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

CONTINENTAL ELECTRICAL SERVICES, LLC, Plaintiff, v. **DELAWARE HALL CONDOMINIUM APARTMENTS ASSOCIATION,** Defendant.	)	C.A. No. CPU4-14-001173

MEMORANDUM OPINION & ORDER

Submitted: November 19, 2018
Decided: January 16, 2019

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WELCH, J.

I. PROCEDURAL POSTURE

On May 9, 2014, the plaintiff, Continental Electrical Services, LLC, ("Plaintiff") filed a Complaint against 1212 Delaware Avenue Associates, LLC, 1212 Delaware Associate, LLC and George Karas alleging breach of a contract for electrical work and unjust enrichment. On June 1, 2014, George Karas, on behalf of himself and as the authorized representative of his co-defendants, filed a pro se Answer denying the substantial allegations and a Counterclaim alleging breach of contract. On July 7, 2014, Plaintiff filed its Answer denying defendants' Counterclaim.

On July 15, 2014, Plaintiff filed a Motion to Dismiss defendants' answer and counterclaim arguing that 1212 Delaware Avenue Associates, LLC and 1212 Delaware Associates, LLC are Delaware limited liability companies that must be represented by Delaware counsel. On July 17, 2014, Bradley P. Leham, Esquire ("Leham") filed an entry of appearance on behalf of defendants. On August 8, 2014, defendants filed a Response in Opposition to Plaintiff's Motion to Dismiss. On August 12, 2014, Hiller and Arban, LLC substituted its appearance for Leham as counsel for defendants. On September 14, 2014, both parties stipulated and agreed to Plaintiff's withdrawal of its Motion to Dismiss.

On August 26, 2014, defendants filed Answer denying the substantial allegations, and a Counterclaim alleging breach of contract. On September 23, 2014, Plaintiff filed Answer to defendants' Counterclaim denying the substantial allegations. On December 19, 2014, Plaintiff filed Motion for leave to amend and supplement its Complaint to add two new claims under Delaware's Building Construction Payments Act. On January 13, 2015, both parties stipulated and agreed to Plaintiff's Motion to Amend its Complaint. On February 2, 2015, Plaintiff filed Answer to defendants' Amended Complaint denying the substantial allegations. On July 31,

2015, defendants filed a Motion to Amend its Counterclaim and on August 21, 2015, the Court granted defendants' motion. On August 21, 2015, defendants filed its first Amended Counterclaim alleging violation of 6 Del. C. § 2731 (Deceptive Consumer Contract Act) and 6. Del. C. § 2511 (Delaware Consumer Fraud Act), in addition to breach of contract. On August 21, 2015, defendants submitted a Crossclaim with the same allegations submitted in its first Amended Counterclaim. On November 17, 2015, Plaintiff filed Answer to defendants' Crossclaim denying the substantial allegations.

On December 9, 2015, defendant's counsel filed a Motion to Withdraw as counsel. On December 11, 2015, Plaintiff did not oppose defendants' motion but requested that the Court enter an order requiring defendants to obtain new counsel within fourteen (14) days. On December 18, 2015, the Court granted Hiller and Arban, LLC Motion to Withdraw as counsel of defendants and gave defendants fourteen (14) days to enter an appearance through counsel or face default.

On December 29, 2015, Plaintiff's filed a Motion to Compel requesting that the Court order defendants to appear for depositions and award Plaintiff sanctions for having to file the motion. On January 4, 2016, the Court reviewed a letter from defendants requesting additional time to obtain counsel. On January 7, 2016, the Court received a letter from Plaintiff objecting to defendants request and further delay of the case. On January 13, 2016, the Court granted defendants' request for additional time to retain new counsel until January 29, 2016. On January 13, 2016, Plaintiff filed a Re-notice of its Motion to Compel, which was scheduled to be heard on Feburary 5, 2016.

On January 22, 2016, Andersen Sleater, LLC filed an entry of appearance on behalf of 1212 Delaware Avenue Associate, LLC and George Karas. On January 28, 2016, defendants

filed an Opposition to Plaintiff's Motion to Compel. Defendants requested that the Court deny the Motion to Compel, because Plaintiff filed the motion while defendants were without representation and defendants re-scheduled the depositions immediately after representation was obtained. In addition, defendants requested that Plaintiff's Counsel pay for the clerk fee and be precluded from future filing until payment of the fee. On February 1, 2016, the Court received a letter from Kollias Law, LLC stating that it was entering its appearance for defendant 1212 Delaware Associate, LLC. On February 5, 2016, Plaintiff's Motion to Compel did not go forward.

On April 4, 2016, Plaintiff filed a Motion to Amend its Complaint, and for Summary Judgement dismissing defendants' Counterclaims. On April 22, 2016, defendants filed Response to Plaintiff's Motion to Amend and for Summary Judgement, consenting to the dismissal of its Counterclaims against Plaintiff, but opposing the request to amend the pleadings and cause further delay. On April 29, 2016, the Court granted Plaintiff's Motion to Amend the Complaint and ordered Plaintiff file an amended complaint within three (3) days of the order and defendants file its answer and counterclaim within three (3) days after.

On May 3, 2016, Plaintiff filed a Second Amended Complaint against Delaware Hall Condominium ("Defendant") and dismissed George as a defendant.[1] On May 4, 2016, Andersen Sleater, LLC substituted its appearance for Kollia Law, LLC as counsel for Delaware Hall Condominium Apartments Association ("Defendant"). On May 6, 2016, Defendant filed Answer, denying Plaintiff's substantive claims, and made Counterclaims against Plaintiff and counterclaimant, Dragoslav Slijepcevic, seeking $72,807.50 plus attorneys' fees, pre-judgement

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[1] Pl.'s 2d Am. Compl.

interest starting on April 25, 2014 and post-judgement interest.[2] On August 15, 2016, Plaintiff and Drago filed Answer denying Defendant's Counterclaims.[3]

On May 25, 2015, Plaintiff filed a Motion for Partial Dismissal of Defendant's Counterclaims. On June 14, 2016, the Court denied Plaintiff's Motion for Partial Dismissal. On July 11, 2016, Defendant filed a Motion for Default Judgment against Drago Slijepcevic, claiming Drago Slijepcevic had yet to file a responsive pleading to Defedant's Counterclaims.[4] On January 17, 2017, Plaintiff filed a Motion to Compel arguing that Defendant failed to properly respond to discovery requests.[5] Plaintiff argued that Defendant failed to complete all the interrogatories, satisfy requests for documents, make witnesses available for deposition and allow Plaintiff's expert to conduct a site inspection of the property.[6] On January 24, 2017, Defendant filed Opposition to Plaintiff's Motion to Compel.[7] Defendant asserted that Plaintiff's counsel never communicated to Defendant's counsel that it was unpleased with the written discovery.[8] In addition, Defendant contended that none of its witnesses were served with subpoenas to appear for deposition and the witnesses Plaintiff requested had already been deposed.[9] Lastly, Defendant stated that Plaintiff's expert witness already inspected the premises and was deposed during discovery.[10] On February 13, 2017, upon consideration of Plaintiff's Motion to Compel and Defendant's Response, the Court granted in part and denied in part. The Court denied Plaintiff's request to depose Defendant's witness once more. However, the Court

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[2] Defs.' Answer & Countercl. ¶ 21.
[3] Pl.'s Answer to Defs.' Answer & Countercl.
[4] Defs.' Mot. for Default J. ¶¶ 4-5.
[5] Pl.'s Mot. to Compel.
[6] *Id.* at 3-7.
[7] Defs.' Opp'n to Pl.'s Mot. To Compel.
[8] *Id.* at 8.
[9] *Id.* at 1-2.
[10] *Id.* at 4.

granted Plaintiff's request to have its expert witness perform an inspection of the property, as well as its request for completed interrogatories and documents.

On August 1, 2017, Defendant filed a Motion in Limine to exclude Robert Smith and Robert Auer from testifying during trial due to their failure to appear at a deposition and produce documents.[11] On August 18, 2017, Plaintiff filed its Opposition to Defendant's Motion in Limine arguing that Defendant issued a subpoena to First State Inspection Agency, not Robert Smith and Robert Auer specifically.[12] In addition, Plaintiff contended that it complied with requests for documents.[13] On August 25, 2017, the Court denied Defendant's Motion in Limine. On May 17, 2018 Defendant filed a Motion for Partial Summary Judgement or, in the alternative, for a Directed Verdict. On September 14, 2018, Plaintiff filed Opposition to Defendant's Motion. The Court reserved its decision.

Trial was convened on October 31, 2018, and the Court reserved its decision. Both parties agree to submit supplemental closing arguments. On November 19, 2018, Plaintiff submitted its Closing Written Memorandum of Law.[14] On November 19, 2018, Defendant filed its Closing Written Memorandum of Law.[15] This is the Court's Final Memorandum Opinion and Order after consideration of the oral and documentary evidence submitted at trial, arguments made at trial, supplemental briefing and the applicable law. For the reasons discussed below, the Court finds in favor of the Plaintiff.

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[11] Defs.' Mot. in Limine.
[12] Pl.'s Resp. to Defs.' Mot. in Limine ¶¶ 9-11.
[13] *Id.* at 2-4.
[14] Pl.'s Closing Br.
[15] Defs.' Closing Br.

II. FACTUAL HISTORY

Based on the testimony and evidence presented at trial, the Court finds the relevant facts to be as follows.

In or about 2013, the Defendant decided to remodel residential units located at 1212 Delaware Avenue, Wilmington DE 19805 (the "Property").[16] The Property is a condominium rental space comprised of thirty-five (35) residential units.[17] On January 9, 2014, the Defendant entered into a contract (the "Contract") with Plaintiff to have electrical work done on the Property.[18] The Contract required Plaintiff to demolish and replace the existing subpanels in 36 units and install smoke detectors and carbon monoxide detectors.[19] The Contract further specified that Plaintiff was to use the existing feeders and branch circuit when replacing the panels.[20] The contracted price included panel replacement as is, using existing wire for feeder and branch circuits.[21] Further, the Contract specified that working drawings were to be submitted before the start of the project and an as-built drawing at the completion of the project.[22] Additional agreed upon work that fell outside of the Contract specifics was to be done on a time and material basis at $56.00 an hour.[23] According to the Contract, the work to be done was valued at $27,435.[24] The parties testified that half of the contracted price or $13,717.50 was to be paid upon completion of half of the work, and the remaining half to be paid upon completion of the entire project.

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[16] Pl.'s 2d Am. Compl.; Defs.' Answer & Countercl
[17] Pl.'s Ex. 1, Tab 4.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

On January 30, 2014, Plaintiff emailed Defendant an invoice for half the Contract amount, $13,717.50, because half of the work was completed.[25] On February 4, 2014 and February 11, 2014, Plaintiff emailed Defendant two invoices ("Invoice 6675" and "Invoice 6709").[26] Invoice 6675 included two change orders ("Change Order 1" and "Change Order 2"), in addition to half the Contract amount.[27] Change Order 1 included one work authorization ("WA 11672") for replaced fuses, which Plaintiff did at a cost of $60.00 in material and labor.[28] Change Order 2 included one work authorization ("WA 11671") for troubleshooting two units, which Plaintiff did at a cost of $372.00 in material and labor.[29]

Invoice 6709 included two more change orders ("Change Order 3" and "Change Order 4").[30] Change Order 3 included a work authorization ("WA 11664") for troubleshooting a wall mounted panel, which Plaintiff did at a cost of $185.00 in material and labor; and a work authorization ("WA 11665") for an added smoke detector, which Plaintiff did at a cost of $134.10 in material and labor.[31] Change Order 4 included one work authorization ("WA 12258") for a surface mount panel required to install a new panel, which Plaintiff did at a cost of $165.00 in labor.[32]

On February 24, 2014 and February 27, 2014, Plaintiff emailed Defendant a final invoice for the last half of the Contract amount, $13,717.50, and three change orders ("Change Order 5," "Change Order 6" and "Change Order 7").[33] Change Order 5 included a work authorization ("WA 12259") for the relocation of a panel, which Plaintiff did at a cost of $694.32 in material

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[25] Pl.'s Ex. 1, Tab 5.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Pl.'s Ex. 1, Tab 6.

and labor; a work authorization ("WA 12262") for troubleshooting panels, which Plaintiff did at a cost of $224.00 in labor; a work authorization ("WA 12263") for troubleshooting a panel and running new feed to an outlet and light switch, which Plaintiff did at a cost of $868.48 in materials and labor; and a work authorization ("WA 11716") for the relocation of a panel, extension of circuit wiring and re-routing of unit feeds, which Plaintiff did at a cost of $1,075.16.[34]

Change Order 6 included a work authorization ("WA 12277") for the installation of conduits and a junction box, which Plaintiff did at a cost of $1,443.60 in materials and labor; a work authorization ("WA 12279") for pipe work from basement to fourth floor, removal and replacement of panel in electric RM and drill work on fourth floor, which Plaintiff did at a cost of $1,295.74 in materials and labor; a work authorization ("WA 12278") for the installation of a pull box in the boiler room, work on a service cable, drilled out basement hallway and attic header for service cable, which Plaintiff did at a cost of $3,345.85 in material and labor; a work authorization ("WA 11713") for installation of a pull box in basement hallway for service feeders, running service cable and feeders, which Plaintiff did at a cost of $1,657.81 in material and labor; and a work authorization ("WA 11714") for work on feeders and circuits, which Plaintiff did at a cost of $1,020.34 in material and labor.[35]

Change Order 7 included a work authorization ("WA 12271") for work on feeders and circuit, which Plaintiff did at a cost of $873.15 in material and labor; a work authorization ("WA 12272") for troubleshooting circuits and work on circuits, which Plaintiff did at a cost of $798.47

[34] *Id.*
[35] *Id.*

in material and labor; and a work authorization ("WA 11712") for replaced AMP fuses in the main fuse panel, which Plaintiff did at a cost of $356.80 in material and labor.[36]

On April 15, 2014, First State Inspection Agency, Inc. ("First State") completed a final inspection of twenty-one units on the Property and certified that the panels in each unit were approved "as meeting the requirements of the National Electric Code, utility, municipalities and Agency rules."[37] On April 16, 2014, Defendant's paid Plaintiff $13,717.50 for half of the job.[38] On April 17, 2014, Plaintiff sent Defendant an email requesting the last half of the Contract amount and that they settle on a date to meet the following week to discuss payment for the outstanding change orders.[39] Around or sometime after April 15, 2014, Drago Slijepcevic ("Drago") met with George Karas ("George"), the President of the Condominium Association, on the Property, and requested payment yet again. When George refused, Drago threatened to sue.

On April 23, 2014, the City of Wilmington informed Defendant that permits were not issued for the electrical work outlined in the Contract between Plaintiff and Defendant.[40] Defendant had another electrician, Delcollo Electric, Inc. ("Delcollo"), evaluate the existing electrical smoke detectors at the Property, and on July 27, 2015, Delcollo submitted a report ("Delcollo Report") outlining costs to repair violations.[41] On August 13, 2015, Robert Smith ("Smith"), the Vice President of First State Inspection Agency Inc., sent an email to Defendant confirming that 21 panels were indeed inspected on the Property.[42] On March 16, 2016, Greg

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[36] *Id.*
[37] Pl.'s Ex. 1, Tab 12.
[38] Pl.'s Ex. 1, Tab 11.
[39] Pl.'s Ex. 1, Tab 8.
[40] Defs.' Ex. 1, Tab 7.
[41] Defs.' Ex. 1, Tab 15.
[42] Pl.'s Ex. 1, Tab 10.

Stimeling ("Stimeling"), Chief Inspection at Middle Department Inspection Agency, Inc., sent a letter informing Defendant of violations on the Property that mirrored those described in the Delcollo Report.[43]

III. PARTIES' CONTENTIONS

Plaintiff contends that Defendant is liable for breach of contract, unjust enrichment and violations of the Building Construction Payments Act ("Act").[44] Specifically, Plaintiff contends that Defendant breached the Contract and was unjustly enriched when it failed to pay Plaintiff half of the Contract amount upon completion of the project and the approved additional work that was submitted by change orders.[45] Moreover, Plaintiff maintains that the Act applies to Defendant and Defendant violated the Act when it failed to pay for the electrical work performed in accordance with the Contract, did not dispute the work within the time frame required by the Act, and withheld payment in bad faith.[46] Plaintiff is seeking $56,574.64 in damages, together with pre and post judgement interest at the legal rate, the cost of this action and attorney fee for Defendant's breach of contract or alternatively under the theory of unjust enrichment and violations under the Act.[47]

Defendant argues that the Act only applies to new construction or alterations to commercial property and therefore it is not subject to the Act.[48] Defendant also contends that it is not an owner under the statue, thus fees and costs cannot shift under the Act.[49] Further, Defendant maintains that payment was not wrongfully withheld, because the panel boxes were not removed from the closets, fourteen units have no inspection certificate, as-built drawings

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[43] Defs.' Ex. 1, Tab 17.
[44] Pl.'s 2d Am. Compl.
[45] Pl.'s 2d Am. Compl.
[46] Pl.'s Closing Br.
[47] Pl.'s 2d Am. Compl.
[48] Defs.' Closing Br.
[49] *Id.*

were not accurate and Plaintiff submitted revised versions of the as-built drawing during litigation, Plaintiff did not request permission from the City of Wilmington to alter and repair the Property, Drago put inspection stickers on uninspected panels, and both Delcollo and Stimeling found the work defective. Moreover, Defendant states that the Contract does not trigger retainage and interest under the Act.[50] In addition to the Act, Defendant also contends that Plaintiff breached the Contract for the above reasons. Further, Defendant asserts that Plaintiff and Drago violated the Delaware Consumer Fraud Act ("Fraud Act"), because the as-built drawing was an inaccurate representation of the work performed and Plaintiff represented that all panels were inspected by a qualified electrical inspection agency.[51] Lastly, Defendant states that Plaintiff and Drago violated the Home Owner's Protection Act ("HOP Act"), because the Defendant will now have to hire another contractor to repair the negligent improvements.[52]

IV. STANDARD OF REVIEW

As trier of fact, the Court is the sole judge of the credibility of each fact witness and any other documents submitted to the Court for consideration.[53] If the Court finds that the evidence presented at trial conflicts, then it is the Court's duty to reconcile these conflicts—if reasonably possible—in order to find congruity.[54] If the Court is unable to harmonize the conflicting testimony, then the Court must determine which portions of the testimony deserve more weight in its final judgment.[55] In ruling, the Court may consider the witnesses' demeanor, the fairness and descriptiveness of their testimony, their ability to personally witness or know the facts about which they testify, and any biases or interests they may have concerning the nature of the case.[56]

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[50] *Id.*
[51] Defs.' Answer & Countercl.
[52] *Id.*
[53] *See Nat'l Grange Mut. Ins. Co. v. Davis*, 2000 WL 33275030, at *4 (Del. Com. Pl. Feb. 9, 2000) (Welch, J.).
[54] *See id.*
[55] *See id.*
[56] *See State v. Westfall*, 2008 WL 2855030, at *3 (Del. Com. Pl. Apr. 22, 2008).

In civil actions, the burden of proof is by a preponderance of the evidence.[57] "The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists."[58]

V. DISCUSSION

Based on the evidence produced at trial, the Court finds that the Plaintiff has proven that by a preponderance of the evidence Defendant breached the Contract and violated the Act and is therefore liable for damages to Plaintiff. The Court further finds that while Plaintiff may not recover double damages under the Act, Plaintiff is entitled to attorneys' fees under the Act.

A. Breach of Contract

Both Plaintiff and Defendant have alleged breach of contract against one another. To prevail on a claim for breach of contract, the movant must establish three elements by a preponderance of the evidence: (1) a contract existed between the parties; (2) breach of an obligation imposed by the contract; and (3) damages.[59] A party is excused from performance under a contract when the other party material breaches the contract.[60] A slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligation of the injured party to perform under the contract.[61] Thus, when there is a minor breach and the injured party fails to perform their obligation under the contract, the injured party is in breach of contract.[62]

Furthermore, the Courts have concluded that a person who holds themselves out as a contractor capable of performing certain work "possesses the requisite skill to perform such

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[57] *See Gregory v. Frazer*, 2010 WL 4262030, at *1 (Del. Com. Pl. Oct. 8, 2010).
[58] *See Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).
[59] *Gregory v. Frazer,* 2010 WL 4262030, at *1 (Del. Com. Pl. Oct. 8, 2010); *VLIW Technology, LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).
[60] *Carey v. Estate*, 2015 WL 4087056, at *20 (Del. Super. Jul. 1, 2015).
[61] *Id.*
[62] *Id.*

labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner."[63] A breach occurs if the contractor fails to display "the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities in perform the work."[64] Moreover, a "good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement, is considered complete if the substantial purpose of the contract is accomplished."[65] The "builder" is entitled to recover despite an owner's dissatisfaction if the construction is able to fully accomplish its intended purposed, and a reasonable person would be satisfied by it. Hence, the law does not secure excellence, but only reasonable workmanship.[66]

The Court finds that Plaintiff did not breach the Contract and performed the electrical work in a workmanlike manner. However, the Court finds that Defendant materially breached the Contract when it failed to pay Plaintiff for the work it completed under the Contract. Per the Contract, Plaintiff requested payment for half of the completed electrical work. On April 16, 2014, Defendant complied and paid Plaintiff $13,717.50 in accordance with the Contract terms.[67] It is undisputed that during the project, Defendant did not raise any complaints regarding the progress or quality of the work. In essence, George and his son, Michael Karas ("Michael") were absent during the performance of the Contract and except for di minimis contacts with Continental, they made no substantive objections to Plaintiff during the performance of the Contract. On February 27, 2014, Plaintiff requested payment after the completion of the rest of the electrical work, along with overdue work orders.[68] Defendant made no attempts to pay the

[63] *Channels v. Deshields*, 2018 WL 3752144, at *6 (Del. Com. Pl. Aug. 6, 2018); *Lee-Scott v. Shute*, 2017 WL 1201158, at *4-5 (Del. Com. Pl. Jan. 30, 2017).
[64] *See Lee-Scott*, 2017 WL 1201158, at *4
[65] *Id.* at *5
[66] *Id.*
[67] Pl.'s Ex. 1, Tab 11.
[68] Pl.'s Ex. 1, Tab 6.

outstanding balance or communicate any dissatisfaction with the work that was done by Continental. As a result, Plaintiff ceased it's remaining contractual obligations to have all the electrical work inspected. Around or sometime after April 15, 2014, Drago and George met at the Property and when Drago was refused payment, he informed George that he would sue.

During trial, George and his son, Michael consistently argued that the as-built drawing, required by the Contract to be produced at the completion of the project, was crucial to the project and not supplied. In addition to the drawings, George and Michael relied on the Delcollo Report, which addressed the following concerns: (1) the panel boxes were not inspected; (2) the panel boxes were not removed from the closets and are not compliant with the National Electrical Code; (3) locks were not on the circuits; (4) directories were not on the panel boxes; (5) screws were missing from a few of the junction boxes; (6) ground and neutral wiring was not separated; and (8) the basement panel board was overloaded.[69] In addition, both George and Michael assert that Drago placed inspection stickers on the panels to indicate that they were. Moreover, Michael repeatedly asserted his concern for the safety of the people in the building.

Regarding the as-built drawing, the Court finds that the drawing is not a material breach. During trial, working drawings were described as illustrative plans that depict the start of a project, while as-built drawings depict changes upon completion of a project. George testified that payment was withheld, because he found the as-built drawing to be insufficient. However, as testified by Smith, the agreed upon electrical work was completed, thus rendering such drawings irrelevant.

With regard to the assertions made in the Delcollo Report, Smith disagreed with the majority and found Plaintiff's work compliant with the Delaware code. Smith did agree that the

[69] Defs.' Ex. 1, Tab 15.

basement panel board was overloaded and wired incorrectly. Smith testified to possessing an education as an electrical inspector and licensed master electrician. Smith further testified that he has been working at First State since 1996. Smith testified at trial that upon a reasonable degree of professional certainty, the electrical work performed by Plaintiff met the regulations and provisions of the Delaware adopted code.

With reference to the inspection by Auer and the inspection stickers found on the panel boxes, the Court finds that there was no breach. Defendant argues that Auer did not inspect the premises. However, the testimony and evidence presented at trial indicates that Auer did, in fact, inspect the Property. Auer testified to possessing years of experience as a licensed master electrician. Auer testified that the received his license in the late 80s and that he does approximately twenty inspections in a day. Additionally, Defendant claims Drago put inspection stickers on uninspected panels to indicate that they passed inspection. However, Defendant provided no support or evidence in the trial record or testimony that Drago placed the stickers on uninspected panels or any of the panels. Further, Auer testified that on large jobs, such as this one, handing stickers to the foreman is not improper, nor is it uncommon. Additional testimony at trial has shown that stickers are not required to indicate that a panel box has been inspected.

Concerning the panel boxes in closets, the Court finds by a preponderance of the evidence that Plaintiff did not violate or breach the Contract. Defendant asserts the Contract specified that the panel boxes needed to be removed from the closets and Plaintiff's failure to do so violated the National Electrical Code. However, Defendant was unable to point to any provision, term or wording in the Contract that stated such a requirement. In fact, the testimony demonstrated that moving the panels and wiring would cost the Defendant more money, because Plaintiff would have had to charge on a time and material basis. Further testimony at trial

revealed that the Defendant wanted to save money and requested that Plaintiff leave the panels and wiring in the closet. Moreover, Plaintiff spoke with Auer regarding Defendant's request, to ensure that leaving the panels in the closets would pass inspection, and Auer confirmed that this could be done as long as the closets were not used for clothes or any other easily ignitable material. With the approval from Auer, Plaintiff felt comfortable to fulfill Defendant's request.

With respect to Plaintiff's failure to retain a permit, the Court finds the breach to be immaterial. Defendant claimed that Plaintiff failed to retain a permit from the City of Wilmington; however, the cost of a permit, as alleged in the Delcollo Report, is $325.00, the electrical work has been completed, and there is no record to suggest that a permit is required to approve the work because a third-party inspector has already approved it.[70] Thus, $325.00 from the Plaintiff to obtain a permit will cure this defect.

In addition to the above contentions, Stimeling raised deficiencies with Plaintiff's work. Stimeling stated that there were no locks on the circuits, no directories on the panel boxes, missing screws on a few of the junction boxes, and ground and neutral wiring was not separated. However, the Court finds all alleged deficiencies were de minimis, as they are curable and do not rise to the level of a material breach of the Contract. In addition, Stimeling testified during trial that his opinion was not based on his own inspection, but came from the Delcollo Report.

Furthermore, Defendant asserts that there is an issue with the basement panel board being overloaded. However, Defendant has presented no evidence that Plaintiff actually performed work on the basement panel. Defendant argued at trial that WA 12279 clearly states that Plaintiff worked on the basement panel; however, WA 12279 states no such thing.[71] WA 12279 refers to "pipe work" that was done from the basement floor to the fourth floor, not panel work

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[70] Defs.' Ex. 1, Tab 15.
[71] Pl.'s Ex. 1, Tab 6.

done on the basement panel.[72] In addition, the evidence and testimony showed that other electricians have been in the building before and after Plaintiff; therefore, it is unclear who worked on the basement panel.

Lastly, the Court does not accept Defendant's plea that it was concerned for the safety and well-being of people in the building. It has been at least four years since the work was completed by Plaintiff and Defendants have done nothing to remedy the alleged faulty work. The Court finds these facts significant. If indeed the electrical work performed by Continental amounted to a material breach of the Contract or created serious electrical and safety issues, the Court finds this would have necessitated immediate corrective action, which was not the case from the trial evidence.

B. Defendant Materially Breached The Contract

The Court finds that Plaintiff has proven by a preponderance of the evidence that Defendant breached the Contract. It is undisputed that a contract existed between Plaintiff and Defendant. The Court finds that Plaintiff's breaches were minor and gave no rise to significant damages. If the Defendant was dissatisfied with the work, it should have voiced this or communicated the underlying facts to Plaintiff. As indicated, both George and Michael never communicated in writing such deficiencies. Instead, Defendant, without any objections, paid Plaintiff when half of the work was completed. This action indicated to Plaintiff that Defendant was satisfied with the work they had done thus far by Continental.

Moreover, the undisputed testimony at trial made it clear that both George and Michael were absent during the entire project as indicated. When questions arose during the project, the Plaintiff could not look to George or Michael for direction or clarification. William Casey

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[72] *Id.*

("Casey") was left to communicate with the Plaintiff and as an agent acting on behalf of the Defendant, approve additional work orders.

Instead, the Court finds that Defendant materially breached the Contract when it failed to pay Plaintiff's for the completed work. Instead of attempting to work things out or communicate with the Plaintiff as to any deficiencies during the performance of the Contract. Defendant did not pay Plaintiff and gave no indication that they eventually would make Plaintiff whole. Thus, Plaintiff was excused from subsequent performance, such as having all of the panels inspected. Plaintiff's counsel made an extremely compelling closing statement, in which he argued that once Plaintiff threatened to bring suit, for Defendant's refusal to make final payment under the Contract and for the authorized change orders, Defendant made a series of evolving affirmative defenses and raised several shifting rationales to create reasons for withholding Plaintiff's right to payment.

Based on this evidence, the Court finds that Plaintiff has suffered $28,287.32 in damages.

C. Unjust Enrichment

In addition to breach of contract, the Plaintiff has claimed unjust enrichment. Unjust enrichment "is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. "[73] Unjust enrichment is comprised of the following prongs: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law.[74] An unjust enrichment claim cannot survive when there is an adequate remedy under contract law.[75] Here, the Court has

[73] *Paliyenko v. Addo*, 2017 WL 8132410, at *3 (Del. Com. Pl. Dec. 20, 2017).
[74] *Id.*
[75] *Uppal v. Waters*, 2016 WL 4211774, at *3 (Del. Super. Aug. 9, 2016).

already found in favor of Plaintiff's claim for breach of contract, thus the Court will not consider Plaintiff's unjust enrichment claim as it is moot.

D. Building Construction Payments Act

The Building Construction Payments Act governs building construction contracts and payment for such services.[76] For the statue to apply, the parties must fall within the definitions outlined under Section 3501.[77] Under 3501 of the Act, an owner is defined as "a person who has an interest in the lands or premises upon which a contractor has undertaken to erect, construct, complete, alter or repair any building or addition to a building."[78] The act further defines a person to include "a corporation, partnership, limited liability corporation or partnership, business trust, other association, estate trust, foundation or a natural person."[79]

First, the Court must determine whether Defendant is a person under the statute. The act explicitly includes associations within the definition of person. Here, Defendant by name is an association and therefore, falls within the definition of person under the Act. Second, the Court must determine whether Defendant is an owner as defined by the statute. Defendant has an interest in its Contract with Plaintiff, as well as the subject of the Contract, which is the Property. In the execution and enforcement of the Contract, Defendant has held itself out as an agent to the owners who live on the Property. Additionally, as a party to this action, Defendant has interest in the outcome of this case, all of which surrounds the electrical work done on the Property.

Under Section 3507 of the Act, the owner shall pay the contractor strictly in accordance with the terms of the contract.[80] However, the act carves out specific circumstances in which

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[76] 6 *Del. C.* § 3501, et seq.
[77] 6 *Del. C.* § 3501.
[78] 6 *Del. C.* § 3501(4).
[79] 6 *Del. C.* § 3501(5).
[80] 6 *Del. C.* § 3507(a).

Section 3507 does not apply: (1) [p]ublic works contracts awarded under Chapter 69 of Title 29; (2) [c]ontracts for the erection of 6 or fewer residential units which are under construction simultaneously, or for the alteration or repair of any single residential unit; or (3) [c]ontracts for the purchase of materials by a person performing work on that person's own property.[81]

Under Section 3508 of the Act, if an owner disputes any amounts stated in an invoice for payment: (1) the party disputing the invoice must notify the other party in writing within 7 days of the receipt of the disputed invoice; and (2) the party disputing the invoice must be specific as to those items within the invoice that are disputed.[82] If notice of dispute is not given within the required time set out by the section, the invoice is deemed accepted as submitted; however, lack of notice does not constitute acceptance of the work performed.[83]

Under Section 3509, if an owner has failed to comply with the payment terms of Section 3507, the Court shall award damages "equal to the amount that is determined by the arbitrator or court to have been wrongfully withheld." The Section further states that "[a]n amount shall not be deemed to have been wrongfully withheld to the extent that it bears a reasonable relationship to the value of any disputed amount or claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment."[84] Good faith is "understood to mean that substantial and justifiable reason existed to withhold payments."[85] Moreover, the Court "shall award to the substantially prevailing party its reasonable attorneys' fees, arbitration costs and expenses for expert witnesses."[86] Similarly, Section 3509 carves out the same exceptions as 3507(f).[87]

[81] 6 *Del. C.* § 3507(e)(1)-(3).
[82] 6 *Del. C.* § 3508(a)(1)-(2).
[83] 6 *Del. C.* § 3508(b)-(c).
[84] 6 *Del. C.* § 3509(a).
[85] *DDP Roofing Services, Inc. v. Indian River School Dist.*, 2010 WL 4657161, at *3 (Del. Super. Nov. 16, 2010).
[86] 6 *Del. C.* § 3509(b).
[87] 6 *Del. C.* § 3509(c)(1)-(3).

While Defendant asserts that the exceptions under 3507(f)(2) and 3509(c)(2) apply to the work performed by Plaintiff, the Court finds that the contracted work involved multiple units; thus, the exceptions cannot apply.[88] Moreover, Defendant's made admissions in its Closing Written Memorandum of Law that the contracted work was in residential condominium units, not on a single residential unit.[89] If the Delaware Legislature's intention was to exclude multiple residential units from coverage under the Act, the Delaware Legislature would not have included the word "single" in its language.[90] This is also evident by the preceding language that exempts the application of the Act in cases involving "6 or fewer residential units."[91] Here, the Delaware Legislature has distinguished a single unit from 6 or fewer unit, or multiple units; thereby, making the use of the word single both deliberate and clear.[92] Thus, the alteration or repair to more than one residential unit does not fall within the exception of the sections, and the Act's payment requirements apply to the Contract.

Now that the Court has established that Section 3507 and 3509 applies, the Court must determine whether Defendant wrongfully withheld payment absent good faith. Here, the Defendant failed to dispute the invoices submitted by the Plaintiff within the time frame set out under the Contract and Section 3508 of the Act; thus, Defendant has accepted the amounts stated in all invoices. Defendant throughout the course of litigation has made it clear that it does not accept the work that was performed by Plaintiff; however, the amount Defendant has withheld does not bear any reasonable relation to the value of the amount Defendant has disputed. Defendant has asserted multiple de minimis reasons for withholding payment, none of which

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[88] Defs.' Closing Br.
[89] *Id.*
[90] 6 *Del. C.* § 3507(e)(1)-(3); 3509(c)(1)-(3).
[91] *Id.*
[92] *Id.*

constitute the amount that Defendant has withheld. When Defendant held payment hostage, Defendant took the law into its own hands. Defendant was dissatisfied with the work done, but made no attempt to communicate this to Plaintiff during the job or upon completion of the job. Defendant simply evaded Plaintiff's multiple requests for payment. Not only did Defendant fail to dispute the work with Plaintiff, Defendant's failed to dispute the work in a court of law. Again, Defendant claims that they are concerned for the safety of unit residents; however, more than four years have passed since Plaintiff completed the project and Defendant has yet to repair the alleged faulty work. Defendant alleges $27,435.00 in damages; however, the only evidence of this amount in damages comes from a report by another electrician, whose allegations have been repudiated by a State of Delaware licensed inspection agency.[93] Thus, the Court finds that Defendant wrongfully withheld payment and Plaintiff is entitled to damages, including attorneys' fees.

Section 3506 of the Act controls retainage and interest penalties on late payments.[94] To assure that a contractor will meet its obligations, a contract may include a clause retaining a portion of the agreed upon contract price until a substantial portion of the work is completed.[95] For retainage to apply to a contract under the Act, the contract must include: (1) [a] payment clause which obligates the owner to pay the contractor for satisfactory performance under the contract within 30 days of the end of the billing period; (2) [a]n interest penalty clause which obligates the owner to pay the contractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the contract pursuant to paragraph (a)(1) of this section; (3) [t]he clause required by this subsection shall not be construed

[93] Defs.' Ex. 1, Tab 15.
[94] 6 *Del. C.* § 3506.
[95] *See* Defs.' Closing Br. at 9.

to impair the right of the owner to include in its contract provisions which permit the owner to retain a specified percentage of each progress payment otherwise due to a contractor for satisfactory performance under the contract without incurring any obligation to incur an interest penalty, in accordance with the terms and conditions agreed to by the parties to the contract. In such a case, the owner must provide written notice to contract as to why payment is being withheld within 7 days of the date required for payment to the contractor."[96]

Here, the Contract has neither an interest penalty clause or retainage clause. Thus, the penalties under Section 3506 do not apply and Plaintiff cannot recover double damages. Based on this evidence, the Court finds that Plaintiff has suffered $28,287.32 in damages due to Defendant's violation of the Act. Traditionally, Delaware adheres to the American Rule, in which the parties to a case each party to a case must bear own expenses of litigation and attorneys' fees.[97] Despite the general practice, a court may shift fees in the event that conduct rises to the level of bad faith.[98] Bad faith implies "some kind of dishonest motive or purpose. There is, thus, the implication of an element of scienter."[99] While bad faith is an exception to the American Rule, it only applies in "extraordinary circumstances as a tool to deter abusive litigation and to protect the integrity of the judicial process."[100] However, a court may award attorneys' fees due to bath faith if doing so is authorized by a statutory or contractual provision. While Defendant's actions in this case did not amount to bad faith under existing case law, it gave the Court concerns.[101] Nonetheless, the Act gives statutory authority to award attorneys' fees if a party wrongfully withholds payment in bad faith, and as discussed above, the Court has

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[96] 6 *Del. C.* § 3506(a)(1)-(3).
[97] *Paliyenko v. Addo*, 2017 WL 8132410, at *5 (Del. Com. Pl. Dec. 20, 2017).
[98] *Id.*
[99] *Nason Const., Inc. v. Bear Trap Commercial, LLC,* 2008 WL 4216149, at *7; *see also DDP Roofing Services, Inc.,* 2010 WL 4657161, at *3.
[100] Paliyenko, 2017 WL 8132410, at *5.
[101] *Id.*

found that the Defendant violated Section 3507 and 3509 of the Act and Plaintiff is entitled to the award of attorneys' fees.

E. Personal Liability for Drago

The issue of personal liability for Drago must be addressed. The Defendant has named Drago as a Counterclaim Defendant throughout the course of litigation.

On November 19, 2018, defense counsel filed a letter requesting that the Court make certain factual findings to hold Drago personally liable for fraud.[102] First, defense counsel makes the assertion that if the Court finds that Auer did not inspect the premises, and Drago put inspection stickers on the panels to indicate that they passed inspection, Drago is personally liable for fraud.[103] As previously discussed, the Court has found that Auer did in fact inspect the Property and the issue of inspection stickers are not pertinent. Further, defense counsel makes an alternative argument that if the Court finds the as-built drawing sent to the condominium representatives and the as-built drawing provided during discovery misrepresents the work done by Plaintiff, Drago is personally liable for fraud.[104] As already stated, the Court has found that Defendant's failed to prove that Drago manipulated the as-built drawings and that the as-built drawings are relevant to the completed work. Lastly, defense counsel makes the claim that if the Court finds that Drago submitted a work authorization for work regarding the breaker panel in the basement, contrary to his representation to Smith, Drago personally participated in tortious conduct and must be held personally liable.[105] As formerly discussed and analyzed, the Court has found that the Defendant failed to prove that Drago or any worker of Plaintiff's performed

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[102] Defs.' Resp. to Pl.'s Nov. 2, 2018 letter.
[103] *Id.*
[104] *Id.*
[105] *Id.*

work on the breaker panel in the basement or that by doing so, Drago committed tortious conduct.

However, Delaware law is clear on the issue of piercing the corporate veil.[106] The Court of Common Pleas has no jurisdiction over issues in equity.[107] The Court of Chancery alone has jurisdiction to make such a finding; therefore, the Court will not assess personal liability for Drago in this case.[108] Alternatively, Defendant has failed to prove these counts by a preponderance of the evidence at trial, notwithstanding this Court lack jurisdiction to pierce the corporate veil.

F. Consumer Fraud Act and Home Owner's Protection Act

In its counterclaims, Defendant argued that Drago violated the Consumer Fraud Act, 6 Del. C. § 2511 et seq., and the Homeowner Protection Act, 6 Del. C. § 3651 et seq., when he put stickers on the panel boxes to indicate that they passed inspection, did not submit a technical drawing and misrepresented the as-built drawing after litigation began.[109]

Under the Consumer Fraud Act, the Plaintiff must show: (1) the defendant engaged in conduct which violated the statute; (2) the plaintiff was a victim of the unlawful conduct; and (3) a causal relationship exists between the defendant's unlawful conduct and the plaintiff's ascertainable loss.[110] The act defines an unlawful practice as the "act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that other rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement

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[106] *See Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973).
[107] *Id.*
[108] *Id.*
[109] Defs.' Answer & Countercl.
[110] *Teamsters Local 237 Welfare Fund v. AstraZeneca Pharm. LP*, 136 A.3d 688, 693 (Del. 2016).

of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice."[111] To prove consumer fraud, the consumer must establish the merchant made a false statement, with the knowledge that the statement was untrue, or the merchant negligently made a misrepresentation.[112]

Under the Homer Owner's Protection Act, a party may recover damages resulting from negligent improvement of residential property.[113] The Act provides that "[n]o action based in tort to recover damages resulting from negligence in the construction or manner of construction of an improvement to residential real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction shall be barred solely on the ground that the only losses suffered are economic in nature."[114]

Here, Defendant has failed to prove by a preponderance of the evidence that Plaintiff nor Drago made a false statement with the knowledge that the statement was not true, negligently made a false misrepresentation, or made negligent improvements to the Property. The evidence at trial corroborates Drago's testimony that his involvement in the project was limited. Drago was involved in the Contract negotiations with Defendant and the requests for payment from Defendant. Defendant asserts that Drago placed stickers on the panel boxes to indicate that they were inspected, although they were not. As previously stated, Defendant has failed to introduce any evidence proving that Drago put stickers on the boxes or that doing so is fraudulent or even improper. Further, Defendant argues that a technical drawing was not submitted, and the as-built drawing given before litigation and presented after litigation was inconsistent. However, the idea that these drawing are valuable to the outcome of the work has been dispelled by testimony

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[111] 6 *Del. C.* § 2513(a).
[112] *Teamsters Local 237 Welfare Fund,* 136 A.3d 688, 693.
[113] 6 *Del. C.* § 3651 et seq.
[114] 6 *Del. C.* § 3652.

and evidence. Defendant offered no evidence to support the claim that Drago changed the as-built drawing. More importantly, as Smith testified, the drawings are not the work. The work was completed and the fact that the drawings were different, incorrect or insufficient to Defendant is no indication of fraud or negligent improvement. Defendant provided no evidence to indicate that Plaintiff tried to mislead or misrepresent "things" to the Defendant, that Drago acted outside of the scope of his job as an employee or member of the company, or that the work was negligently done.

VI. CONCLUSION

For all the foregoing reasons, the Court hereby enters judgment in favor of Plaintiff in the amount of $27,287.32, plus pre- and post-judgment interest at the legal interest rate according to 6 Del. C. § 2301, et seq., which includes the $1,000 offset to Defendant to remedy the minor breaches made by Plaintiff. Defendant shall pay Plaintiff's costs of this action. Defendant's Motion For Partial Summary Judgement is now moot and is denied. The Court awards attorneys' fees as indicated above. Plaintiff's counsel shall within fifteen (15) calendar days to file his petition for attorney fees. Defendant shall file its reply within fifteen day thereafter. The Court shall issue a written decision within thirty (30) calendar days on the award of alleged fees.

IT IS SO ORDERED this 16th day of January, 2019

John K. Welch, Judge

cc: Ms. Patricia Thomas, Civil Clerk