IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JOHN AND PATRICIA GIBBONS,	)	
	)	
Plaintiffs,	)	
v.	)	C.A. No. 2008-02-133
	)	
JOHN WHALEN III, t/a WHALEN CONTRACTING	)	
	)	
	)	
Defendant.	)	

Submitted: May 11, 2009
Decided: August 11, 2009
Amended Order: September 21, 2009

K. William Scott, Esquire, counsel for Plaintiffs.
Dean A. Campbell, Esquire, counsel for Defendant.

AMENDED DECISION

In this breach of contract action the Court is called upon to determine whether Defendant is liable to Plaintiffs (John and Patricia Gibbons) for the faulty construction of a two-story addition at Plaintiffs residence in Lewes, Delaware. Alternatively, the Court is asked to decide whether Plaintiffs breached the contract by failing to tender to Defendant the final payment due. Furthermore, the Court is asked to calculate appropriate damages. The Court conducted a trial and took testimony and evidence on May 6, 2009 and May 11, 2009. This is the Court's decision.

FACTS

The Court makes the following findings of fact after reviewing the testimony and exhibits submitted. On May 7, 2007, Plaintiffs entered into a contract with Defendant, a social acquaintance, in which Defendant was to construct a two-story addition to the Plaintiffs'

residence. Construction of the addition proceeded throughout the ensuing months. However, communication between the parties concerning construction ceased in October of 2007.

During the months of September and October of 2007, Plaintiffs, who apparently were not satisfied with Defendant's work, hired home inspectors to investigate Defendant's construction of the addition and complete home inspection reports. These reports indicated a number of deficiencies in Defendant's construction and identified several violations of the Sussex County Building Code. Plaintiffs did not undertake any repairs and failed to provide Defendant with a copy of any of the inspection reports. Moreover, Plaintiffs did not request that Defendant make any repairs outlined in the reports.

According to the contract, Defendant was to be paid a total of $53,120.00 in three installments. While Plaintiffs remitted to Defendant the first and second payments (a total of $42,496.00) as required under the contract, Plaintiffs failed to make the third and final payment. Additionally, Plaintiffs did not inform Defendant of why they failed to pay. When the final payment was not made, Defendant filed suit on January 15, 2008 against Plaintiffs in the Justice of the Peace Court. Subsequently, Plaintiffs, on February 25, 2008, filed suit in the Court of Common Pleas against Defendant for breach of contract.

DISCUSSION

Breach of Contract

To establish a prima facie case of breach of contract, the Plaintiff must prove three things by a preponderance of the evidence. First, the Plaintiff must show that a contract existed. Second, the Plaintiff must establish that the Defendant breached an obligation imposed by the contract. Finally, the Plaintiff must prove that it suffered damages as a result of the Defendant's breach. *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

There is no dispute that the parties entered into a binding contract for the construction of a two-story addition at Plaintiffs' home in Lewes, Delaware. Thus, the remaining issues before the Court are whether Defendant committed a breach of the contract and, if so, to what extent Plaintiffs are entitled to damages. Likewise, the Court must determine whether Defendant has met its burden of establishing the same elements of its breach of contract counterclaim.

Plaintiffs allege that Defendant failed to construct the addition in accordance with applicable building codes and product manufacturer installation specifications. Delaware law recognizes an implied builder's warranty of good quality and workmanship. *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712, at *3 (citing *Smith*, 287 A.2d at 695). This implied warranty arises by operation of law. *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4. "Where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses the requisite skill to perform such 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." *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908).

In determining whether the contractor's work was performed in a workmanlike manner the standard is whether the party "displayed the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities" in performing the work. *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. Feb. 5, 1993). 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." *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at *3 (Del. Com. Pl. May 9, 2007) (quoting Del. Civ. Pattern Jury Instructions § 19:18 (1998)).

Therefore, if the work done is such that a reasonable person would be satisfied by it, the builder is entitled to recover despite the owner's dissatisfaction. *Shipman*, 1993 WL 54469, at *3.

In the instant case, it is evident that Defendant clearly held itself out as possessing the requisite skill to construct an addition for Plaintiffs' home. As Defendant held itself out to be a competent contractor, the Court finds by a preponderance of the evidence that Defendant's work is covered by the implied warranty of good quality and workmanship. The only issue remaining is whether the implied warranty of good quality and workmanship was breached by Defendant.

Plaintiffs' expert, Steve Szypulski, owner of American Home Inspection Technologies, LLC, testified to twenty (20) deficiencies in Defendant's construction of the addition at Plaintiffs' home. Of those twenty (20) violations, nine (9) are violations of the Sussex County Building Code. Defendant's expert, Ron Hamblin, agreed in his report with eleven (11) of those twenty (20) deficiencies (being Items 3, 6, 7, 8, 9, 12, 13, 14, 15, 17, and 20).[1] The experts did not agree on nine (9) of the deficiencies identified in Mr. Szypulski's report (being Items 1, 2, 4, 5, 10, 11, 16, 18, and 19).[2] Despite the disagreement on which items are deficient, Mr. Szypulski testified that Defendant failed to complete the construction in a workmanlike manner as the construction indicated that the individuals who performed the work did not demonstrate a familiarity with the products, the requirements necessary to install the products, or the applicable Codes. However, Mr. Hamblin testified that the construction was completed in a workmanlike manner and that it would be next to impossible to construct a home to Mr. Szypulski's specifications. While John Whalen, III, owner of Whalen Contracting, also testified that the addition was constructed in a workmanlike manner, the Court gives his opinion on this issue little weight as his familiarity with the applicable building codes was called into question given his disagreement with his own expert, both experts, and, on occasion, the Code.

While the contract provides that the work was to be "completed in a substantial workmanlike manner," even if the Court were to find any one of the alleged deficiencies to constitute breach, Plaintiffs have failed to introduce any credible evidence as to the value of damages. *See Gunzl v. Veltre*, 2008 WL 5160137, at *4 (Del. Com. Pl. May 22, 2008) (providing that the plaintiff "has a responsibility of proving damages as an essential element of his [or her] claim by a preponderance of the evidence").

The Court heard conflicting testimony from the parties' expert witnesses regarding costs to rectify the deficiencies in Defendant's construction. Plaintiffs' proof of damages centers on the testimony of Stephen Myers, who testified regarding the cost of repairs. However, the Court does not find Mr. Myers testimony as to damages to be credible. While Mr. Myers testified that he does residential work in the coastal areas of Delaware, New Jersey, and Pennsylvania, he admitted that he does not hold a license in either State. Mr. Myers further testified that he is not knowledgeable of Sussex County building practices. This is evident in the fact that the second two pages of Mr. Myers report were completed after Mr. Myers read Mr. Szypulski's report. This is important because Mr. Myers states, in his report, that he "realized it was necessary [for him] to add to [his own] report [after reading Mr. Szypulski's report and] to include items that [he] overlooked *mainly concerning code requirements*." (emphasis added). Mr. Myers unfamiliarity with Sussex County building practices is also evident in his use of $50.00 per hour for labor, which is more than double what John Whalen, IV is now paid per hour as a carpenter in Sussex County.

Additionally, Mr. Myers requests $57,777.50 to reconstruct Plaintiffs addition. However, the agreed upon contract price between Plaintiffs and Defendant for the complete addition was $53,120.00 plus plan review and permit fees. While Mr. Myers testified that his repair costs

were done using an online cost estimator, with cost based on time and material, when asked to clarify how his estimates were arrived at, Mr. Myers could not clearly substantiate them. For instance, Mr. Myers did not provide the Court with how he reached the costs for landscaping, which is not included in the original contract, or grading. Moreover, while Mr. Hamblin provides individual repair costs for each item, Mr. Myers groups the repair costs for multiple items together (i.e. flashing, sliding doors, sidelights, siding, and base molding), making it impossible for the Court to conclude whether the repair costs provided for each item are reasonable. Furthermore, Mr. Myers testified that he would raise the floor joist four (4) inches to repair Item 2 (elevation problem between home and addition). However, Defendant's testimony, which was not refuted, provides that raising the floor four inches would not be possible because Mr. Myers would not be able to install headers over the sliding glass doors on the first floor. Mr. Myers report also provides that raising the floor would not only result in a ceiling that is four inches lower, but that this might create aesthetic or Code problems as well. It appears that the repair work Mr. Myers suggests would create more problems.

Overall, Mr. Myers did not provide the Court with any credible testimony as to the amount of time, number of workers, or materials he would need to complete the repairs claimed to be required. Additionally, Mr. Myers did not and could not indicate the amount of money he believed he could save by utilizing existing materials or how this affected his overall repair cost. Furthermore, despite his testimony to the contrary, Mr. Myers report indicates that he was re-doing work two and three times (i.e. removing siding and decking several times).

While Mr. Szypulski testified that he reviewed the costs as detailed by Mr. Myers and found them to be reasonable and customary, Mr. Szypulski also testified that some of the valuations provided by Mr. Hamblin were customary and reasonable. However, it is logically

impossible for Mr. Szypulski to conclude that the estimates provided by both experts are correct on items where the experts disagree. For instance, Mr. Hamblin testified that the cost to remove and reinstall the crawl space insulation is $300.00 while Mr. Szypulski testified that this price is reasonable and customary. However, Mr. Myers charges $1,000.00 because he plans to use encapsulated fiberglass insulation, which is not only beyond what the contract and the Code requires, but, once again, illustrates Mr. Myers unfamiliarity with the Code. Additionally, Defendant introduced evidence illustrating that $720.00 was paid for the installation of a torch down roof. However, Mr. Myers charges $5,000.00 to install a new rubber roof and give the roof a pitch despite Mr. Hamblin's testimony that the roof has a pitch. Based on the foregoing, the Court concludes that the damages asserted by Plaintiffs are unreliable, unrealistic, and clearly include undue expenses. With the provided repair cost, Plaintiffs are attempting to demolish the addition and begin anew.

Not only have Plaintiffs failed to prove the value of damages, they have also failed to prove that they have mitigated their damages in any way. Case law provides that "a party has a duty to mitigate damages once a material breach of contract occurs." *Veltre*, 2008 WL at *4. *See also Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at *5 (Del. Com. Pl. Mar. 9, 2007) (citing *Lowe v. Bennett*, 1994 WL 750378, at *4 (Del. Super. Ct. Dec. 29, 1994)). "The mitigation of damages doctrine requires the plaintiff to take reasonable steps to minimize the consequences flowing from the breach." *Veltre*, 2008 WL at *4 (citing *In Re Wilson v. Pepper*, 1995 WL 562235 (Del. Super. Ct. Aug. 21, 1995)).

In the case at bar, once Plaintiffs had complaints about the construction, they kept those complaints to themselves and hired a variety of home inspectors. On September 17, 2007, Plaintiffs had the sliding glass doors inspected by K.C. and Company, Incorporated. On October

15, 2007, Bay Country Building Specs did a home inspection and prepared a report. On October 31, 2007, Mr. Myers completed a home inspection and prepared the first four pages of his November 15, 2007 report. Mr. Szypulski performed an on-site (non-invasive) home inspection on November 20, 2008, and also produced a report. Mr. Myers then updated his initial report with the last two pages after December 2, 2008. Despite the numerous inspection reports completed, Plaintiffs never shared the reports with Defendant or notified Defendant of the alleged deficiencies. In fact, even after Plaintiffs received Defendant's November 30, 2007 letter trying to collect the last payment, Plaintiffs never informed Defendant of the inspection reports that were completed, did not inform Defendant of their dissatisfaction with Defendant's work, and did not communicate to Defendant why they were not paying the final draw. Instead, Plaintiffs hired an attorney and sued Defendant after Defendant sued Plaintiffs for failure to pay the final payment.

The inspection reports introduced at trial list a number of problems with Plaintiffs addition. The November 15, 2007 report prepared by Mr. Myers lists a number of problems, however, Plaintiffs failed to attempt any repairs for these problems. In fact, Mr. Hamblin provided that none of the items had been repaired when he did his inspection on December 1, 2008. Despite all the inspection reports completed, Plaintiffs did nothing to mitigate damages and failed to provide Defendant the opportunity to complete any repairs. As a result, the Court concludes that Plaintiffs obligation to mitigate damages by providing notice and an opportunity to cure defects has not been met. For the foregoing reasons, Plaintiffs claim for breach of contract must fail.[3]

Counterclaim

Defendant counterclaims that Plaintiffs breached the contract by failing to pay the final payment even though the addition is substantially complete. "The general rule is that construction is substantially complete when the builder finishes all the essentials necessary for the full accomplishment of the purpose for which the building has been constructed." *Wilmington Parking Authority v. Becket,* 1993 WL 331072, at *2 (Del. Super. Ct. Apr. 26, 1993).

The facts of this case indicate that Plaintiffs have been using the addition as of August of 2007. Additionally, both experts testified that the addition was substantially complete. In fact, Mr. Szypulski stated that "[i]n the concept that it is possible to utilize the space for the intent of the space's construction, I would say yes," the addition is substantially complete. Moreover, the parties agree that a punch list was created and the experts agree that the last event to occur in a normal construction job is the preparation of a punch list so that minor defects can be corrected. In fact, Mrs. Gibbons testified that Defendant completed most of the punch list items. Despite the foregoing, Plaintiffs and Mr. Szypulski contend that the addition is not substantially complete due to significant building code violations and defects in construction. However, the Court cannot ignore the fact that many of the issues complained of by Plaintiff have already passed inspection by Sussex County inspectors. As such, the Court concludes that Defendant has substantially completed the construction. Therefore, Defendant's counterclaim for breach of contract prevails and Defendant is entitled to the final payment of $9,344.92.

Interest, Court Costs and Expert's Fees

This Court awards post-judgment interest at the legal rate to the Defendant. Additionally, Defendant is awarded costs of $66.00 pursuant to CPP Civil Rule 54(d).

In the present case, Defendant affirmatively requested pre-judgment interest in its Counterclaim against Plaintiffs. On October 18, 2007, Defendant mailed an invoice to Plaintiffs demanding payment of the balance left outstanding on their account. As a result, pre-judgment interest accrued from that date, because Defendant made demand on the Plaintiff for payment of the balance owed. Accordingly, the Court awards Defendant pre-judgment interest at the legal rate calculated from October 18, 2007, totaling $940.80.

CCP Civil Rule 54(h) provides that fees for expert witnesses may be included as costs in the discretion of this Court. Generally, the prevailing party may only recover expert witness fees associated with testifying, waiting to testify, and reasonable travel expenses. *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007). Expert witness fees should be "limited to time necessarily spent in attendance upon the court for the purpose of testifying." *Stevenson v. Henning*, 268 A.2d 872, 874-875 (Del. Supr. 1970). "This does not include time spent listening to other witnesses for 'orientation', or in consulting and advising with a party or counsel or other witnesses during the trial." *Id*. Ultimately, determining the award of expert fees is a matter left to the trial court's discretion. *Taveras v. Mesa*, 2008 WL 5244880, at *1 (Del. Super. Dec. 15, 2008) (citing *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).

The Defendant produced Mr. Hamblin as an expert witness at trial and now seeks reimbursement for fees in the amount of $6,000 for his services. Defendant produced three invoices from Hamblin & Associates, Inc. that itemizes the number of hours that Mr. Hamblin allocated to this case. The invoices dated January 26, 2009 and February 27, 2009 indicates the hours Mr. Hamblin spent reviewing documents in preparation for trial, traveling to visit sites, and making telephone calls to Defendant's attorney. It follows that Defendant is not entitled to

reimbursement for Mr. Hamblin's fees listed in these invoices, because the expert expenses were incurred for matters related to Mr. Hamblin preparing for trial and not for his attendance upon the court for the purpose of testifying.

The Hamblin & Associates, Inc. invoice dated May 15, 2009 lists nine and one half (9.5) hours for time spent attending court on May 6, 2009 and eight (8) hours on May 11, 2009. A review of trial records shows that Mr. Hamblin did not testify the first day of trial on May 6, 2009, but was present in the courtroom. Defense counsel was aware of the order that witnesses were likely to be presented to the Court and should have anticipated that trial testimony would extend past the first day. Nevertheless, Mr. Hamblin attended the entire first day of trial despite a high likelihood that he would not testify. Although the Defendant may owe Mr. Hamblin for services rendered at the full rate, the Plaintiff is not responsible for expert fees not necessarily spent in attendance upon the court for the purpose of testifying. Accordingly, this Court finds Defendant is entitled to reimbursement of expert witness fees in the amount of $712.50 for nine and one half hours (9.5) at the reduced rate of $75.00 per hour.

On the second day of trial, Mr. Hamblin took the stand as a Defense witness and again as a rebuttal witness. Although Mr. Hamblin was the final witness for the defense, his attendance upon this Court on May 11, 2009 was necessary for the purpose of testifying. Therefore, this Court awards expert witness fees to the Defendant in the amount of $1,200 for eight (8) hours at the expert's rate of $150.00 per hour. Thus, expert fees are granted and assessed as costs in the amount of $1,912.50.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs have failed to prove its claim by a preponderance of the evidence. Therefore, on Plaintiffs claim for breach of contract, judgment

is entered in favor of Defendant. As to Defendant's counterclaim, judgment is entered in favor of Defendant and against Plaintiffs in the amount of $9,344.92, plus post-judgment interest, plus costs of $66.00. Pre-judgment interest is granted and assessed as costs from October 18, 2007 in the amount of $940.80. Expert witness fees are granted in the amount of $1,912.50 as stated above.

IT IS SO ORDERED, this _____ day of September, 2009.

_____

The Honorable Rosemary Betts Beauregard

[1] As to Item 3, both parties agree that the foundation vents are deficient and need to be corrected.

As to Item 6, both experts and Stephen Myers, who testified on behalf of Plaintiffs regarding the cost of the repairs, agree that the crawl space needs to be excavated as some areas are not in compliance with the required clearance from the crawl space floor to the underside of the non-decay resistant wood floor frame. However, John Whalen, III, testified that he is in compliance with the Code, but acknowledged that there may be areas in the crawl space that do not meet the requirement.

As to Item 7, both experts and Mr. Myers agree that the insulation installed in the crawl space was put in backwards and needs to be removed, reversed, and reinstalled. However, Mr. Whalen, III testified that he would install the insulation the same way as the experts as well as the Code are incorrect.

As to Item 8, the parties agree that the staircase outside the addition was not required by the contract and is not included in the drawings and specifications. However, all parties also agree that the stair carriages are deficient and should be modified to meet the manufacturer's specifications.

As to Item 9, both experts agree that head flashing is required above the two sidelights.

As to Items 12-15, both experts, Mr. Gibbons and Mr. Whalen, III agree that the installation of the siding is deficient and that undersill utility clamp trims need to be installed.

As to Item 17, both parties agree that the base molding is incomplete. However, Mr. Whalen, III testified that there were delays in putting in the molding because Mr. Gibbons wanted a specific type of molding (a crown/ceiling molding) to be used instead of a base molding. Mr. Whalen, III further testified, and Mr. Gibbons confirmed, that Mr. Gibbons asked Defendant not to install one part of the baseboard to enable Mr. Gibbons to run speaker wires behind the molding.

As to Item 20, both experts agree that a smoke detector needs to be installed. However, at trial Mr. Hamblin reversed his opinion and testified that because none of the rooms are bedrooms or adjacent to a bedroom, a smoke detector is not required. While Brian Cini, who did the electrical work on the addition to Plaintiffs home, agreed with Mr. Hamblin, he did not dispute that the Code could require smoke detectors in rooms that are not bedrooms.

[2] As to Item 1, all parties agree that grading is not part of the contract. However, Mr. Szypulski explained and Mr. Hamblin as well as Mr. Whalen, III acknowledged that Sussex County does not have a rehabilitation code, but, instead, requires that grading comply with all current codes. Thus, the parties have agreed the Code requires grading

whenever a new portion of a home is constructed, whether the contract provides for grading or not. *See* R. 102.7.1 of the Code (providing that "[a]dditions, alterations or repairs to any structure shall conform to that required for new construction without requiring the existing structure to comply with all requirements of this Code unless otherwise stated)." Therefore, despite testimony regarding the problems that will arise with raising the exterior grade to meet the Code (e.g. the inability to maintain eight inches of clearance between the grading and the siding and the fact that Plaintiffs sprinkler system would be affected), the parties have agreed that the grading is deficient.

As to Item 2, all parties agree that: (1) there is a significant elevation change of floor level from the existing house to the addition, and (2) the plans do not indicate that an elevation change is to exist. However, Mr. Whalen, III testified that the plans were not meant to show any elevation change and that Mr. Gibbons was aware of the fact that he would have to step up and down between the house and the addition prior to the plans being drawn up. While the Court disagrees with Mr. Hamblin's conclusion that Plaintiffs issuance of the second payment constituted a blanket acceptance of the work in progress, especially when the payment was made prior to the County's inspection of the framing, the Court concludes that Plaintiffs failed to prove their dissatisfaction with the height change given their installation of a floor covering around this design. *See Gunzl v. Veltre*, 2008 WL 5160137 (Del. Com. Pl. May 22, 2008) (where plaintiff allowed tile and carpet to be laid on the uneven surfaces of the basement floor and constructed an entire living space on the floor complete with electric and new interior walls, plaintiff has failed to mitigate damages and is deemed to have accepted the work).

As to Item 4, Mr. Szypulski testified that the through wall access opening to the crawl space is located under a door to the residence which is prohibited by the Code. However, Mr. Whalen, III testified that the sliding glass doors were never intended to open, which makes them windows. As a result, Mr. Hamblin provided that the sliding glass door over the crawl space access should be rendered inoperable, and, as such the Code would not then apply. Notwithstanding the foregoing, Mr. Gibbons testified that Defendant was specifically told the direction in which Plaintiffs wanted the sliding doors on the first floor to open. Despite this testimony, the Court concludes that it does not provide any insight as to whether Plaintiffs intended the slider over the crawl space access to be used as a door or whether any of the doors were to be used as windows.

As to Item 5, Mr. Szypulski testified that the crawl space does not have an areaway of not less than 16" by 24." While Mr. Hamblin ignores the Code requirement in his report by simply noting that the crawl space is accessible, at trial, he relied on exhibits to show that the crawl space had a 16" by 36" semi-circle areaway. As the parties agree that the areaway need not be rectangular in shape, the Court concludes that the areaway is accessible.

As to Item 10, Mr. Szypulski testified that the sliding glass doors at the first and second floors of the addition need flashing. However, Mr. Hamblin testified that head flashing is not required on the doors because Mr. Whalen, IV used tyvek tape as flashing. While Mr. Szypulski testified that the manufacturer of tyvek tape does not permit its use as flashing, there was no documentation to support this testimony.

Mr. Szypulski further testified that all of the sliding glass doors are not installed properly as they are not installed to be level, plumb, square, and true and have no shims installed at the jambs to stabilize the doors level, plumb, square, and true. However, Mr. Hamblin testified that he used a Smart Level and found that the doors were level and installed correctly, but require adjusting.

As to Item 11, all parties agree that the sidelights are not installed properly as they are supposed to be placed even on the floor with the sliding glass doors. Mr. Whalen, III testified that issues with electrical wiring inside the wall made it difficult to place the sidelights where Plaintiffs wanted them and, as a result, the parties agreed to install the sidelights at their present height. While Mr. Whalen, III contends that the sidelights are level, Mr. Gibbons asserts that they are not and contends that he did not agree to the installation of the sidelights at different heights. While the Court did not receive concrete testimony from Mr. Cini that the wires affected the height of the sidelights, as he did not recall this information, the Court concludes that Plaintiffs failed to complain about this problem after the sidelights were framed.

Mr. Szypulski further testified that the sidelights have no flashings and Mr. Hamblin agreed (addressing this issue in Item 9 and stating that head flashing is required above the two sidelights).

As to Item 16, Mr. Szypulski testified that the vinyl railing does not comply with the contract or the product manufacturer's installation specifications. The contract provides that the railing is to be installed using a "timber

tech floor system [with] 4x4 treated posts wrapped in vinyl sleeves [and] white vinyl rail system . . .." However, pictures show and Mr. Whalen, IV testified that he used lag-bolted metal posts instead of the 4x4 wood posts, without discussing it with Plaintiffs, because there was not enough room to put the 4x4 wood posts in stable. When the railing failed by becoming loose and swinging out (the parties disagree on whether the railing and deck were complete at the time of this incident), Mr. Whalen, III repaired the problem by putting additional screws in the mounting brackets to stabilize the posts. Mr. Szypulski testified that this is inappropriate because the metal post is specifically intended to be used on concrete decks only with concrete anchors and a base plate that makes it stable. While Mr. Hamblin and Mr. Whalen, IV agree that the metal posts that were used are typically installed in concrete, both provided that nothing prohibits using the metal posts in other places. In fact, both Mr. Hamblin and Mr. Whalen, III testified that the metal posts are an improvement over the 4x4 wood posts which would deteriorate over time. Despite the testimony on this issue, the Court concludes that neither party provided documentation to prove that the metal posts are safe or unsafe to use in a wooden deck.

As to Item 18, Mr. Hamblin and Mr. Whalen, III testified that the jamb extensions on the block window in the sunroom addition were installed in a workmanlike manner. However, Mr. Szypulski testified that the dimensions of the jamb extensions do not match the dimensions of the existing window to which they attach, and, as a result, are not installed in a workmanlike manner. The Court concludes that Mr. Hamblin's mere conclusion that this work was done properly fails to address the issue.

As to Item 19, all parties agree that there is no heating supply source provided for in the contract. However, the parties disagree on whether the Code requires that all habitable living space, regardless of how the space is used, have heat installed. The Court concludes that R. 303.8 of the Code requires that heat be installed.

[3] The Court notes that Plaintiffs testified about several other problems. To begin, Plaintiffs claim that Defendant breached the contract by failing to complete the construction in six weeks has no merit as there is no provision in the contract providing that time was of the essence and the parties did not engage in a course of dealing that implied that time was of the essence. *See Silver Properties, LLC v. Ernest E. Megee, L.P.*, 2000 WL 567870, at*2 (Del. Ch. Apr. 27, 2000) (providing that the contract must either provide specific language that "time was of the essence," or the course of dealing between the parties must imply that time was of the essence). Furthermore, the Court finds that Plaintiffs interference with the contract caused significant delays as Mr. Whalen, III testified that: (1) Plaintiffs request to postpone siding after rotten wood was found delayed the completion of the project by about a week; (2) installation of the sliding glass doors on the first floor as requested caused a delay of about a week; and (3) installation of the molding was delayed due to Plaintiffs request to use a specific type of molding. Second, Mr. Gibbons testified that one piece of timber-tech material used to build the upstairs deck was defective and had to be removed, but that this problem was fixed. Mr. Gibbons also testified that screws in the deck were sticking up, but that this problem was fixed as well. Third, Mr. Gibbons testified that the shingles did not match the existing roof color. However, Plaintiffs failed to produce any evidence to support this allegation. Fourth, Mr. Gibbons testified that the shingles were delivered loose (not packaged). However, the exhibits establish that the shingles were delivered by a boom truck and placed up on Plaintiffs roof. Fifth, Mr. Gibbons testified that the property was supposed to be cleaned every Friday, but this was only done twice. However, while the contract provides that "all debris [is] to be removed by builder at builders expense," there is no language that debris would be removed every Friday. Finally, Mr. Gibbons testified that rain poured through the sliding glass doors after they were installed. However, Mr. Gibbons acknowledged that the home was still under construction at that time. The Court concludes that Plaintiffs' arguments have no merit as the problems were fixed, or Plaintiffs failed to prove the allegation, or Plaintiffs failed to prove that the contract required the work.