

December 10, 2009

William B. Wilgus, Esq.  
28537 Dupont Boulevard  
Millsboro, DE 19966

Richard E. Berl, Jr. Esq.  
406 South Bedford St.  
P.O. Box 588  
Georgetown, DE 19947

RE: ***Jerry Smith t/a Affordable Construction Enterprises v. Frank Marshall  
Case No: U607-12-120; Decision After Trial***

Dear Counsel:

Trial was held in this breach of construction contract matter on November 18, 2009. Counsel for the parties requested the Court reserve decision rather than rule from the bench after a recess for deliberation, since counsel had other matters to attend. This is the Court's letter decision, in which it finds for the Plaintiff in the amount of \$9,256.06, plus reasonable attorneys' fees in the amount of \$4,000.00.

The Court makes the following findings of fact and conclusions after reviewing the testimony and exhibits submitted. On April 27, 2007, Defendant Marshall signed a contract with Plaintiff Smith to have Plaintiff perform construction services to repair fire damage on a house owned by Defendant. According to the contract, the work was to be "completed in a substantial workmanlike manner for the sum of \$21,384.09." Payments were to be made in three equal installments of \$7,128.03: (1) \$7,128.03 to start; (2) one-third when the drywall was hung; and (3) the balance due upon completion. Defendant remitted to Plaintiff the first payment as required under the contract. Work commenced soon thereafter.

During the course of the work the electrical inspector required that the wiring in parts of the house not damaged by the fire, or covered in the repair contract, be brought up to code. Defendant initially refused to agree to the additional work, bringing the job to a halt. Plaintiff, however, negotiated with Defendant's hazard insurer to obtain additional funds. As a result, on July 2, 2007 the parties entered into a second contract for the additional electrical work. The agreed price for the second contract was \$1,079.00 and this amount was paid. On July 29, 2007, after Plaintiff requested his second draw, Defendant ordered him off the job site and delivered a letter to Plaintiff stating that the April 27, 2007 contract was terminated and that Plaintiff's services were no longer needed as he was displeased at the lack of progress on the job. On August 1, 2007, Plaintiff, through its attorney, sent a demand letter for the \$14,256.06 balance Defendant owed under the contract. However, the balance was not paid and Plaintiff filed suit in the lower court on August 17, 2007.

Plaintiff has established by a preponderance of the evidence that Defendant breached the construction contract when he unilaterally terminated the contract upon request for payment of the second draw. Defendant contends that he was not obligated to continue to honor the contract because Plaintiff had initially breached the contract by failing to perform in both a timely and workmanlike manner. Defendant has the burden of proof of establishing Plaintiff's failure of performance, but he has not met that burden.

#### ***Time Not of the Essence***

Although it is clear that the parties did discuss Defendant's desire that the contract be completed within four months, no such provision was made an express term of the contract. Moreover, Defendant terminated the contract by writing a letter to the

Plaintiff after only three months had passed from the date the contract was signed. Indeed, the contract did not provide that time was of the essence, but only that the contract be performed within a reasonable time. It further expressly noted that additional time to complete performance would be granted for change orders and unforeseen circumstances, both of which occurred in this instance. Specifically, the contract provided that, “[i]f the contractor is delayed at any time in the progress of the work by changes ordered in the work, labor disputes, owner, fire or natural storms, unusual delay in transportation, unavoidable casualties, causes beyond the contractor’s control, then a reasonable time allowance will [be] determined by contractor.” (Plaintiff’s Exhibit 2). The second contract was a change ordered in the work, as this electrical work was to be done in addition to what Plaintiff agreed to do in the original contract. Because additional work was added, it is clear that the overall construction project would take longer than the originally anticipated time period of four months.

At trial, Plaintiff produced uncontroverted testimony that the electrical inspector required that wiring in parts of the house be brought up to code. This additional electrical work was not included in the original contract. Defendant refused to pay for the additional work this would require. Consequently, Plaintiff was unable to progress with the contracted work until the additional electrical work was performed. Plaintiff, acting on his own initiative, ultimately prevailed upon the insurance company to pay for the additional electrical work. However, it was not authorized, and the second contract for the additional work signed, until 4 to 5 weeks had elapsed, during which time Plaintiff could not continue under the original contract. Thus, both unforeseen circumstances and change orders occurred, justifying additional completion time under the original contract.

### ***Workmanship***

The Court accepts Defendant's evidence that Plaintiff did not show up every work day, and often worked only 2 to 3 hours a day. However, those facts alone do not establish a breach of the contract by Plaintiff, or that the work would not be completed in a reasonable time. Likewise, Defendant may have been understandably concerned about the quality of the work being performed when Plaintiff brought in local persons known to Defendant and his son as drug users, rather than experienced construction workers. However, the Defendant offered no evidence to the Court showing that the work performed was un-workmanlike. Accordingly, the Court finds that the Plaintiff did not breach the contract, because Defendant did not meet its burden of establishing Plaintiff's failure of performance. Without an initial breach by the Plaintiff justifying Defendant's cancellation of the contract, the Court must find from the evidence that the Defendant breached the construction contract by unilaterally terminating it without proven cause.

### ***Damages***

The sole evidence offered at trial on the issue of damages was Plaintiff's testimony that the only remaining cost to him to complete the job was approximately \$5,000 for cabinets and other materials. If the Court accepts this evidence, then the remaining amounts unpaid under the contract were for Plaintiff's labor. Defendant testified that Plaintiff was often on the job performing the work without other workers, and that the workers he did bring on were, essentially, unskilled workers he picked up in the neighborhood. If the balance of the unpaid contract price, less the materials cost, was for Plaintiff's labor, then that amount, as the lost benefit of the contract, is Plaintiff's damages.

Although the Court finds plausible Defendant's speculation that Plaintiff had greater saved costs by not completing the contract than he testified to, Defendant did not support this argument with any credible evidence, other than referring to the lack of completion shown by Plaintiff's video. Plaintiff's evidence regarding his damages was unrefuted by any other evidence, and the Court must find the burden of proof as to damages met. The remaining amount due under the contract was \$14,256.06. As a result of the breach, Plaintiff did not have to spend the \$5,000.00 for cabinets and other unpurchased items. Thus, Plaintiff's damages for Defendant's breach amounts to \$9,256.06.

#### *Attorney's Fees*

The contract provides for payment of reasonable attorneys' fees if suit is brought upon the contract. Plaintiff brought suit, and prevailed, in Justice of the Peace Court. Defendant appealed that judgment *de novo* to this Court. Plaintiff is entitled to reasonable attorneys' fees for both the original and appeal action. Counsel for Plaintiff submitted fee affidavits for the time spent up to the day of trial, at his rate of \$300.00 per hour totaling \$5,550.00. Trial lasted 4.5 hours. Counsel for Plaintiff's total documented fee request is therefore \$6,900.00.

In applying the factors set forth in the Delaware Lawyers Code of Professional Responsibility DR-1.5, the Court finds the fee request generally reasonable in light of most of the enumerated factors. However, the Court was not provided information on one of the factors; namely, whether the fee arrangement is fixed or contingent. In addition, the Court views the amount of fees requested in light of the fourth enumerated factor in DR-1.5, "the amount involved and the results obtained." Although the result obtained from this action is a judgment for the majority of the amount sought, the

amount of fees requested, \$6,900.00, appears large in comparison to the \$9,256.06 judgment, even in light of the fact that most of the fees were generated as a result of defendant's appeal of the matter. The Court takes notice that, if Plaintiff's fee arrangement were contingent, the customary and usual maximum 40% contingency in this local area would result in a fee of approximately \$3,700.00. Finally, the Court may consider "the losing party's ability to pay" in awarding fees. The Court infers from the evidence at trial, including the modest nature of the house in question and defendant's advanced age, that defendant's ability to pay is likewise modest at best. In consideration of all of the foregoing, the Court finds a fee award of \$4,000.00 to be reasonable under these circumstances.

***Conclusion***

Accordingly, judgment is entered in favor of Jerry Smith t/a Affordable Construction Enterprises and against Frank Marshall in the amount of \$9,256.06 plus court costs, pre-judgment and post-judgment interest from August 17, 2007 at the legal rate, and reasonable attorney's fees in the amount of \$4,000.00.

**IT IS SO ORDERED, this 10<sup>th</sup> day of December, 2009.**

---

**Kenneth S. Clark Jr.**  
**Judge**