

*Submitted: January 22, 2001*

*Decided: April 24, 2001*

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**RE: *Delaware Site Excavating, LLC v. Double S. Fine Homes, Inc.*  
*C.A.No. 99C-06-059-JOH*  
*Decision After Non-Jury Trial***

**Counsel:**

***FINDINGS OF FACT***

**1. Plaintiff Delaware Site Excavating, LLC, is a Delaware limited liability company whose principal place of business is located at 22 Brookhill Drive, Newark, Delaware, 19702.**

**2. Defendant Double S. Fine Homes, Inc. is a Delaware corporation with offices located at 56 West Main Street, Newark, Delaware 19702.**

**3. At all times relevant to this matter, Double Fine was the owner of a residential housing development known as Mariner's Watch which contained 198 proposed lots at the time Delaware Site commenced work on the project.**

**4. At all times applicable to this matter, the principals of Delaware Site were R. Arnold Boyer, Jr., and Gregory Pettinaro. Arnold Boyer, Jr., is the son of R. Arnold Boyer, Sr., who had performed work similar to Delaware Site, namely, site work, for a number of years. Arnold Boyer, Sr. was not a principal officer or employee of Delaware Site but was a consultant who had authority, however, to act on Delaware Site's behalf.**

5. Gregory Pettinaro is the son of Verino Pettinaro who has been a general contractor and developer in this area since 1965. Verino Pettinaro is not an owner, officer, employee of, or a consultant for Delaware Site. Verino Pettinaro, however, had contributed substantial sums of money and equipment to his son Gregory to start up Delaware Site.

6. Through his company, Arnold Boyer, Sr., had performed site work for Double Fine for a number of years. He was well-known to and respected by Double Fine's principals.

7. On September 12, 1996, Delaware Site entered into a written contract with Double Fine for site work at Mariner's Watch. It was to be built in four phases of 45-51 lots per phase. The contract price was \$2,850,951 for general site work at Mariner's Watch, but not individual lot work. Arnold Boyer, Jr., and Leo McMahon, a Double Fine vice president, negotiated the contract.

8. Delaware Site recommended to Double Fine the name of another contractor to do the lot work in Mariner's Watch. On March 31, 1997, Double Fine entered into a contract with Coombs Contracting. It was to be paid \$1,475 per lot for the work. McMahon was Double Fine's signatory to this contract. He was aware Delaware Site did not want to do the lot work.

9. Delaware Site started its site work on phase one of Mariner's Watch in the Fall of 1996. Some of that work, however, entailed projects related to all phases of Mariner's Watch, such as a sewer pumping station, etc.

10. Delaware Site and Double Fine entered into subsequent change orders to their original contract.

11. Coombs did lot work, starting in 1997, on 12-20 lots before it ceased working altogether on Mariner's Watch.

12. Despite Delaware Site's expressed wish not to do the lot work, Double Fine believed Delaware Site had promised to step in and do the lot work if Coombs was unwilling or unable to do so. It is unclear if Delaware Site had committed itself to this obligation prior to recommending Coombs or the execution of the Coombs/Double Fine contract.

13. There never was a written contract between Delaware Site and Double Fine to perform the lot work. McMahon said that when he asked Delaware Site to pick up Coombs' lot work obligation, Delaware Site again expressed reluctance to do it and wanted a better price than what Coombs was to be paid. He rejected Delaware Site's offer to be paid on a time and material basis.

14. Delaware Site, through Arnold Boyer, Sr., primarily, repeatedly asked Double Fine to find another lot work contractor and was told that Double Fine was looking for one. For a period of time, he continued to submit bills to Double Fine for lot work on a time and material basis. These bills, too, were rejected. Delaware Site complained the per lot cost was below its cost.

15. Throughout much of Delaware Site's work at Mariner's Watch, Arnold Boyer, Sr., was daily on site and had frequent conversations with key people of Double Fine, including McMahon.

16. Delaware Site performed the lot work from about the Summer of 1997 to the Fall of 1998. There never was a written contract, such as the one for site work, between the parties.

17. Prior to January 1998, disputes arose between Delaware Site and Double Fine over a series of invoices. On March 6, 1998, the parties signed an "Acknowledgment of Payment in Full." In pertinent part, it states:

I, R. Arnold Boyer, Jr., President of [Delaware Site], acknowledge check number 3686 in the amount of \$6,384.53 as payment in full for any and all outstanding and disputed invoices as of January 31, 1998, for any and all site or lot work subcontracted by [Double Fine]. I, hereby release said corporation from any additional liability on work performed and/or billed prior to January 31, 1998.<sup>1</sup>

18. A check was issued to Delaware Site for \$6,384.53 and was paid February 20, 1998.

19. The exact invoices covered by this "acknowledgment" is unclear. Plaintiff's Exhibit 1, Tab 19, itemizes a list of so-called unpaid invoices, several of which

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<sup>1</sup>Defendant's Exhibit 2.

pre-date January 31, 1998 (the cut-off date in the acknowledgment). Those invoices total \$43,312.43.

20. Of that amount, \$39,000 is a claim for balance due on a “dewatering” project related to the sanitary sewer system. The original charge to Double Fine for this project was \$57,000 on which it paid \$18,000 on March 12, 1998 by check.

21. The original invoice for this project is dated November 28, 1997. The project covered in the invoice was not part of Delaware Site’s original contract with Double Fine or any change order approved by Double Fine.

22. Delaware Site encountered water while digging a sanitary sewer line, which was part of its contract with Double Fine. Arnold Boyer, Jr., indicated that since the area where the water problem was encountered was covered with crops, which were to be harvested, at the time Delaware Site would have dug test holes. It was, therefore, unable to detect water until actual trenching began. Double Fine did not dispute that testimony. It maintained it never authorized the work. Double Fine does not dispute the existence of the water problem and the work required to rectify it.

23. Delaware Site basically finished its work on phase one of Mariner’s Watch and began work on phase two in 1988.

24. In the Spring of 1998, Double Fine began to hear rumors of Delaware Site being in some financial difficulty. On June 24, 1998, at Double Fine’s insistence, the parties signed several “Joint Checks Agreement(s).” These agreements provided that all of Double Fine’s checks made payable to the vender/subcontractor would be made out to that vendor and Delaware Site.

25. In the Summer of 1998, Double Fine insisted that it be able to keep a retainage. Its purpose, it claimed, was to insure Delaware Site would be around to finish its contract.

26. Double Fine claims it received information in the Summer of 1998 that Delaware Site was not paying certain employee benefits.

27. These rumors and the consequent joint checking agreement and retainage agreement sparked a series of meetings between representatives of Delaware Site and Double Fine.

28. Verino Pettinaro was authorized to speak on behalf of Delaware Site in some of these meetings. He was asked by one of the principals of Double Fine, Al Schwartz, to meet concerning the situation. The two had known each other for some time. Schwartz wanted assurance from Pettinaro that Delaware Site would complete the contract. He gave Schwartz that assurance. There was a subsequent meeting. He and his son, Gregory, the other fifty percent owner, then contacted all vendors to assure them Delaware Site's bills would be paid.

29. A subsequent meeting was held with principals of Double Fine. In attendance were Verino Pettinaro and Leonard Iacono. Iacono is fifty percent owner, with Pettinaro, and President of Daisy Construction. Daisy had done some paving work at Mariner's Watch as part of the Double Fine contract. Double Fine had heard rumors that Delaware Site was selling some of its equipment. Pettinaro brought Iacono to this second meeting to reinforce assurances that Delaware Site would complete the Mariner's Watch contract. Such assurances entailed Daisy helping to provide any needed equipment and personnel.

30. Pettinaro and Iacono made the assurances. Both believed the balance of Delaware Site's contract was profitable.

31. Neither Pettinaro nor Iacono put their assurances in writing, but neither did Double Fine ask them to do so.

32. Verino Pettinaro acknowledges that he told Delaware Site to stop performing the lot work at Mariner's Watch. The reason for the stoppage was because Delaware Site was losing money on that work at the prices Double Fine was paying it for lot work. It appears Pettinaro repeated that statement to the principals of Double Fine.

33. The principals of Double Fine, who testified, indicated, however, that Pettinaro and Arnold Boyer, Sr., said Delaware Site was stopping all work at Mariner's Watch. According to them, this included site work, as well as lot work.

34. Based on their understanding of what Pettinaro and Boyer said, in October or November 1998, Double Fine started to look for another contractor, or contractors, to complete the site and lot work.

35. The Court finds that what Boyer and Pettinaro said at any time, whether by phone or in person, was that Delaware Site would no longer do the lot work. At no time applicable to his dispute did any representative of or spokesperson for

**Delaware Site tell any representative of Double Fine that it was ceasing all work at Mariner's Watch.**

**36. The basis for his finding of fact is severalfold. First, there never was a written contract between the litigants for Delaware Site to do the lot work. Second, there is a dispute, which the Court need not resolve, whether Delaware Site did or did not promise to do that work if Coombs defaulted. Third, Double Fine knew from the beginning of the work on Mariner's Watch that Delaware Site did not want to do the lot work, prompting the contract with Coombs. Fourth, from the time Delaware Site started to do the lot work, it asked to be paid more and/or on a different basis than Coombs'. Fifth, Delaware Site repeatedly asked Double Fine to find another lot work contractor. Sixth, Double Fine's efforts to do so were less than expeditious. Seventh, Double Fine preferred to have one contractor do both, but was aware for many months that Delaware Site did not want to do lot work and wanted to be paid more per lot for it. Eighth, based on its predilections in this regard, it chose to believe Delaware Site's statement it would no longer do lot work as saying it was not going to finish its contract for the balance of Mariner's Watch. Ninth, as the bulk of the profit on the entire contract would come in final portion of work, it was of no economic benefit to Delaware Site to declare it was ceasing all work.**

**37. There were a series of meetings following the ones in October 1998 where efforts were made to allow Delaware Site to finish its contract, albeit with increased help from Daisy Construction. These meetings were inconclusive.**

**38. Meanwhile, in October and November 1998, after its mistaken belief that Delaware Site was ceasing all work, Double Fine started to look for a contractor to replace Delaware Site.**

**39. In late 1998 and early 1999, Delaware Site started to sell equipment and lay off some employees. Some of the latter may have been season-driven. The next phase of Mariner's Watch was scheduled to start in the Spring of 1999.**

**40. Double Fine became aware of these events which prompted it to send a letter to Delaware Site on February 25, 1999 terminating their contract. The letter states that the termination was by mutual agreement. The Court finds nothing in the record to support that statement. There is no evidence that Delaware Site had notice of termination prior to receipt of this letter.**

41. The Court finds that Delaware Site's lay-offs and equipment sales were due to (1) the inconclusiveness of the discussions concerning Delaware Site's continued involvement and (b) the need to reduce overhead in light of the uncertainties.

42. Double Fine ultimately contracted with another entity to finish the site and lot work at Mariner's Watch.

43. There are various items of damages which Delaware Site seeks:

(a) \$75,576.22 for unpaid invoices. According to Double Fine's records, it concurs it owes \$23,746.79. This total represents two payments by checks which Delaware Site did not cash.

(b) \$39,000 for "deep sanitary sewer" work. Double Fine, however, claims it did not authorize or approve of this work. It also claims the original invoice for this work, dated November 28, 1997, for \$57,000, was included in a settlement agreement dated March 6, 1998, covering all disputed outstanding invoices as of January 31, 1998. A check was issued to Delaware Site dated February 20, 1998, in that amount. A separate check for \$19,000 was issued on March 12, 1998 to Delaware Site for this work.

(c) \$105,125.90 in lost profit on this balance of the Mariner's Watch contract. This is calculated at a ten percent profit on the balance of the original contract of \$1,051,259.

(c) \$232,350.10 net overhead.

44. Double Fine seeks damages for:

(a) \$86,706.28 to cover the additional cost to it of a new contractor to complete the Mariner's Watch site-work contract.

(b) \$70,163.34 to cover completion of the lot work contract at Mariner's Watch.

#### *CONCLUSIONS OF LAW*

1. Delaware Site did not breach its site work contract with Double Fine. Double Fine decided in the Fall of 1998 to terminate that contract when Delaware Site

indicated it could no longer afford to do the lot work at Mariner's Watch. Double Fine's delay in finding a replacement lot work contractor to Coombs and its per unit price precipitated a substantial part of Delaware Site's financial problems.

2. Delaware Site's statement to Double Fine that it was ceasing lot work was not an anticipatory breach of contract. Essentially there was little to do at that point on the phases worked on. While Delaware Site had been performing lot work for some months prior to this announcement, it did so under repeated protest to Double Fine about the price and its undue delay in finding a new lot work contractor. There never was a written contract for this work or meeting of the minds on price.

3. Double Fine viewed the lot work announcement as a breach and began to receive and solicit bids from other contractors to continue with the work on Mariner's Watch. The bulk of that work was to be on phase 3 starting in the Spring of 1999.

4. Double Fine breached its written site work contract with Delaware Site. Its reasoning that it did so because Delaware Site renounced all work on Mariner's Watch is rejected as a matter of fact-finding. Its additional reason that Delaware Site was selling equipment and laying off employees, which it was in late 1998, early 1999, is pretextual. By its own admission in October 1998, it had decided to seek a new contractor. An offer was made to allow Delaware Site to finish that site work contract at its price, albeit with Daisy Construction assistance. Acceptance of this offer would have eliminated the risk of possible additional cost, such as those Double Fine now seeks. At the time in October when the Court finds Double Fine decided to terminate Delaware Site's site-work contract, Delaware Site was in a position to finish the site work on Mariner's Watch.

5. Since Double Fine breached its site-work contract with Delaware Site, Delaware Site is entitled to be placed in the same position as it would have been if the contract had been properly performed. Delaware Site's ten percent profit figure was part of the original site-work contract with Double Fine and is sufficiently reasonably certain to be recoverable. That percentage is reasonable. Accordingly, Delaware Site is awarded \$105,125.90 for lost profits.

6. Delaware Site was given checks for various invoices which it never cashed. The record indicates that it is still owed the work reflected in those invoices. Accordingly, it is awarded \$23,746.79.

7. Delaware Site claims it is owed \$39,000 as balance due of an original bill for \$57,000 deep sanitary sewer work. Double Fine contends (a) it did not authorize this work and (b) any dispute over it was resolved by the March 6, 1998 “Acknowledgment for Payment in Full.” Delaware Site and Double Fine may agree in a subsequent contract that some act will be accepted as full performance of the pre-existing contract.<sup>2</sup> The elements of accord and satisfaction which Double Fine argues are: (a) a bona fide dispute existed as to the amount owed which was based on good faith, (b) the debtor (Double Fine) tendered an amount to the creditor (Delaware Site) with the intent that the payment would be in total satisfaction of the debt; and (c) the creditor agreed to accept the payment in full satisfaction of the debt.<sup>3</sup>

There was a bona fide, good faith dispute between these parties over some unpaid invoices. Double Fine tendered payment of \$6,384.53, which it believes totally satisfied various unpaid invoices. Its action, however, of later issuing a separate check for \$18,000 as partial payment on a \$57,000 invoice makes it impossible to conclude its payment of \$6,384.53 was meant to discharge the dispute over this particular invoice. The Court concludes also that Delaware Site did not accept the \$6,384.53 check as full satisfaction of the debt. It continued to seek payment of the \$39,000 due and that invoice represented the largest amount in dispute for which a check of \$6,384.53 is out of proportion. Accordingly, Delaware Site is awarded \$39,000 as the balance due on this invoice.

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<sup>2</sup>*Empire Box Corp. v. Jefferson Island Salt Mining Co.*, Del.Supr., 36 A.2d 40 (1944).

<sup>3</sup>*Acierno v. Worth Bros. Pipeline Corp.*, Del.Supr., 693 A.2d 1066, 1068 (1997).

8. Delaware Site has failed to meet its burden showing why it should recover for overhead to be incurred. It never was able to perform the rest of the contract and has not demonstrated any overhead was incurred for work not performed.<sup>4</sup> In fact, employees were laid off, equipment sold or returned. Accordingly, Delaware Site's claim for \$232,352.10 for lost overhead is DENIED.

9. Because of these various awards, all of Double Fine's damages claims are DENIED.

**CONCLUSION**

Judgment is awarded as specified herein. Counsel for Delaware Site will prepare and submit an order reflecting that judgment and the appropriate rate of interest, stated in numerical terms applicable to that judgment. Counsel for Double Fine shall sign consent as to form.<sup>5</sup>

**IT IS SO ORDERED.**

Sincerely,

JOH/bsr  
Original to Prothonotary

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<sup>4</sup>See *Ripsom v. Beaver Blacktop, Inc.*, Del.Super., C.A.No. 83C-AU-128, Poppiti, J. (April 6, 1988 revised April 26, 1988).

<sup>5</sup>Counsel are reminded of this Court's suggestion/recommendation to engage in mediation, which was made at the end of the first part of the trial. I refer counsel and the parties to the Supreme Court's admonition in *Citisteel USA, Inc. v. Connell Limited Partnership*, Del.Supr., 758 A.2d 928, 932 (2000).