

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

BILL ZACK CONSTRUCTION)	
CO., INC., a Delaware)	
corporation,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 1999-08-142
)	
FRANK PETROCCITTO,)	
)	
Defendant.)	

Date Submitted: February 24, 2000
Date Decided: March 3, 2000

Christopher P. Simon, Esq. The Bayard Firm P. O. Box 25130 Wilmington, DE 19899 Attorney for Plaintiff	H. James Childerston, Esq. Suite 24 5143-A West Woodmill Drive Wilmington, DE 19808 Attorney for Defendant
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FINAL DECISION AND ORDER AFTER TRIAL

Trial took place in this matter on February 24, 2000 and at the conclusion of the receipt of evidence and testimony the Court reserved decision. This is the Court's Final Decision and Order.

Introduction

This is a breach of contract action brought by Bill Zack Construction Co., Inc. ("Zack") against Frank Petroccitto ("Petroccitto"). Zack alleges that on November 30, 1998 he delivered to Petroccitto a written proposal ("the agreement") in order to construct a retaining wall

at Petroccitto at 230 Peoples Way, Valley Falls, Hockessin, Delaware (“the premises”). The agreement called for the installation of a block retaining wall, approximately 112 feet, adjacent to an existing pool deck. The agreement, originally an estimate, but signed by both parties and approved as a contract, was for Sixteen Thousand Four Hundred Dollars (\$16,400.00) and called for half of the balance prior to commencement of construction and half upon completion of the agreement. There was no dispute at trial that in early January 1999 the parties accepted the agreement and Petroccitto paid Zack Eight Thousand Two Hundred Dollars (\$8,200.00) on or about January 12, 1999. On February 1, 1999 Zack began erecting the retaining wall and during construction, without a change order pursuant to the terms of the original agreement, the evidence at trial indicated Petroccitto requested an additional wall in front of a large gazebo near the backyard pool; and second, a terrace to accommodate a children’s play structure; and third, additional steps to a smaller gazebo. Plaintiff claims the additional consideration was Three Thousand Eight Hundred Dollars (\$3,800.00).

Zack has alleged that Petroccitto breached the contract and has been damaged Twelve Thousand Dollars (\$12,000.00), monies due allegedly under the first contract as well as \$3,800 for the additional work he did not receive payment.

Petroccitto answered the Complaint and filed a Counterclaim. However, prior to trial Petroccitto produced no records in

response to plaintiff's Requests for Production after Honorable Jay Paul James granted a Motion to Compel. Petrocitto alleged Thirteen Thousand Dollars (\$13,000.00) in damages as set forth his Counterclaim allegedly because of plaintiff's failure to complete the work and negligence in performing the work actually compiled in an unworkmanlike manner. As set forth in the record below, no evidence was produced at trial to substantiate any part of the counterclaim and a judgment is granted in plaintiff's favor.

Factual Background

At trial Zack testified he owns a small construction business and has prior excavating and construction experience totaling 12 years and incorporated his current business in 1996. He is 25 years old. He testified, as set forth in the Complaint, that he signed an agreement which became a contract to install the above-referenced work. At trial there was no dispute that the parties executed the contract and January 5, 1999 the parties met and signed the estimate which became a binding contract.

At trial it was also undisputed that fifty percent (50%) of the contract payments were paid to Zack by Petrocitto. Zack testified during the contract period there was also a discussion regarding the additional work which was completed and costs his corporation \$3,800. At trial, Zack introduced, without objection, numerous exhibits which were marked and received into evidence. Plaintiff's Exhibit "1" was a

copy of the Estimate and Contract between the parties. Plaintiff's Exhibit "2" was the signed agreement between the parties. Plaintiff's Exhibits "3", "4" and "5" were copies of invoices from Milestone Materials, Inc. documenting block that was ordered for the job. Plaintiff's Exhibit "6" was an invoice from Holland Mulch detailing block caps, block corners and pallets for the total costs of Three Thousand Two Hundred Six Dollars and Ninety Cents (\$3,206.90).¹

Plaintiff's Exhibit "8" was an additional invoice from Milestone Materials, Inc. detailing 84.79 tons for retaining wall delivered to the job site. Plaintiff's Exhibit "9" was a faxed message to Bill Zack Construction Co., Inc. suggesting "an area 11 feet wide and 27 feet long to allow a ship in" the notation on the invoice from Space Makers, Inc. that this "will allow for some adjustments to be made on the site to ensure that the side and ramp land where we want them. I suggest blue stone to simulate the ship floating on water. The ship will be ready for delivery no later than the week of February 15, 1999. The lighthouse should be delivered by February 10, 1999." A copy of an actual diagram was appended to the faxed message.

Plaintiff's Exhibit "11" was a copy of the diagram which showed the area of defendant's property with stone, block steps and increased block for the boat area. Plaintiff's Exhibit "12" was Zack was a job analysis worksheet which indicated 166.5 hours for the Petrocitto

¹ There was also two additional invoices from Fizzano Bros. Concrete detailing

retaining wall by Zack. In addition, plaintiff's Exhibit "13" was a time sheet for all the various employees of Zack and hourly rates paid by Zack for the Petroccitto job.

At trial plaintiff also produced numerous pictures detailing the status and progress of the job site. Zack also testified he paid three (3) employees \$15, \$13 and \$10 an hour respectively for a total of 166 man hours. Zack testified he completed the entire project by mid-March which included the gazebo, wall, steps and wall in front of the gazebo.

Zack testified at trial that he did extensive excavating with two-pieces of equipment he owns, both at the rate of \$600 per day for two and a half (2 ½) hour weeks. Zack testified that he believed he performed the job "satisfactorily" and the construction work was completed according "to the specs of the contract the parties signed." Zack testified that he never was paid the 50% or \$8,200 and the \$3,800 additional costs.

The Court also received into evidence photographs depicting the project in the condition when the work was completed. Zack testified that he completed the entire job by mid-March and "probably left mid-March." Zack testified that the sketch introduced into evidence "was not to scale" but showed 112 linear feet and 766 block and 1,038 blocks purchased and used at the job site.

numerous blocks and supplies delivered to the job site.

On re-direct examination, Zack testified initially the wall was three (3) feet high but that it was seven and a half (7 ½) feet high and he had to cut 14 to 15 feet back into the property.

The defense presented its case in chief. Petroccitto agreed that it was his signature on the estimate and the parties had a binding contract. He testified that Zack never signed or submitted a change order for the additional \$3,800 in work. He testified he paid the \$8,200, but did not pay the additional monies because, “He [Zack] didn’t get paid until the job was done.” Petroccitto testified that the job was not substantially completed because there was “a pipe and a whole left and no french drain on the job.” Additionally, Petroccitto said Exhibit “1-C” showed piled up rock at the end of the property area and also depicted the property was “left in shambles and not a completed job.” He also testified Zack left equipment on the property for three (3) weeks.

Petroccitto said he hired 12 to 13 persons and they finished and “buttoned-up the job” in one (1) calendar day. He testified that he paid for “shovel work” and purchased materials included 600 blocks and repaired some of the project areas he believed Zack did not complete. He testified he paid payments to 12 to 13 employees totaling \$14,000 through credit cards, cash and checks. However, Petroccitto produced no evidence of either cash payments, credit card receipts, or cancelled checks at trial. Petroccitto testified that he could not remember the names of any of the employees.

Petrocitto admitted on cross-examination that he finished the project Zack allegedly failed to complete in one (1) to two (2) days.

The Law

A good summary of the law regarding contract construction appears in *Demetree v. Commonwealth Trust Co.*, Del. Ch. C.A. No. 14354, Allen, Ch. (August 27, 1996) at pp. 7-9:

The primary goal of contract interpretation is to satisfy the reasonable expectations of the parties at the time they entered into the contract. This process often requires courts to engage in an analysis of the intent or shared understanding of the parties at that time.

Under the plain meaning rule of contract construction, if a contract is clear on its face, the Court should rely solely on the clear, literal meaning of the words. Where parties have entered into an unambiguous integrated written contract, the contract's construction should be that which would be understood by an objective reasonable third party. An inquiry into the subjective unexpressed intent or understanding of the individual parties is neither necessary nor appropriate where the words of the contract are sufficiently clear to prevent reasonable persons from disagreeing as to their meaning.

In cases where the language of a contract is clear and unambiguous, this Court may not consider parol evidence to interpret the intent of the parties.

Of course, if there is uncertainty concerning the meaning of contractual language, the Court should consider the context and circumstances in which the words were used in order to determine the intended meaning.

See, R.E. Harsh & Associates v. W.B. Verables & Sons, Inc., Del. Super.,
1996 W.L. 65896 Lee, J. (1996).

* * *

Although a builder may not have satisfactorily performed a construction contract in every particular, 'the American courts are united in holding that a substantial performance of a building or construction contract will support a recovery . . .' 13 Am. Jur. 2d 44, *Building and Construction Contracts*, Sec. 41. That Delaware likewise follows this rule is indicated by the language in headnote 8 of *Hawthorne v. Murray*, 3 Boyce 349, 84 A. 5, 6 (Del. Super., 1912).

* * *

It is established Delaware law that in order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance with all of the provisions of the contract. *McCloskey v. Maciey*, Del. Super., No. 83L-AP-32, Ridgely, J. (November 29, 1984), at 3; *Emmett S. Hickman Co. v. Emilio Capaldi Developer, Inc.*, Del. Super., 251 A.2d 571, 573 (1969). If the plaintiff has committed a material breach he cannot complain if the non-breaching party subsequently refuses to perform. *Hudson v. D & V Mason Contractors, Inc.*, Del. Super., 252 A.2d 166, 170 (1969). The converse of this principal is that a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract. 11 Williston on Contracts, § 1292, at 8 (3d ed. 1968). Non-performance by the injured party under such circumstances will operate as a breach of contract.

The question whether the breach is of sufficient importance to justify non-performance by the non-breaching party is one of degree and is determined by 'weighing the consequences in the

light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.’ 4 Corbin on Contracts, § 946, at 809 (1967). See also 11 Williston on Contracts § 1292, at 8-11 (1968). Materiality of the breach is the subject of the Restatement (Second) of Contracts § 241, which provides:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See, *Eastern Electric and Heating, Inc. v. Pike Creek Professional Ctr.*, Del. Super., 1987 WL 9610, O’Hara, J. (1987).

Discussion

The issue for the Court to decide is whether plaintiff substantially performed or completed the job in question as set forth in the trial record. The Court finds by a preponderance of evidence that Zack fully completed the job in mid-March and should be paid the

balance due of \$8,200. Applying the case law set forth above, the Court finds by a preponderance of evidence the Court finds plaintiff demonstrated substantial compliance with all terms and conditions of the contract between the parties. The Court finds that Zack to be the most credible witness at trial and believes his version of the events as well as all of the evidence produced at trial indicated compliance with the terms of the contract.

A second issue for the Court to decide is whether there is a bar from Zack being paid the \$3,800 for the additional work by the defendant because a formal change order was not completed. It is clear in the trial record that a contract was duly performed; Zack completed the extra work as requested by the defendant, totaling \$3,800, and should therefore be paid for the work. The fact that Zack did not issue a formal change order does not cause the Court to conclude there was not a binding contract between the parties. The Court finds by a preponderance of testimony produced at trial that such a binding contract was entered into between the parties for the additional \$3,800 work and Zack fully performed said additional work. JUDGMENT IS ENTERED FOR Three Thousand Eight Hundred Dollars (\$3,800.00) in favor of Zack.

As to defendants' counterclaim, the Court finds the claim was not proven by a preponderance of evidence and enters judgment in favor of plaintiff.

The Court therefore ENTERS JUDGMENT IN FAVOR OF ZACK for Twelve Thousand Dollars (\$12,000.00) plus pre and post-judgment interest at the legal rate of ten percent (10%). Plaintiff's counsel is requested to file an appropriate Affidavit and legal authority setting forth the counsel fees incurred in this action. Defendant's counsel shall have ten (10) days thereafter to respond in writing and the Court shall thereafter issue an appropriate Order.

IT IS SO ORDERED THIS 3rd day of March, 2000.

JOHN K. WELCH
ASSOCIATE JUDGE