

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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February 27, 2013

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**RE: *State Farm Fire & Casualty Co. a/s/o Robert Harris and Judith Harris v.
Atlantis Homes, LLC v. Poore's Propane Gas Service, Inc. and Brittingham &
Collins, Inc.***
C.A. No. S11C-04-002 RFS

*Third-Party Defendant Brittingham & Collins, Inc.'s
Motion for Summary Judgment on Defendant/Third-Party Plaintiff's
Atlantis's Counterclaim.
Granted.*

Submitted: January 11, 2013
Decided: February 27, 2013

Dear Counsel:

In this subrogation case, Third-Party Defendant Brittingham & Collins, Inc. ("Brittingham") moves for summary judgment on a counterclaim filed by Defendant/Third-Party Plaintiff Atlantis Homes, LLC ("Atlantis") against Brittingham and Third-Party Defendant Poore's Propane Gas Service, Inc. ("Poore's"). The third-party defendants have made cross-claims against each other.

Atlantis constructs, sells and installs modular homes. Brittingham performs, among other things, set-up of modular homes. In this case, Atlantis hired Brittingham for set-up of a modular home.

Plaintiff State Farm and Casualty Co.'s ("State Farm" or "Plaintiff") action against Atlantis stems from a house fire at 23058 Deep Creek Drive, Lincoln, Delaware. The fire occurred January 21, 2010. The two-story modular home ("the home") was purchased by Robert and Judith Harris from Atlantis. At the time of the fire, the Harris's had homeowners insurance through Plaintiff State Farm. State Farm paid the Harris's \$292,620.99 in insurance benefits for personal and property damages resulting from the fire. Plaintiff seeks judgment in that amount against Atlantis.

Issues. It is undisputed that the house fire resulted from faulty installation of the second floor chimney connected to a gas fireplace on the first floor. On summary judgment, Brittingham argues that there are no facts that connect it to the chimney installation and that no evidence exists to create a genuine issue of material fact as to its alleged negligence.

Atlantis argues that questions of material fact exist as to whether Brittingham should have installed the chimney and whether Brittingham covered up a faulty pipe with the plywood sub floor, thus causing the floor to ignite.

Standard of review. When the moving party's motion for summary judgment is supported by evidence that no genuine issues of material fact exist, the burden shifts to the non-moving party to demonstrate the existence of issues of material fact in dispute.¹ The Court must view the facts in the light most favorable to the non-moving party,² but uncontroverted evidence in support of summary judgment must be considered as true.³ If, after viewing the evidence in the light most favorable to the non-moving party, the Court finds there are no genuine issues of material fact, summary judgment is appropriate.⁴

Brittingham. In October 2004, Atlantis employed Brittingham to disassemble the home on the sales lot and do a standard reassembly on the Harris lot. Mark Brittingham ("Mr. Brittingham") owns and operates Brittingham. Mr. Brittingham testified that his company performed the agreed-upon tasks but did not install the chimney because he was not asked to do so. He prefers not to install chimneys.

¹*Moore v. Sizemoore*, 405 A.2d 679 (Del.1979).

²*Matas v. Green*, 171 A.2d 916 (Del.1961).

³*Battista v. Chrysler Corp.*, 454 A.2d 286 (Del.Super.1982).

⁴*New Castle County v. State*, 698 A.2d 401 (Del.Super.), *aff'd*, 688 A.2d 888 (Del.1996).

Mr. Brittingham stated that if he had installed the chimney, he would have billed for it because it requires two to three hours of labor. There was no written contract or work order, but Brittingham's invoice itemized the work and was paid in full without dispute. The 15 items listed on his invoice do not reference the chimney. There is no argument that any of the 15 tasks include chimney installation.

Mr. Brittingham testified that the plywood sub floor on the second floor was completely installed when he first entered the house on the sales lot. In order to transport the house, he had to take apart the two halves of the roof, which involved removing the center sub floor two feet from center on each side of the home. The center flooring is heavy in order to hold the weight of the roof, and chimneys are not installed through the center of the floor.

Mr. Brittingham saw the piping package necessary to complete the chimney was on the second floor, but he did nothing with it. He also saw that the metal chimney pipe located on the sub floor was folded over and hand-crimped in an effort to seal it. Mr. Brittingham stated his belief that Atlantis Home Services would complete the chimney following standard set-up.

Atlantis's former construction manager, Ted Spengos, testified that Atlantis expected set-up to include chimney installation. However, Mr. Spengos worked elsewhere at the time of these events and had no personal knowledge of them. His statements as to general practice do not raise a genuine issue of material fact.⁵

Atlantis also argues that "no one knows" whether Brittingham would have covered the crimped pipe with plywood, thus causing the fire. Assuming this to be true, Atlantis has no grounds for its counterclaim. The statement that "no one knows" does not establish a fact question. Mr. Brittingham's testimony that the chimney pipe was not underneath the center plywood is confirmed by Mr. Harris, who testified that the pipe was located left of center over the fireplace on the first floor.

Atlantis states that the question of whether Brittingham should have installed the chimney is a contract issue, without identifying or producing a contract. The only written evidence of the work agreement is Brittingham's invoice, which, as stated previously, was paid in full without dispute. The invoice list 15 tasks without reference to the chimney. Mr. Brittingham testified that he would bill for chimney installation because it takes two or three hours of work. Atlantis does not dispute these representations.

⁵The only other Atlantis representative produced was John Sparks. He had no knowledge of the construction of the house, the chimney or Atlantis's inspection of the home.

Fire Marshall's investigation does not implicate Brittingham. Deputy Fire Marshall William P. Goins ("DFM Goins") conducted the investigation into the fire at the Harris home.⁶ Mr. Goins's testimony did not link Brittingham's work to the fire or to faulty installation of the chimney.

Mr. Goins testified that this modular home was constructed in a factory. He contacted the people who built the home. He was told that the factory workers install the fireplace on the first floor and run pipes behind the walls only to the level of the second floor because the roof has to be folded flat for transport. They package the remaining chimney pipes and leave them in the house. DFM Goins' opinion was that the pipe was folded over and crimped, creating a loose seal. The seal allowed heat to seep through to the second story plywood sub floor, eventually causing it to ignite in a process known as pyrolysis. Based on his findings, Mr. Goins requested Atlantis to identify other Atlantis homes that potentially had this problem. He did not make any connection between the fire and Brittingham's work.

The assertion that Brittingham did not conduct the installation is supported by the testimony of Deputy Fire Marshall Goins, who stated that construction of the house was done at the factory. Mr. Brittingham's assertion that the final chimney installation was completed by Atlantis Home Services following reassembly is not disputed.

In sum, Atlantis asserts that the issue at bar is one of contract without identifying a contract or making a contract-based argument. Further, its assertion is refuted by Mr. Brittingham, who stated that Atlantis contacted him to do the work and that the only written evidence of an agreement is the Brittingham invoice, which does not bill for chimney installation and which Atlantis paid without dispute. Atlantis does not argue that any of the 15 tasks on the invoice encompass chimney installation. The witnesses presented by Atlantis were not experts and neither one had personal knowledge of construction of the house or installation of the chimney pipe.

Viewing the evidence in the light most favorable to Atlantis, I find that Brittingham met its initial burden of showing that no genuine issues of material fact exists as to Brittingham's role in the chimney installation. Atlantis has not met the shifting burden of showing the existence of a genuine issue of material fact. Summary judgment on Atlantis's third party counterclaim is appropriate.

Third party defendant Brittingham's motion for summary judgment is **GRANTED**.

⁶Brittingham's motion refers to Goins's multi page report, but the document submitted is the news release about the fire, dated one day after the fire, which occurred January 21, 2011. However, the relevant pages from Goins' deposition are sufficient to establish his opinions.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary