

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DAWN D. GEMMILL,)	C.A. No. CPU5-09-000303
)	
Plaintiff Below, Appellant,)	
)	
v.)	
)	
JAMES MCMILLION & SON,)	
)	
Defendant Below, Appellee.)	

DECISION AFTER TRIAL

Date of Trial: August 19, 2009

Date Decided: September 21, 2009

Judgment for Plaintiff.

Dawn D. Gemmill, 2456 Williamsville Road, Houston, DE 19954, Pro Se, Plaintiff Below, Appellant.

James McMillion, 4175 Gun and Rod Club Road, Houston, DE 19954, Pro Se, Defendant Below, Appellee.

Reigle, J.

In this civil appeal from the Justice of the Peace Court, this Court finds that the Plaintiff, Dawn D. Gemmill, is entitled to recover \$1,979.37 from the Defendant, James McMillion & Son.

I. PROCEDURAL POSTURE

On January 20, 2009, a decision was rendered by the Justice of the Peace Court. The plaintiff below, Dawn D. Gemmill, filed a timely notice of the appeal on February 3, 2009. The defendant below, James McMillion & Son, filed a timely answer and a counterclaim. Appeals to the Court of Common Pleas from the Justice of the Peace Court are by *trial de novo*. 10 Del. C. §9571(c). A pre-trial conference was held on July 22, 2009 and a trial was held on August 19, 2009. On the date of trial, Ms. Gemmill appeared for herself. Mr. McMillion, who traded as James McMillion & Son, a sole proprietorship, appeared for himself. Mr. McMillion's counterclaim was dismissed by the Court, pursuant to Court of Common Pleas Civil Rule 72.3(c), because it was not an issue that was raised in the court below.

II. THE FACTS

At trial, Ms. Gemmill and Mr. McMillion both testified to the origin of two written contracts and an oral contract.

On May 2, 2007, the parties entered into the first written contract. It was an agreement for Mr. McMillion to remove the aluminum siding from Ms. Gemmill's home and replace it with foam board and vinyl siding and also to trim and paint the window frames. The total cost for labor and supplies was \$2,816.84. Both parties signed the

contract. Ms. Gemmill gave Mr. McMillion \$2,000 as a down payment and he gave her a receipt. (Plaintiff's Ex. 1 and Defendant's Ex. 6).

On May 3, 2007, Mr. McMillion started work and tore off the old siding on the house. He testified that he took the material to be recycled and kept the funds as was agreed to under the contract.

On May 4, 2007, a second contract was formed when Ms. Gemmill advised Mr. McMillion that she also wanted her garage sided. The contract was for the removal of the old siding and replacement with foam board and new siding. The total cost for labor and supplies was \$609.59. Ms. Gemmill paid Mr. McMillion \$409.56 as a down payment and he gave her a receipt. (Defendant's Ex. 5 and 6).

Problems began almost immediately with the project. Mr. McMillion was injured in a fishing accident that required hospitalization and surgery. He was unable to work for several weeks. When he returned to work, his work was sporadic. Ms. Gemmill testified that she often worked nights and slept during the day. She had agreed with Mr. McMillion that he would have to work odd hours to accommodate her schedule, or advise her when he would work, so that she would plan to be away from the home to allow him to work during the day without disturbing her sleep. Testimony by both parties indicated that Mr. McMillion would work a few days during the week and Saturdays and that initially there was no problem with either party with this arrangement.

In July of 2007, Mr. McMillion, who also runs a cleaning service with his wife, was seldom able to work on Ms. Gemmill's home because he had a contract to clean the Delaware State Fair Grounds. Ms. Gemmill testified that she understood this prior commitment; however she was frustrated after the fair ended and the work failed to

increase. She testified that Mr. McMillion's work was infrequent and little was being accomplished on her home. He would only show up for an hour or two at a time, make excuses for arriving late or leaving early, or fail to show up after Ms. Gemmill made plans to sleep at another location, which was generally inconvenient to her. While Mr. McMillion quibbled with details of Ms. Gemmill's testimony, he did agree that his work was inconsistent due to other events and projects. He repeatedly asserted, however, that he had done a significant amount of work on Ms. Gemmill's house for which he believed that he deserved to be compensated.

Both parties agreed that in September of 2007, Mr. McMillion told Ms. Gemmill that he needed more siding than he had originally estimated. Ms. Gemmill paid Mr. McMillion an additional \$241.00 for siding supplies and he gave her a receipt. (Defendant's Ex. 6).

Between the fall of 2007 and the winter of 2008, Mr. McMillion continued to work sporadically until the weather became too cold and work ceased altogether.

By the spring of 2008, Ms. Gemmill was frustrated by the incompleteness of the house and the lack of any work on the garage. She testified that she tried repeatedly, without success, to call Mr. McMillion and that she left messages that he bring her all the supplies for which she had paid so that she could hire another contractor to complete the project. Mr. McMillion disputed, in his testimony, that he was difficult to reach or that he purposefully avoided Ms. Gemmill. He testified that he was unable to return the supplies to Ms. Gemmill because his truck and all of Ms. Gemmill's supplies were stolen from his driveway in January of 2008. The Court concludes that, at some point in the spring of 2008, Mr. McMillion abandoned the project.

Ms. Gemmill hired another contractor, Mr. Hastings, to finish the work on the house. Ms. Gemmill and the new contractor both testified that they agreed that, rather than form a contract, she would reimburse him for his purchase of supplies outright and that he would bill her for labor. Both testified that the cost for the labor was \$1,350.00 to complete the siding project on the house. The contractor also charged Ms. Gemmill to paint a small shed and install a front door, but these items were billed separately. The contractor did not do any work on the garage. Ms. Gemmill paid for the supplies to complete the project in the amount of \$795.62. (Plaintiff's Ex. 7). The total cost for Mr. Hastings to complete the work left undone by Mr. McMillion was \$2,145.62 for labor and supplies. Mr. Hastings testified that these amounts were only to finish the work left undone by Mr. McMillion. He testified that Mr. McMillion only partially completed three sides of the house and those three sides lacked finish work such as trim pieces.

Both Ms. Gemmill and Mr. McMillion presented photographic evidence of the house during the course of renovation. Mr. Mitchell, the Plaintiff's father, also testified regarding the photographs. This evidence was confusing to the Court. Ms. Gemmill only provided some photographs prior to the completion of the project by the second contractor and there were insufficient dates given in conjunction with the photographs.

In his defense, Mr. McMillion testified that he completed three sides of the house with only small details on the front of the house outstanding. Additionally, he testified that he removed all the aluminum siding on the back of the house and began attaching foam board to that part of the house. He agreed that he had received money for sale of the aluminum scrap siding that he removed from the house, but testified that he never advised Ms. Gemmill that she would receive a set-off. He agreed the garage was never

done and also that an additional coat of paint on the trim was not done. He also agreed that he never returned the supplies to Ms. Gemmill due to their theft while in his truck. He also agreed that the house was not fully completed by the spring of 2008, when Ms. Gemmill advised him that she wanted to hire another contractor. He argued, however, that he completed most of three sides of the house and that Mr. Hastings exaggerated the amount of work and cost that it took him to finish the job. He also argued repeatedly that he should be paid a fair value for his work, even if his circumstances had changed and caused him to be unable to complete his job under his contract. He also testified that he had many out-of-pocket expenses from Ms. Gemmill's project. (Defendant's Ex. 8). In addition, he testified that he had installed a soffit around the house between the roof and the sides of the house. He produced receipts for soffit materials. Ms. Gemmill disputed that those receipts were used for her specific job, but did not dispute that Mr. McMillion installed soffits. It appears from the photographs that there are soffits on the house. Mr. McMillion testified that this was part of a vinyl siding job, but it was not specifically itemized on either Proposal.

Mrs. McMillion, the wife of the contractor, testified that photographs introduced by Mr. McMillion (Defendant's Ex. 7) were taken after he completed his work, but was unable to give a date. Mr. McMillion testified that the correct date of the photographs was November 2, 2007. Ms. Gemmill disputed the date given for the photographs and testified that they must have been taken after Mr. Hastings completed his work, while she was not at home. Some of the photographs were taken at a distance, which made it difficult to tell the details of the work or to see more than one side at a time.

III. CONCLUSIONS OF LAW

A. Contract for Siding of Garage

There is no dispute as to the issue regarding the garage. Ms. Gemmill entered into a contract to pay \$609.59 to have her garage siding replaced under the first contract with Mr. McMillion. She paid him \$409.59. Mr. McMillion completely breached the contract by not performing the job. He admits in his answer that Ms. Gemmill is owed a refund in the amount of \$409.59.

B. Additional Siding Supplies

There is no dispute as to the issue regarding the additional siding. Ms. Gemmill paid \$241.00 for additional siding that was not included as part of either contract. Both sides agree that the siding was not placed on the house. Mr. McMillion admits in his answer that Ms. Gemmill is entitled to a refund of her \$241.00.

C. Contract for Siding of House

1. *Breach of Contract*

There is a dispute on the contract for the siding on the house and the appropriate remedy. Ms. Gemmill, in her complaint, claimed \$2,650.59 and costs, but admitted that she did not know how to calculate her damages. Mr. McMillion also was unable to articulate an appropriate amount of damages. He admits that he did not finish the job, but asserts that he has a defense of intervening circumstances and that he should be paid fairly for the work that he completed.

In a civil contractual dispute, the burden of proof is on the plaintiff to prove her damages by a preponderance of the evidence. *Interim Healthcare, Inc. v. Spherion*

Corp., 884 A.2d 513, 545 (Del. Super. Ct. 2005). “To state a claim for breach of contract the Plaintiff must establish three elements. First, [the Plaintiff] must prove that a contract existed. Second, [the Plaintiff] must establish that the Defendant breached an obligation imposed by the contract. Finally, the Plaintiff must show that the breach resulted in damage to the Plaintiff.” *Wilkinson Constr. v. Brice Builders*, 2005 WL 958131, at *1 (Del. Com. Pl.) citing *VLIW Tech., LLC v. Hewlett-Packard Co. Stmicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).

In this case, the Court is convinced that the Plaintiff has met this burden of proof for all three elements. First, there was a written contract. Second, it was established that the Defendant breached an obligation imposed by the contract by failing to complete it as Mr. McMillion testified that he failed to complete the contract.

2. Defense Presented

Mr. McMillion presented a defense that he should be excused from performance under the contract due to the theft of the supplies needed for the project.

Under the Restatement (Second) of Contracts § 263, the rule is:

If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

Since Mr. McMillion could have easily replaced the standard construction materials that were stolen from his truck, it is not a defense to his performance of his duty under the contract that they were stolen. The Court holds that the theft of the supplies is not a defense to his failure to perform under the contract and that he still had a duty to perform his end of the contract by completing his work on Ms. Gemmill’s house.

3. *Remedy*

It appeared from the testimony during trial that the parties began with a good working relationship. Ms. Gemmill understood that Mr. McMillion had given her a good price on the contract in exchange for his flexibility of time on the project. Mr. McMillion also appears to have factored into the cost of the project the probability that he would receive additional income from the scrap metal that he removed from the house. The parties were able to modify the agreement due to circumstances initially but eventually the contract was breached. The problem is that when matters go awry, everyone is bound by the original contract and the remedies that the law provides. When Mr. McMillion failed to complete the project, he breached the contract and risked that another contractor would charge more money than he had stated in the contract.

This Court finds by a preponderance of the evidence that Mr. McMillion breached his contract with Ms. Gemmill by failing to complete the project. It was reasonable for Ms. Gemmill to deem the contract breached and to hire a second contractor to finish the job.

“The standard remedy for breach of contract is based upon the reasonable expectations of the parties.” *Wilkinson* *2 citing *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). *See also* The Restatement (Second) of Contracts § 347.

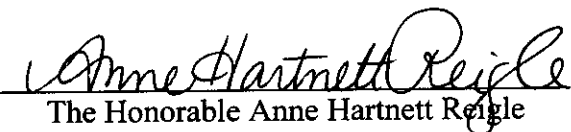
As a remedy for the breach, Ms. Gemmill is entitled to her expectation damages under the contract. This is the amount of money that she paid over the amount of the contract to side the house. I find the testimony of Mr. Hastings to be credible as to his supplies and labor.

Ms. Gemmill's total expectation for the contract with Mr. McMillion to have the house sided was a flat fee of \$2,816.84. She paid \$2,000.00 to Mr. McMillion. She paid an additional \$2,145.62, to finish the job with a second contractor. Thus, Gemmill paid a total of \$4,145.62 to have the house sided and her expectation damages are the difference between her original expected contract price in the amount of \$2,816.84 and the amount she ultimately paid for the project in the amount of \$4,145.62. That amount is \$1,328.78 and she is entitled to that amount as damages from Mr. McMillion.

IV. DECISION OF THE COURT

Ms. Gemmill is entitled to a \$409.59 refund for the garage, a \$241.00 refund for the supplies and \$1,328.78 on the breach of contract for the siding on the house. The total amount awarded to Ms. Gemmill is \$1,979.37, with interest at the legal rate of 5.5% from the date of judgment, plus court costs.

IT IS SO ORDERED, this 21st day of September, 2009.


The Honorable Anne Hartnett Reigle