October 18, 2011, First State and the Schweigers entered into the Contract.
10. The Contract contains the name "First State Exteriors, LLC" on its top, and also contains the following "Quality Workmanship Since 1957." Pl. Ex. 3. Other documents provided by First State to the Schweigers also provided similar statements like: "Quality Since 1957." *See* Pl. Ex. 9.
11. Mr. Sorg executed the Contract on behalf of First State. Pl. Ex.3.
12. The Schweigers executed the Contract. Pl. Ex. 3.
13. Mr. Sorg made representations regarding the use of First State employees in his initial meetings with the Schweigers. The extent of these representations is unclear to the fact finder.
14. The Contract makes no reference to First State promising to employ only First State employees when performing under the terms of the Contract.
15. The Contract does not have a material term which provides that First State agrees to use only its employees when performing its obligations under the Contract. Pl. Ex. 3 and Pl. Ex. 5.

16. The Schweigers were aware that First State employed subcontractors in connection with the Contract, but did not timely act or object with respect to the use of subcontractors.
17. The Contract was amended on Nov. 25, 2011.
18. The Contract is a valid and enforceable agreement.
19. The Contract, as amended, provides that the Schweigers are to pay First State a total of \$44,650.00 for the work to be done by First State in connection with the Contract.
20. As set forth in more particularity in the Contract, First State was to provide improvements to the Property including, but not limited to: replace the roof on the Property; install siding and gutters; install 16 double hung windows, 1 casement window and one bay window; install a handicap ramp; remove and repair a metal roof on the Property; remove any asbestos; inspect for and replace bad sheathing; replace flashing; install water and ice shield; install new pipe collars and paint to match roof. Pl. Ex. 3, Pl. Ex. 5, and D. Ex. 2.
21. First State and its subcontractors began work on the Property on or about November 2, 2011.
22. Other than minor “punch list” items, First State and its subcontractors no longer performed any work at the Property after December 19, 2011.
23. The Schweigers made an initial payment under the Contract of \$10,000 on October 18, 2011.
24. In total, the Schweigers made payments totaling \$23,000.00 under the Contract.
25. The total amount remaining to be paid by the Schweigers under the Contract is \$21,150.

26. First State did not properly perform its work in connection with the Contract. The evidence produced (testimony, photographs, etc.) at the Trial supports the conclusion that the work performed by First State or its subcontractors needs substantial reworking or replacement, including repair to the newly installed siding, removal and repair of parts of the newly applied roof, evidence of leaking (the bay window (initially), windows in various rooms, two areas in garage and on the rear patio), improper sealing, the failure to inspect for bad sheathing and replace same; and the installed doors need to be rehung.
27. First State failed to properly maintain and clean the site as required under the Contract.
28. First State did not perform its work on the Property under the Contract in a timely or workmanlike manner.
29. The Schweigers voiced their concerns concerning the work done by First State and eventually barred First State from further work at the Property.
30. First State materially breached its obligations under the Contract.
31. There was sufficient reason for the Schweigers to discharge First State and make no further payments under the Contract to First State when the Schweigers saw the poor quality of work being performed.
32. First State did not carry its burden at the Trial in proving that the work performed and the materials provided was worth either (i) \$44,650.00 or (ii) \$23,000.00.
33. The Schweigers have not had any of First State's work repaired or replaced.
34. The Schweigers are excused from further performance under the Contract due to First State's material breach of its obligations under the Contract.

35. First State Contractors, Inc. obtained two building permits – one for roofing on the Property and the other for the ramp at the Property -- from NCC Dept. of Land Use.
36. First State Contractors, Inc. obtained two certificates of occupancy – one for roofing on the Property and the other for the ramp at the Property -- from NCC Dept. of Land Use.
37. NCC Dept. of Land Use provided First State Contractors, Inc. with notice of a violation with respect to the building permit for the roofing on the Property.
38. The evidence with respect to NCC and code violations while relevant is not dispositive as to whether First State did or did not breach its obligations under the Agreement. This evidence shows that First State's work was not code compliant, but it also shows that the Schweigers refused to allow First State an opportunity to address the code violations in July, 2012.
39. First State did not provide evidence as to itemized costs of materials or labor for work done at the Property. Instead, First State relied upon the amounts, paid and unpaid, owed under the Contract as evidence of damages.
40. First State intentionally misrepresented that it was in existence since 1957.
41. Mr. Sorg and Mr. Mazzetti, both representatives of First State, knew that First State had not provided quality workmanship since 1957 yet continued to use materials which made such a claim.
42. First State's intentional misrepresentation created a condition of falseness.
43. First State had to use First State Contractors, Inc. in order to obtain building permits and certificates of occupancy on the Property from NCC Dept. of Land Use.

44. The Schweigers did not demonstrate at the Trial that they believed they had contracted with First State Contractors, Inc. instead of First State.
45. The Court makes no finding of fact or conclusions of law as to whether First State is a separate entity from First State Contractors, Inc., was an undercapitalized entity, has been fraudulently reincorporated in Delaware and is now operating under a new name, or otherwise improperly conducted business in Delaware under the name of First State.
46. The Schweigers failed to carry their burden of proof in demonstrating either an intentional or negligent misrepresentation by First State that First State would only use its employees to perform work in connection with the Contract.
47. As the Court finds First State failed to perform its obligations under the Contract and has not demonstrated that the work performed and materials furnished was worth \$44,650, First State has not carried its burden of proof with respect to its Mechanics Lien cause of action for an *in rem* mechanics lien judgment in the amount of \$21,150.
48. First State has not carried its burden of proof with respect to its breach of contract claim because First State did not demonstrate that it properly performed its obligations under the Contract.
49. First State has not carried its burden of proof with respect to its quantum meruit and valebant claim because First State did not demonstrate that the work performed and the materials provided improved the Property and benefited the Schweigers.
50. The Schweigers have carried their burden of proof with respect to their claim for breach of contract by demonstrating the existence of the valid Contract, that First State materially breached the Contract, that the Schweigers were excused from

further performance under Contract due to First State's material breach of its obligations under the Contract, and that the Schweigers suffered damages as a result of First States' breach of the Contract.

51. The Schweigers have carried their burden as to the intentional misrepresentation consumer fraud claim as that claim relates to First State's representation that First State provided quality workmanship since 1957.
52. The Schweigers have failed to carry their burden with respect to their consumer fraud claims as those claims related to the purported intentional or negligent misrepresentation that First State would only use its own employees.
53. To the extent the claim was not withdrawn, the Court concludes that the Schweigers failed to meet their evidentiary burden on the claim for breach of good faith and fair dealing.
54. The appropriate measure of damages in a breach of contract action is that amount which will return the damaged parties to the position they would have been in had the breach not occurred. *Delaware Limousine Servs., Inc. v. Royal Limousine Serv., Inc.*, C.A. No. 87C-FE-104, Goldstein, J. (Del. Super. April 5, 1991), letter op. at 7, (citing *J.J. White, Inc. v. Metropolitan Merchandise Mart, Inc.*, Del.Super., 107 A.2d 892, 894 (Del. 1954). Those damages include those which might have been foreseen or anticipated as being likely to flow from the breach. *McClain v. Faraone*, Del.Super., 369 A.2d 1090, 1092 (Del. 1977) (citing *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889 (Del. Super. 1942). However, the damaged party must take steps to mitigate his or her losses. *McClain*, 369 A.2d at 1093; *Katz v. Exclusive Auto Leasing, Inc.*, 282 A.2d 866, 868 (Del. Super. 1971) (citations omitted).

55. Under the common law of contracts, the measure of damages has always been tempered by the rule requiring the injured party to minimize, that is, mitigate, the losses, although the party causing the breach must pay for the cost of mitigation. *Katz*, 282 A.2d at 868. In Delaware, the duty to mitigate exists even in the absence of an express mitigation clause in the contract. *E.I. du Pont de Nemours & Co. v. Allstate*, 686 A.2d 152, 156 (Del. Super. 1996) (citing *Monsanto Co. v. Aetna Cas. and Surety Co.*, C.A. No. 88C-JA-118, 1993 WL 563248 (Del. Super. Dec. 9, 1993)). However, the duty to mitigate is subject to the rule of reasonableness under the circumstances. *See, e.g., American General v. Continental Airlines*, 622 A.2d 1, 11 (Del. Ch. 1992). Mitigation requires reasonable action under the circumstances so as not to unduly enhance the damages caused by the breach. *See Hanner v. Rice*, C.A. No. 98A-11-013, 2000 WL 303458 (Del. Super. Jan. 3, 2000). If the court decides that the non-defaulting party has made reasonable efforts to minimize the defendant's damages, the award will not be limited by the doctrine of avoidable consequences. *See id.*

56. The Court does not find that the Schweigers have proved damages in an amount equal to tearing out and replacing the work done by First State. A myriad number of estimates and opinions were offered during the Trial, but the Court finds and holds that none of these were provided in a manner that rose to the level of either competent evidence on damages or, if competent, specific evidence on the amount of damages. Moreover, neither party provided the Court with itemized amounts as to materials and labor expended under the Contract. Accordingly, the Court finds the appropriate measure of damages here is that amount which will return the Schweigers, the damaged party, to the position they would have been in had

the breach not occurred. The Court therefore awards the Schweigers damages in the amount of \$23,000 plus interest.

57. The Court also finds that the Schweigers acted reasonably under the circumstances so as not to enhance the damages caused by First State's breach of the Contract. As such, the Court's award of damages is not to be limited by the duty to mitigate.
58. In a consumer protection act case, the proper measure of damages is either (i) benefit of the bargain damages or (ii) out of pocket damages which return the injured party to his/her position before the transaction occurred. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1076 (Del. 1983). Here, the Court finds and holds that the proper measure of damages would be out of pocket damages which return the Schweigers to their financial position prior to signing the Contract. In this instance, that amount is \$23,000 plus pre- and post-judgment interest dating from the first date that the Schweigers made a payment to First State, *i.e.*, the \$10,000 payment made on October 18, 2011.

ORDER OF JUDGMENT

59. The Court will not provide a double recovery in this case, so JUDGMENT is awarded to the Schweigers in the amount of \$23,000 plus pre- and post-judgment interest dating from the first date that the Schweigers made a payment to First State, *i.e.*, the \$10,000 payment made on October 18, 2011.
60. The Court will entertain a request for costs under Rule 54 of the Superior Court Civil Rules of Procedure.

IT IS SO ORDERED this 23rd day of January, 2014.

/s/ Eric M. Davis
Eric M. Davis
Judge, Superior Court