

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

KAISER CONSTRUCTION )  
COMPANY, Inc., )  
Plaintiff, ) C.A. No.: 2006-05-505  
)  
v. )  
)  
SAMI KHAN and NYLA KHAN, )  
Defendants. )

Submitted: September 11, 2007  
Decided: September 27, 2007

Mary Ann Plankinton, Esquire  
MacElree Harvey, Ltd.  
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Kennett Square, PA 19348-3111  
*Attorney for Plaintiff*

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*Attorney for Defendants*

**DECISION AFTER TRIAL**

Kaiser Construction Company, Inc. (hereinafter “Kaiser”) brings this breach of contract action for failure of Defendants, Sami Khan and Nyla Khan (hereinafter “Khans”) to pay an outstanding balance of \$20,666.34 for services rendered under a home improvements contract entered into by the parties on or about June 12, 2003. Kaiser insists that it has substantially performed its obligations under the contract and is entitled to payment. In the alternative, Kaiser seeks recovery on a claim for unjust enrichment. The Khans deny the claim and assert that Kaiser did not perform in a workmanlike manner and maintain that the \$192,183.66 in payments already tendered are sufficient consideration to compensate Kaiser for the work received. Khan also brings a counterclaim for unworkmanlike services and failure to complete the contract.

## FACTS

The facts as testified to by David Leinbach, President of Kaiser Construction, indicate that the Khans entered into a contractual agreement for Plaintiff to renovate and add an extension to their residence at 301 High Ridge Road, Centreville, Delaware. (Joint Exhibit 1) He indicated that the project included replacing shingles, pressure washing exterior masonry, drywalling and painting interior walls and ceilings, adding two walk-out bay windows, placing a laundry room in the former breezeway, and completing several other smaller projects. He further testified that the Khans agreed to pay Kaiser \$212,850.00 upon Kaiser's full completion of the work under the contract.

Leinbach testified that, with exception of a few items on a punch list, Kaiser fully performed their contractual obligations. He stated that Kaiser refused to perform several items on the list because they were not included in the original contract. These items included the kitchen cabinet knobs, installation of the window tops, HVAC register covers, and refinishing of the hardwood steps. According to his testimony, the Khans entered into separate contracts with other parties who were then obligated to complete those items. He further testified that towards the end of the contract period he reviewed the punch list and made several unsuccessful attempts to contact the Khans so he could complete the outstanding matters.

Leinbach further testified that, although hardwood flooring was included in the original contract, the Khans later decided to go "direct" for this item. Kaiser subsequently executed a written change order which reflected this change. Although the stairwell was not specifically identified in that change order, Leinbach testified that an

oral agreement was made between the parties indicating that the stairs were no longer part of the contract.

Leinbach further testified that under the contract terms, Kaiser was responsible for installing the drywall and lighting for the vaulted ceilings in the family room. He indicated that at the beginning of the project the Khans were not sure about the type of lighting. He testified that Kaiser completed the family room drywall with a low level of finish, and the Khans subsequently decided to have tray lighting installed. According to his testimony, the installation of tray lighting requires a high level of drywall finish, because it reflects bumps and seams which would not be evident with low level lighting. He testified that because the Khans made the decision to use tray lighting after the drywall had been completed with a lower level of finish, minor flaws are apparent when the lights are on.

Adam Chrapowicz, Kaiser's foreman for the Khan project, testified the company installed two walk-out bay windows for the living room and dining room. He also testified the Khans informed him that water was leaking from the bay windows onto the floor. He stated he and a co-worker went to the home and observed the floor wet and buckling. However, after thoroughly inspecting the windows and surrounding areas, he could not find a leak. He testified he used a hose and put water on those areas for two hours and was unable to find a leak. Thereafter, he told the Khans to contact him during the next rainfall so he could return to inspect for leaks. However, he did not receive any further communications from the Khans.

Brian Oliver, owner of Blue Hen construction and expert witness for the Khans, testified he reviewed the punch list and visited residence to evaluate the problems.

According to his testimony, his inspection of the home found several of the projects were either incomplete or not done in a workmanlike manner. He testified some of the masonry work was done poorly or incomplete, that the pipes in the new laundry room needed insulation, corrective work was needed on the living room ceiling around the tray lighting, and there were water-damaged walls and floors surrounding the bay windows, which required repair. He further testified that he never reviewed the contract between the parties and was not aware which items on the punch list were Kaiser's responsibility. He provided an itemized estimate of the costs necessary to complete the renovation project, which came to a total of \$14,450.00 but did not include the cost of re-installing the decorative architectural window top. (Joint Exhibit 2).

Defendant Sami Khan testified that he was not satisfied with Kaiser's work performance. According to his testimony, the masonry was inferior, there was a gap in the roof between the addition and the existing structure, and the pipes in the laundry room had no hot water because of the lack of insulation. Regarding the family room ceiling, he further testified that the tray lighting was a part of his original vision for the change and that preparations for the lights, such as electrical work and purchase of the lighting system, were completed far before Kaiser commenced renovations. He testified leaky windows have damaged their furniture. He also testified that Kaiser representatives would not complete any of the indicated items until the outstanding balance was paid. He stated that after he and his wife informed Kaiser of their decision to pay after Kaiser fulfilled all contractual obligations, Kaiser refused to return to complete the work.

## DISCUSSION

To recover on a claim for breach of contract, Plaintiff must establish three elements, 1) the existence of a contract; 2) the breach of an obligation imposed by that contract; and 3) resulting damage to the non-breaching party. *Crowhorn v. Nationwide Mutual Insurance*, 2001 WL 695542 (Del.Super.) The claim brought by Kaiser is based upon an agreement executed by the parties for renovation work done on the Khan's home. The President, Mr. Leinbach, and his employee Mr. Chrapowicz, testified that they completed the work required under the contract until they were prevented from returning to the Khan's residence to complete the items indicated on the punch list. Sami Khan testified that much of the work contracted for was incomplete, he found the quality of the work inferior, and that he refuses to make payment for the work.

There is no dispute that a contract existed between the parties to have work done on Khan's residence. There is some question, however, concerning the extent of the obligation Kaiser owed to the Khans under the contract terms, and the amount of damages suffered by Kaiser. In order to recover damages for breach of contract, plaintiff must demonstrate substantial compliance with all of the provisions of the contract. *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, 251 A.2d 571, 573 (Del.Super. 1969). Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred. *Delaware Limousine Service, Inc. v. Royal Limousine Svc., Inc.*, 1991 Del.Super. LEXIS 130, at \*8 (Del.Super. 1991).

The amount of Kaiser's recovery will turn on whether the items required by Kaiser to be completed jobs were done in a workmanlike manner. The standard for

whether or not work is performed under a contract in a workmanlike manner is “whether they displayed that degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities.” *Shipman v. Hudson*, 1993 WL 54469, at \*3 (Del.Super.). A “builder who has performed work under a construction contract is nevertheless entitled to recovery despite the owner’s dissatisfaction, if the work done is such that a reasonable person would have been satisfied by it.” *Shipman*, 1993 WL 54469, at \*3. Under this rule, the owner’s satisfaction is measured by objective criteria. *Id.*

Plaintiff is entitled to recovery for work performed, but subject to a deduction for portions of the job not completed in a workmanlike manner. With regards to the family room drywall ceiling, leaking bay windows and uninsulated water pipes in the laundry room, the evidence in the record shows Plaintiff’s work on these items fell short of reasonable standards of workmanship. It is not unreasonable for the Khan’s to expect that the drywall would be finished in a manner that any type of light would reflect a surface free of imperfections, or that newly installed windows would be leak-proof, and that pipes located in an uninsulated room would be protected from freezing or adverse weather conditions. Regarding the foyer stairwell, it is evident from the record that Kaiser began stripping the stairs and left them unfinished. Although there was a change order executed for the Defendants to subcontract for second floor flooring, the stairwell is not mentioned in that document. Therefore, there is no basis to believe the stairs were excluded from the original agreement.

Defendant’s expert Brian Oliver’s written estimate indicated that the total amount to have the drywall refinished, refinish the stairs, correct the damage from the leak, and

insulate the pipes would cost \$11,100. I am satisfied by his testimony that this amount is considered reasonable by industrial standards. Therefore, I award defendants on their counterclaim the amount of \$11,100.00 for the cost of the work that Plaintiff failed to complete or rendered in an unworkmanlike manner. Although the Court recognizes Defendants' claim that some furniture was damaged by the leaking windows, however, I award no amount because the damage was not a foreseeable consequence of Plaintiff's acts.

This Court is not inclined to award any amount on the counterclaim for the doors, thresholds, window tops, masonry work and electrical cover plates, because Plaintiff testified these items were completed and could have been done without difficulty if Defendants had permitted Plaintiff entry to the property.

I find that Plaintiff has substantially performed under the contract and is entitled to the balance due subject to an offset for the amounts awarded on the counterclaim.

### **CONCLUSION**

Based on these findings of fact and conclusions of law, I find for Plaintiff in the amount of \$9,566.34, post judgment interest from the date hereof at the legal rate until paid, each party will pay their own cost.

**IT IS SO ORDERED**

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**Alex J. Smalls**  
CHIEF JUDGE