IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

TIDEWATER ENVIRONMENTAL SERVICES, INC. Plaintiff, v. JOHN L. STANTON a/k/a JACK STANTON Defendant	)	C.A. No. CPU6-10-001121

Submitted: April 11, 2012
Decided: May 11, 2012

Patrick Scanlon, Esq., Attorney for Plaintiff.
John O'Brien, Esq., Attorney for Defendant.

DECISION AFTER TRIAL

For the reasons discussed below, the Court rules in favor of Plaintiff Tidewater Environmental Services, Inc. ("TESI") and against Defendant John Stanton in the amount of $19,500.90, plus pre-judgment and post-judgment interest, and Court costs.

Finding of Facts

The Court finds the facts of the case at hand to be as follows. Plaintiff TESI and Defendant Stanton entered into two contracts regarding a tract of land in Delmar, Delaware which Defendant Stanton had planned to develop into a mobile home park ("the Pinckney Property" or "the Project"). Plaintiff TESI was retained to begin testing and monitoring of the soils in regards to the proposed mobile home park. The work performed under the two contracts was primarily to determine if the soils were suitable

for an on-site wastewater treatment and disposal facility that could accommodate a minimum of 150 lots.

The first contract, dated December 29, 2006 and signed by both parties on January 11, 2007, was titled "Preliminary Soil Reconnaissance and Wetland Evaluation (Phase I)." The estimated[1] total cost was $4,900.00. Following completion of the work required under this contract, TESI prepared a report. According to the report, which was preliminary in nature, the soil could accommodate an on-site wastewater disposal system. However, further soil studies would be required.

TESI and Defendant Stanton's representative, Brian Koyanagi, who was instrumental in bringing the Project to Defendant Stanton, reviewed the report at the Project site prior to Defendant Stanton signing the second contract (Stanton was living in Florida at the time). Defendant Stanton knew the report had been completed because TESI reviewed the report with Stanton's agent. Defendant Stanton, however, never requested to personally review the report.

The second contract, dated January 19, 2007 and signed by both parties on February 2, 2007, was titled "Wet Season Monitoring and Authorized Agent for the Pinckney Property." Defendant Stanton flew back to Delaware the week this contract was signed. The estimated[2] total cost was $8,450.00. This contract enabled TESI to begin work in order to satisfy wet season monitoring regulations established by the Delaware Department of Natural Resources and Environmental Control (DNREC).[3] TESI began work under this contract on approximately March 8, 2007 and completed work on approximately May 18, 2007 – a period of approximately ten weeks.

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[1] The contract included the following language: "Please be advised this is only an estimate and may change depending on condition of soils."

[2] The contract included the following language: "[TESI] obtained an estimated cost from Advanced Environmental Concepts, Inc. to install the wells and complete the weekly wet season monitoring…"

[3] According to DNREC regulations, the wet season period is December 1 through May 15, and the standard amount of time required for monitoring is thirteen weeks. Both parties testified at trial, however, that there is leeway in establishing the wet season dates depending upon weather conditions throughout the year.

Both of the contracts contained the following condition: "If a decision is made to abandon this project, put the project on hold, or there is a failure to move the project forward for any other reason, TESI shall be reimbursed within three (3) months *for all expenses incurred.*" (Emphasis added). Sometime in mid-2007, while TESI was still performing their work under the second contract, Defendant Stanton decided to abandon the project. Not only did Defendant Stanton not pay TESI for the work performed, but he failed to inform TESI that he had abandoned the project. Over the next year and a half, TESI tried on numerous occasions to communicate with Defendant Stanton, but was met with silence. Finally, on March 19, 2009, TESI sent an invoice to Defendant Stanton requesting payment in the amount of $19,500.90.[4] To date, Defendant Stanton has not paid TESI any portion of that amount.

Plaintiff TESI filed suit against Defendant Stanton on April 28, 2010 for the breach of the two contracts. Defendant Stanton disputed the allegations, arguing that he should not be held liable for the first contract because TESI misrepresented the feasibility of developing the Pinckney Property by miscalculating the number of lots the Property could support. As to the second contract, Defendant Stanton argued that he should not be held liable because TESI failed to provide him with the report from the first contract. He claims that had he been provided with the report -and had the calculations in that report been properly completed- he would not have signed the second contract. He alleges that TESI's failure to provide the first report to Stanton fell below the standard of care required of a firm providing wastewater services in Delaware.

Discussion

In an action for breach of contract, the plaintiff must prove the following by a preponderance of the evidence: "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the

[4] $4,900.00 for work performed under the first contract; $9,450.00 for work performed under the second contract; $300.00 for DNREC application fees; and $4,850.90 to cover TESI's management expenses. All of these costs fell within the above-mentioned "for all expenses incurred" project-abandonment condition included in both contracts.

resultant damage to the plaintiff."[5] "Misrepresentation" is an affirmative defense, however, to the claim of breach of contract.

"A misrepresentation is an assertion not in accordance with the facts. A contract may be voidable on the basis of misrepresentation, be it fraudulent or innocent misrepresentation. However, for a contract to be voidable because of a misrepresentation, a party must show: (1) There was a misrepresentation; (2) The misrepresentation was either fraudulent or material; (3) The misrepresentation induced the recipient to enter the contract; and (4) The recipient's reliance on the misrepresentation was reasonable."[6] At issue here is the first element: whether there were any misrepresentations put forth by Plaintiff TESI.

As to the first contract in the case at hand, Defendant Stanton argued that TESI misrepresented the feasibility of developing the Pinckney Property by miscalculating the number of lots the Property could support. The alleged miscalculations centered on the number of lots the Property could support based upon the use of an on-site "drip irrigation system" for the disposal of wastewater. Defendant Stanton had informed Plaintiff TESI that the Property would have to include at least 150 lots in order to be financially feasible.

In determining the number of lots that a drip irrigation system could support, two terms at trial became important regarding the alleged miscalculations: "loading rate" and "gallons per day." Simply understood, loading rate refers to the volume of wastewater applied to a surface area over time. "Gallons per day" refers to a set number established by DNREC regulations that must be used in calculating the size of a wastewater disposal area for a planned development.

Plaintiff TESI's expert witness, Ray Ebaugh, testified at trial that the report was properly completed without any miscalculations. As to loading rates, because an exact loading rate could not be determined at such an early stage in the Project, the report used a range of loading rates based upon the preliminary soil studies conducted pursuant to the

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[5] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

[6] *Kirchner v. Stief*, 2001 WL 1555313 (Del. Com. Pl. 2001) (internal citations and quotations omitted).

first contract. In addition, the report used a "gallons per day" number of 300, as that was the number required pursuant to DNREC regulations in 2007. Using these numbers, Ebaugh testified that the report concluded that the Project site could support between 72 and 216 lots. Thus, at this preliminary stage in the process, it was at least feasible that the site could support the needed 150 lots.

Defendant Stanton's expert witness, Gregory Scott, testified at trial that, based upon his own calculations using loading rates and gallons per day, he would not have advised the Project go forward as the Property area was too small to support 150 lots. Scott testified that TESI's report should not have used the 300 gallons per day calculation, as that was not the number required under current DNREC regulations. As stated above, however, TESI prepared the report in 2007. Plaintiff submitted into evidence at trial Plaintiff's Exhibit I which corroborated Plaintiff's expert's testimony and his calculations. The DNREC regulation stated that 300 gallons per day was the correct number to use in 2007. Additionally, on cross-examination, Scott admitted that he did not have the actual loading rate for the Project, but instead relied upon an estimated loading rate he calculated based upon past experiences.

Based upon the testimony at trial of each parties' respective expert witnesses, the Court holds that there were no miscalculations in the report. Defendant Stanton's expert witness based his calculations on the *current* "gallons per day" number (not the 2007 number) and used an estimated loading rate. Plaintiff TESI's expert witness used the correct "gallons per day" number for 2007, and their range of loading rates was based upon the preliminary soil studies performed pursuant to the first contract. TESI knew 150 lots were needed for the Project to go forward, and their preliminary calculations supported the feasibility of that number. Based upon these facts, the Court holds that Defendant Stanton has failed to prove that the report contained fraudulent or innocent misrepresentations.

As to the second contract, the Court holds there was no breach of the reasonable standard of care on the part of TESI regarding their failure in providing Defendant Stanton with a copy of the report from the first contract. Defendant Stanton's agent Brian Koyanagi was provided with a copy of the report and was able to review the report at the Project site with TESI. Ray Ebaugh testified that he met with Koyanagi after the report

was completed and reviewed the report on site with him. Ebaugh referred to Koyanagi as Stanton's representative. Defendant Stanton knew the report had been completed because TESI reviewed the report with his agent. Defendant Stanton made the decision not to personally review the report before signing the second contract.

Conclusion

Plaintiff TESI has proven by a preponderance of the evidence the existence of both contracts, that Defendant Stanton breached those contracts by failing to pay TESI for the work performed, and that TESI suffered damages in the amount $19,500.90 as a result of the breach.

Defendant Stanton has failed to prove by a preponderance of the evidence the affirmative defense of misrepresentation as to either contract. As such, the Court rules in favor of Plaintiff Tidewater Environmental Services, Inc. and against Defendant John Stanton in the amount of $19,500.90, plus pre-judgment and post-judgment interest from May 3, 2009 to May 11, 2012 at the rate of 5.5 per annum in the amount of $4218.56 and Court costs in the amount of $875.00.

IT IS SO ORDERED this _____ day of May, 2012.

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The Honorable Rosemary Betts Beauregard