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

ANGELA LEE-SCOTT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. CPU4-16-001459**
	)	
JAMES SHUTE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION & ORDER

Submitted: January 3, 2017
Decided: January 30, 2017

Angela Lee-Scott
105 Fife Road
Middletown, DE 19709
Pro se Plaintiff

James Shute
261 Emma Way
Newark, DE 19702
Pro se Defendant

WELCH, J.

This case involves the breach of a contract arising from Defendant's promise to construct a front walkway and backyard patio according to Plaintiff's specifications. Both parties appeared for trial before the Court on Tuesday, January 3, 2017. The Court reserved its decision. This is the Court's Final Memorandum Opinion and Order after consideration of the pleadings, oral and documentary evidence submitted at trial, arguments made at trial, and the applicable law. For the following reasons, the Court enters judgment in favor of Plaintiff for $7,187.

I. Procedural Posture

On May 24, 2016, Angela Lee-Scott ("Plaintiff") filed a Complaint in this Court against James Shute ("Defendant"), alleging that Defendant failed to properly construct a front walkway and backyard patio according to agreed upon specifications. On June 3, 2016, Defendant was served with the Summons and Complaint at his home address of 261 Emma Way, Newark, Delaware 19702-4807.[1] On June 17, 2016, Defendant filed an Answer in which he asserted that the patio was built to Plaintiff's specifications, and noted that Plaintiff still owed him $3,500 for his labor.

On August 2, 2016, Defendant filed his Civil Case Management Order, denying any knowledge of Plaintiff's claims while listing exhibits he anticipated

[1] Defendant's address never changed throughout these proceedings, despite Defendant's claim at trial that he was unaware of Plaintiff's position.

producing that supported his position. Plaintiff filed her Civil Case Management Order on August 4, 2016, re-alleging her claims and cause of action. She stated that she had paid Defendant in installments of $7,082 and $6,000 towards the completion of her front walkway and backyard patio, paying a second company to make the necessary repairs to Defendant's work when he refused to rectify his poor workmanship. Plaintiff demanded reimbursement of $23,262.00. On August 15, 2016, a pre-trial conference was held before Judge Danberg, and civil trial was scheduled for January 3, 2017. Both parties appeared for Trial.

II. Facts

Based on the testimony and evidence presented at trial, the Court finds the relevant facts to be as follows.

On November 16, 2015, Plaintiff and Defendant formed a contract.[2] Defendant, doing business as Shute Masonry,[3] agreed to build Plaintiff a front walkway for $2,300 and a backyard patio for $14,782—for a total price of

[2] Plaintiff became acquainted with Defendant when the landscaping company she often hired, Page Precision Cuts (hereinafter "Precision Cuts"), suggested Defendant as a viable masonry alternative since Precision Cuts could not fit Plaintiff into its schedule. Plaintiff's witness, Zachary Page (hereinafter "Page"), an employee of Precision Cuts worked with Defendant for approximately one week before he left over disagreements with Defendant and his methods. Assumedly, because Plaintiff was a former client, Page began occasionally visiting the project after the sixth week, and testified that he witnessed an empty site or laborers following incorrect procedure.

[3] It is unclear whether Shute Masonry is a business entity or Defendant is simply using the name for correspondence purposes. Regardless, Plaintiff sued Defendant in his individual capacity.

$17,082.[4] The project was based on specifications that Plaintiff requested and Defendant drafted; the specifications were included in Plaintiff's Architectural Request Form which was submitted to her homeowners association on September 18, 2015.[5] Saint Annes Home Owners Association approved the project on October 5, 2015, allowing a "new paver walkway from [Plaintiff's] existing porch to the sidewalk with two 4' pillars, to overlay all existing concrete walkways and front porch with pavers and to install a 26'x10' paver patio with steps to a lower 16'x10' patio with two pillars."[6]

Defendant agreed to begin construction on the front walkway on Wednesday, November 18, 2015, at 7:00 a.m. after Plaintiff made an initial down payment of $7,082.[7] Because Defendant had not secured the appropriate permits, he was unable to start Wednesday morning. Defendant and several of Defendant's workers began later that afternoon by tearing down Plaintiff's backyard stairs. Defendant informed Plaintiff that the project would take two weeks to complete.

Approximately three weeks later, on Wednesday, December 9, 2015, Defendant requested a second payment of $6,000 from Plaintiff for the work

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[4] See Plaintiff's Exhibit 2, which was submitted into evidence without objection. Defendant quoted Plaintiff a sum of $19,060 that included additional material Defendant had overlooked; however, Defendant agreed to his original quote at the behest of Plaintiff.
[5] *See* Plaintiff's Exhibit 1.
[6] *See id.*
[7] *See* Plaintiff's Exhibit 3.

performed, which she immediately paid.[8] After this second payment, Defendant's workdays became infrequent and sporadic. When present, he would work approximately four hours in the morning and then leave the project site for the remainder of the day. Additionally, Plaintiff could no longer reach Defendant directly. Plaintiff was required to communicate with Defendant's business manager whose communications did not align with Defendant's original assertions.

On February 1, 2016, Defendant informed Plaintiff that he would be further delayed in completing the project. On February 4, 2016, Defendant promised to finish the project the next day. Even on warm February days, Plaintiff was unable to reach Defendant. However, on February 17, 2016, Defendant requested $3,000 out of Plaintiff's remaining balance of $3,507 before he would clean up, sand the masonry pavers and re-seed the backyard, which he claimed could not occur for "at least a couple of weeks" because of the freezing temperatures.[9] Plaintiff refused to pay Defendant the remaining balance until he completed the project. She noted that the work would have been completed if he had consistently worked on the project from the beginning, as he originally promised. She stated that she would pay him the full amount of $3,507 when he finished the project. Defendant reluctantly agreed.

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[8] *See id.*
[9] *See id.*

In the interim, Plaintiff was again unable to reach Defendant, so she asked another contractor to inspect her backyard patio because the sand was sinking out from underneath the patio, the steps were loose, and there were "lumps" in the patio. On Sunday, February 21, 2016, Plaintiff contacted Defendant with numerous complaints about his workmanship and requested he promptly fix them.[10] An inspection of the patio indicated that the pier caps were missing, pillars were not cemented, the left side of patio was not level, an incorrect sand-type was used, gaps existed between the backyard patio and the house, the lower patio was sinking, masonry pavers were loose and cracked on the lower patio, the patio was not furnished with a concrete border, steps were incorrectly cemented, there were gaps between steps, and Plaintiff had failed to cover the outside vent with a concrete covering.[11] Plaintiff informed Defendant on Tuesday, March 1, 2016, that if she did not hear from him in two days, then he would forfeit the final payment of $3,507 and she would hire a new contractor to finish the work. On March 3, 2016, Plaintiff informed Defendant by email and certified mail that he had until Thursday, March 10, 2016, to contact her about making the appropriate repairs.[12]

In April, Plaintiff hired Page Precision Cuts ("Precision Cuts") to fix Defendant's mistakes. Zachary Page ("Page") oversaw the repairs to Plaintiff's

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[10] *See id.*
[11] *See id.*
[12] *See* Plaintiff's Exhibit 5.

backyard patio, which took approximately two weeks. On April 20, 2016, Precision Cuts billed Plaintiff for $7,187 based on various repairs to her backyard patio that were required.[13] These repairs included: (1) replacing the patio's concrete wall as the barrier that was installed was not rated for the appropriate weight, (2) relaying the top tier masonry pavers and fixing various problems with gaps between pavers and incorrectly sized pavers, (3) disassembling and re-assembling the patio steps because they were falling apart, (4) relaying the entire bottom tier of masonry pavers, (5) removing the sump pump drain from underneath the patio, and (6) laying sod in areas that Defendant damaged.[14] Likewise, certain backyard patio steps were so loose that the steps could be separated from the foundation by hand. Additionally, the lower patio masonry pavers that Defendant used were discontinued, requiring Page to use Precision Cuts' own pavers when repairing the patio from the water damage that resulted from Defendant's workmanship.

[13] *See* Plaintiff's Exhibit 4.

[14] *See id.* Plaintiff introduced an abundance of pictures into evidence which detailed Defendant's mistakes. *See* Plaintiff's Exhibits 6 – 9.

III. Standard of Review

In civil actions, such as breach of contract, the burden of proof is by a preponderance of the evidence.[15] "The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists."[16]

As trier of fact, the Court is the sole judge of the credibility of each fact witness and any other documents submitted to the Court for consideration. If the Court finds that the evidence presented at trial contains conflicts, it is the Court's duty to reconcile these conflicts—if reasonably possible—in order to find congruity. If the Court is unable to harmonize the conflicting testimony, then the Court must determine which portions of the testimony deserve more weight in its final judgment. In ruling, the Court may consider the witnesses' demeanor, the fairness and descriptiveness of their testimony, their ability to personally witness or know the facts about which they testify, and any biases or interests they may have concerning the nature of the case.

IV. The Law

Under the Bootstrapping Doctrine, when a plaintiff's claim results from a breach of contract, the claimant must sue in contract.[17] In other words, Delaware law does not allow plaintiffs to attempt to satisfy the elements of a tort at trial

[15] *See Gregory v. Frazer*, 2010 WL 4262030, at *1 (Del. Com. Pl. Oct. 8, 2010).
[16] *See Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).
[17] *See Uppal v. Waters*, 2016 WL 4211774, at *3 (Del. Super. Aug. 9, 2016).

while complaining of a contractual wrong.[18] For example, "[i]f a complaint alleges that 'the parties had a contract and [defendant] intended not to follow through with its obligations under the [contract] and nothing more,'" then plaintiff cannot also claim that defendant was negligent or perpetrated fraud under this contractual arrangement.[19] While the claimant is permitted to allege multiple causes of action, the non-contractual causes of action must be premised "'on conduct that is separate and distinct from the conduct constituting breach.'"[20]

To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of the evidence that: (1) a contract existed between the parties; (2) the defendant breached his obligation imposed by the contract, and (3) plaintiff suffered damages as a result of the defendant's breach.[21]

V. Discussion

Preliminarily, the Court notes that it is cognizant of the deference afforded to *pro se* litigants. The Delaware Supreme Court recently reiterated that *pro se* litigants are afforded "some leniency in presenting their cases."[22] However, this leniency does not afford the *pro se* litigant the ability to skirt the rules of the court

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[18] *See id.*
[19] *See id.*
[20] *Hiller & Arban, LLC v. Reserves Mgmt., LLC*, 2016 WL 3678544, at *4 (Del. Super. Jul. 1, 2016).
[21] *See VLIW Technology, LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).
[22] *Damiani v. Gill*, 116 A.3d 1243 (Table), at *1 (Del. July 14, 2015).

or bring the trial court's "administration of justice" to a screeching halt.[23] Thus, the *pro se* litigant is not afforded the indulgence to adversely "affect the substantive rights of the parties."[24] While Defendant is afforded leniency, "even a *pro se* litigant . . . , is required to make the 'fullest possible preparation of the case before trial.'"[25] Hence, Defendant's failure to prepare and present his case to this Court, despite the Court's multiple explanations regarding the proceedings, is not justified by his *pro se* status.[26]

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[23] *See id.* (internal quotation marks omitted).

[24] *Maddox v. Isaacs*, 2013 WL 2297030, at *2 (Del. Super. May 7, 2013).

[25] *State Farm Mut. Auto. Ins. Co. v. Dailey*, 2016 WL 938457, at *1 (Del. Com. Pl. Mar. 14, 2016).

[26] After Plaintiff rested her case, the Court asked Defendant if he would like to testify. After Defendant noted that he was previously unaware of Plaintiff's position, the Court advised Defendant that he would need to be sworn in if he desired to testify. Defendant responded that he did not wish to testify because he did not have "enough information to testify." The Court inquired whether Defendant desired not to testify and instead rest his case. Defendant stated that he wanted to rest his case and further replied, "no disrespect, but I want to appeal it to Superior Court now that I know what she is asking for, I need to do research." The Court then quizzically asked whether Defendant wanted to present his case-in-chief. Defendant retorted that he did not have proper time or information to present his case. The Court reminded Defendant that he had stipulated to Plaintiff's exhibits as evidence and the pleadings had been mailed to him. Defendant agreed, but stated that it was the first time he was hearing of Plaintiff's requested damages. After Defendant stated that he "did not understand all this," the Court explained to Defendant that the current trial was the time and place where Defendant could be sworn in and present "his side of the story." The Court further noted that Defendant could not be forced to present testimony, but that the present trial before the Court of Common Pleas was the appropriate place for Defendant to argue his side of the story as provided in his Answer. Defendant replied that he "does not know what to say." The Court noted that what Defendant testified to on the stand was up to him, but the Court could not provide legal advice and advise Defendant of what he could say. Defendant stated that he understood, but that he "would rather appeal to Superior Court now that [he] knows what is going on."

Because Defendant refused multiple promptings from the Court to explain his side of the story, the Court stated that it would consider Defendant's case rested. Before Plaintiff presented her closing argument, Defendant apologized to the Court for not testifying but stated that he did not understand Plaintiff's case. The Court then asked Defendant whether the Court had explained the proper procedure; Defendant agreed that it had and that he understood the

A. Contract Formation

Neither party disputes that a contract was formed. In general, a contract is formed when one person ("offeror") makes an "offer" to a second person ("offeree") to enter into a contract and the offeree accepts, intending to be bound by the terms of the contract.[27] Matters concerning the formation of a contract are questions of fact.[28] Delaware law has defined a contract "as an agreement upon sufficient consideration to do or not to do a particular thing."[29] "Consideration is a bargained-for-exchange of legal value."[30] All contracts and contract modifications require consideration.[31] In order to create a contract, there must be "mutual assent to the terms of the agreement, also known as the meeting of the minds."[32] "Mutual assent requires an offer and an acceptance wherein 'all the essential terms of the

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procedure. In closing, Plaintiff postulated that Defendant was "wasting the Court's time" because he was provided a sum certain in her Civil Case Management Order and at the pre-trial conference where Defendant allegedly disputed the amount. Defendant agreed to make a closing statement. He argued in closing that the sum certain was inaccurate because he completed a large portion of work, which was required before Precision Cuts could "redo" his work. Defendant concluded by stating that he was unprepared for trial because of the damage amount that Plaintiff requested.

[27] *See* BLACK'S LAW DICTIONARY 341, 1113-14 (8th ed. 2004); *see Siegfried Grp., LLP v. Piotrowski*, 2001 WL 1555544, at *1 (Del. Com. Pl. May 31, 2011) (Welch, J.) ("overt manifestation of assent"); *see also Wilson v. Diienno*, 2001 WL 34077743, at *1 (Del. Com. Pl. Dec. 19, 2001).

[28] *See Sheets v. Quality Assured, Inc.*, 2014 WL 4941983, at *2 (Del. Super. Sept. 30, 2014).

[29] *Howlett v. Zawora*, 2012 WL 1205103, at *2 (Del. Com. Pl. Mar. 30, 2012) (citing *Rash v. Equitable Trust Co.*, 159 A. 839, 840 (Del. Super. 1931)).

[30] *Harmon v. State*, 2010 WL 8250826, at *2 (Del. Super. Sept. 27, 2010) (citing *Barnard v. State*, 642 A.2d 808, 818 (Del. Super. 1992), *aff'd*, 637 A.2d 829 (Del. 1994)).

[31] *See id.* at *2; *see also De Cecchis v. Evers*, 174 A.2d 463, 464 (Del. Super. 1961).

[32] *Thomas v. Thomas*, 2010 WL 1452872, at *4 (Del. Com. Pl. Mar. 19, 2010) (citing *Quinones v. Access Labor*, 2008 WL 2410170, at *5 (Del. Super. 2008)).

proposal must have been reasonably certain and definite.'"[33] If the meeting of the minds does not occur, then the contract is unenforceable under Delaware law.[34]

Clearly, Plaintiff and Defendant entered into a contract where Plaintiff made an offer to Defendant to pay him a total sum of $17,082 for the construction of a front walkway and backyard patio with the appropriate masonry pavers.[35] Defendant accepted Plaintiff's offer—intending to be bound by Plaintiff's specifications—for consideration in the form of a promise to be paid in installments.[36] Defendant agreed to follow appropriate procedures and begin constructing the backyard patio on November 18, 2015.[37]

B. Contractual Breaches

"A breach of contract occurs by a party's non-performance, repudiation, or both."[38] Additionally, in order for the injured party's remaining obligations under the contract to cease, the breach must be "material."[39] The breach will be deemed material if it concerns the "'root' or 'essence' of the agreement between the

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[33] *See id.* (quoting *Gleason v. Ney,* 1981 WL 88231, at *1 (Del. Ch. 1981)).
[34] *See Rodgers v. Erickson Air–Crane Co. L.L.C.,* 2000 WL 1211157, at *6 (Del. Super. 2000).
[35] *See* Plaintiff's Exhibit 1 and 2.
[36] *See* Plaintiff's Exhibit 2 and 3.
[37] *See* Plaintiff's Exhibit 1 and 3.
[38] *Preferred Fin. Servs., Inc. v. Business Builders for Entrepreneurs, LLC*, 2016 WL 4537759, at *3 (Del. Com. Pl. Aug. 30, 2016) (internal citations omitted).
[39] *See id.*

parties, or [is] 'one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.'"[40]

1. First Breach - Defendant's Poor Workmanship

Fundamentally, the law presumes that Defendant will construct the front walkway and backyard patio in a skillful and competent manner. Under the Implied Warranty of Good Quality and Workmanship, contractors involved in building homes or home additions must have the appropriate skill to "perform the work they offer . . . 'in a skillful and workmanlike manner.'" [41] This Court has held that a breach occurs if the contractor fails to "'display[] 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."[42]

Even so, the implied warranty does not ensure "excellence," but only "reasonable" workmanship.[43] Phrased differently, "[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

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[40] *2009 Caiola Family Trust v. PWA, LLC*, 2015 WL 6007596, at *18 (Del. Ch. Oct. 14, 2015) (internal citations omitted).
[41] *Casale Const., LLC v. Best Stucco LLC*, 2014 WL 1316150, at *3-4 (Del. Super. Mar. 28, 2014) (quoting *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908)); *Duncan v. JBS Const., LLC*, 2016 WL 1298280, at *3 (Del. Com. Pl. Mar. 31, 2016) (quoting *Bye*, 76 A. at 622).
[42] *Afilipoaei v. Fruehauf*, 2013 WL 5970491, at *2 (Del. Com. Pl. Oct. 31, 2013) (footnote omitted) (quoting *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. Feb. 5, 1993)).
[43] *See Carey v. Estate of Myers*, 2015 WL 4087056, at *24 (Del. Super. July 1, 2015).

contract is accomplished.'"[44] Indeed, if the construction is able to "fully accomplish" its intended purpose,[45] and a "reasonable person would be satisfied by it, the builder is entitled to recover despite the owner's dissatisfaction."[46] Importantly, the purchaser is not protected under this warranty if he was aware of the defect before purchasing the property, or—in the case of an addition—before he "accepted the work."[47]

The Implied Warranty of Good Quality and Workmanship is applicable to Defendant. This Court has held that the implied warranty attaches to contracts between homeowner and contractor,[48] and the warranty has been applied to additions to the home.[49] Defendant's mistakes did not involve labyrinthine

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[44] *Afilipoaei*, 2013 WL 5970491, at *2.

[45] *Gibbons v. Whalen*, 2010 WL 8250809, at *4 (Del. Super. Mar. 22, 2010) (quoting *Wilmington Parking Authority v. Becket*, 1993 WL 331072, at *2 (Del. Super. Apr. 26, 1993)); *Healy v. Silverhill Const., Inc.*, 2009 WL 295391, at *2 (Del. Com. Pl. Feb. 5, 2009) (quoting *Wilmington Parking Auth.*, 1993 WL 331072, at *2) (internal quotation marks omitted).

[46] *Afilipoaei*, 2013 WL 5970491, at *2.

[47] *See Council of Unit Owners of Breakwater House Condo. v. Simpler*, 1993 WL 81285, at *4-5 (Del. Super. Feb. 18, 1993) ("This implied warranty covers only latent defects or those defects of which a buyer had no actual knowledge."); *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908) (paying with full knowledge of defects is a waiver of the implied warranty).

[48] *See Duncan*, 2016 WL 1298280, at *1; *see also Carey*, 2015 WL 4087056, at *1.

[49] *See Casale Const., LLC*, 2014 WL 1316150, at *3-5 ("Delaware recognizes that the implied warranty can attach when contractors, such as Best Stucco, make an addition to an existing structure."); *Afilipoaei*, 2013 WL 5970491, at *1; *Gibbons v. Whalen III*, 2009 WL 3014325, at *1 (Del. Com. Pl. Sept. 21, 2009), *aff'd* 2010 WL 8250809; *Marcano v. Dendy*, 2007 WL 1493792, at *1 (Del. Com. Pl. May 22, 2007) (Welch, J.) (home renovations); *Council of Unit Owners of Breakwater House Condo.*, 603 A.2d at 795 (constructing "condominiums within an existing shell"); *Bye*, 76 A. at 623 ("constructing a [] porch and steps for the defendants' home").

industry standards,[50] and were explained in detail by Plaintiff's witness, Zachary Page—an experienced contractor and landscaper—who credibly testified regarding Defendant's work-product deficiencies and Page's actions in repairing those deficiencies.[51] In summary, Defendant incorrectly secured the masonry pavers and, thus the pavers shifted, fell apart, and were unable to support the appropriate weight. Defendant also failed to level the upper patio and use the correct materials to prevent the lower patio from sinking.

It is apparent that Defendant portrayed himself as a skilled mason, yet his workmanship was deficient and Plaintiff refused to accept his inferior work-product.[52] It is also clear that the latent defects of Defendant's workmanship were not apparent to Plaintiff since she testified that guests had fallen on more than one occasion while visiting her home because of the defects. Finally, Defendant's

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[50] D.R.E. 701; *Marcano*, 2007 WL 1493792, at *4, 7-8 (experienced fact-witness was able to testify to his examination of home renovations); *compare Oster v. Clemow*, 2011 WL 3849669, at *2 (Del. Com. Pl. Aug. 8, 2011) (requiring expert witness to inform the Court whether a galvanized steel door, versus a solid steel door, satisfied construction industry standards) *and Coupe v. Resort Repairs, Inc.*, 2009 WL 3288202, at *5 (Del. Com. Pl. Oct. 14, 2009) (expert testified to "appropriate procedures and techniques used to install and flash windows," which had recently changed), *with Gunzi v. Veltre*, 2008 WL 5160137, at *5 (Del. Com. Pl. May 22, 2008) (Welch, J.) (determining whether the pouring of concrete resulted in a leveled surface did not require expert testimony) *and Afilipoaei*, 2013 WL 5970491, at *2-3 (determining whether defendants installed mismatched roof shingles, failed to repair roof leak, and failed to follow further specifications regarding interior remodeling did not require expert testimony).

[51] *See Grant T. Dockety Builder, Inc. v. Mahon*, 2010 WL 1172975, at *11-12 (Del. Com. Pl. Mar. 17, 2010) (fact-witness contractor testified to masonry work); *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at *2-4 (Del. Com. Pl. Mar. 9, 2007) (Welch, J.) (fact-witnesses able to testify to home renovation work).

[52] This is not a case where Plaintiff prepared construction specifications and the specifications contained latent defects. *See, e.g., Ridley Inv. Co. v. Croll*, 192 A.2d 925, 926-27 (Del. 1963).

workmanship was patently unreasonable, as the addition could not satisfy its sole purpose by physically supporting Plaintiff or her guests.

Even though Plaintiff's guests avoided physical harm, Plaintiff was unable to avoid monetary harm. Testimony that Plaintiff spent her savings, which she had reserved for her daughter's education, repairing Defendant's mistakes, is telling. Because Delaware law allows homeowners to hire a new contractor if the original contractor fails to correct defects in his workmanship prior to a proposed deadline, Plaintiff acted reasonably in setting a deadline for Defendant to complete the project.[53] Plaintiff allowed Defendant considerable time to complete the project and a reasonable deadline, which she later extended, to fix his substandard work-product. Because Defendant did not respond, and the non-breaching party has an obligation to mitigate damages,[54] Plaintiff hired Precision Cuts out of necessity.

Defendant's poor workmanship deprived Plaintiff of the sole purpose of her backyard patio and, therefore, his conduct resulted in a material breach of the construction contract.[55]

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[53] *See Steyermark v. Lants*, 1970 WL 3675, at *3 (Del. Ch. July 30, 1970), *modified on reh'g*, 1970 WL 227.

[54] *John Petroleum, Inc. v. Parks*, 2010 WL 3103391, at *6 (Del. Super. June 4, 2010).

[55] *See English v. Colonial Const., Inc.*, 2009 WL 7883, at *7 (Del. Com. Pl. Jan. 2, 2009) (finding unleveled floors to be a material breach), *aff'd & rev'd on other grounds*, 2010 WL 4812858 (Del. Super. Nov. 17, 2010).

2. *Second Breach - Defendant's Failure to Complete the Contract in a Reasonable Time*

Defendant's failure to complete the construction contract in a reasonable time was a material breach of the contract. "When time is of the essence in a contract, a failure to perform by the time stated [in the contract] is a material breach of the contract that will discharge the non-breaching party's obligation to perform its side of the bargain."[56] In the present case, the contract does not contain a time of the essence clause.

"When a contract does not contain a time of the essence clause, courts look to the surrounding circumstances to determine whether the parties intended strict compliance with a particular timeframe."[57] This is because the requirement to perform with "reasonable expediency" is intrinsic to "every contract."[58] It is not apparent to the Court that Defendant intended to be strictly bound by his two-week timeframe statement to Plaintiff.

Nevertheless, the Delaware Court of Chancery has held that even "[w]hen time is not of the essence in a contract, a party still commits a material breach

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[56] *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5417101, at *7 (Del. Super. Nov. 5, 2012) (quoting *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *11 (Del. Ch. May 2, 2007)) (internal quotation marks omitted).

[57] *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *10 (Del. Ch. May 2, 2007).

[58] *See AQSR India Private, Ltd. v. Bureau Veritas Holdings, Inc.*, 2009 WL 1707910, at *7 & n.26 (Del. Ch. June 16, 2009) (quoting *Comet Sys., Inc. S'holders' Agent v. Miva, Inc.*, 2008 WL 4661829 (Del. Ch. Oct. 22, 2008)) (internal quotation marks omitted).

when it fails to perform within a reasonable time."[59] Here, Defendant informed Plaintiff that the project would take approximately two weeks to complete. Defendant began the project on November 14, 2015 and advised Plaintiff that he would complete the project around November 28, 2015. Yet, after approximately one month, Defendant's work attendance became sporadic and Plaintiff could not reach him directly. Thus, through no fault of Plaintiff's, the project was still incomplete on March 10, 2016. Moreover, because of Defendant's unprofessional approach, the project was not ultimately completed until April 20, 2016. Plaintiff lost the use and enjoyment of these additions for nearly five months. Even assuming a month of freezing days, Defendant had three and a half months to complete the project. Notably, Precision Cuts only required two weeks to tear down and reconstruct a substantial part of Defendant's work.

Therefore, Defendant's failure to finish the project in a reasonable time resulted in a material breach of the construction contract.[60]

3. Third Breach - Defendant's Abandonment of the Contract

Finally, Defendant breached the contract by abandoning his duties under the contract. Abandonment of a contract is a material breach.[61] The Delaware Superior Court held in *Carey v. Estate of Myers* that an abandonment occurred

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[59] *HIFN, Inc.*, 2007 WL 1309376, at *11.
[60] *See AQSR India Private, Ltd.*, 2009 WL 1707910, at *7 & n.26 (late delivery of a closing statement is unreasonable).
[61] *See Smith v. Mattia*, 2010 WL 412030, at *4 n.32 (Del. Ch. Feb. 1, 2010).

when a contractor "left the job and gave no indication that he would return to finish the outstanding work."[62] In *Carey*, the homeowners contracted with plaintiff, a general contractor, for the building of a $246,000 home.[63] The contract implemented a "draw schedule," where plaintiff would be paid in installments when indicated portions of the building project were completed.[64] Defendants paid draws one to six, even though plaintiff admitted he had not finished the exterior additions to the house, which was the triggering mechanism for payment of the sixth draw.[65] Plaintiff completed the interior trim, which triggered the seventh draw, however, defendants refused to pay him until he finished the exterior additions.[66]

Plaintiff refused to continue the project until he was paid.[67] When he was not paid, he stopped working on the house.[68] When Defendants did not hear from Plaintiff, they hired legal counsel and contacted him; plaintiff demanded payment before he returned.[69] The Court found that plaintiff's failure to complete the

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[62] *Carey*, 2015 WL 4087056, at *23.
[63] *See id.* at *2-3.
[64] *See id.* at *3 (internal quotation marks omitted).
[65] *See id.* at *4.
[66] *See id.*
[67] *See id.* at *5.
[68] *See id.*
[69] *See id.* at *7.

exterior additions was a material breach because he did not attempt to complete his unfinished work, choosing to leave the project instead.[70]

Similar to *Carey*, Defendant in the present case refused to complete the project despite Plaintiff's repeated requests. Unlike *Carey*, where the parties were in continuous communication until plaintiff's breach, neither Defendant nor his staff contacted Plaintiff after February 17, 2016. Defendant's prolonged silence is sufficient to support Plaintiff's inference that Defendant had abandoned the project, necessitating the hiring of another contractor to finish the project. Moreover, Plaintiff's assumption is reasonable since Defendant failed to respond even though he was aware that the remaining balance of $3,507 depended on his response. Defendant was owed a substantial balance, and his failure to respond to any one of Plaintiff's numerous communications supported an assumption that he had abandoned the contract.

Therefore, through Defendant's inaction, he materially breached the contract by abandoning the project.

C. Damages

The standard remedy for breach of contract is based upon the reasonable expectations of the contracting parties.[71] Expectation damages are measured by determining "the amount of money that would put the promisee in the same

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[70] *See id.* at *23.
[71] *See Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

position as if the promisor had performed the contract."[72] "Damages for a breach of contract must be proven with reasonable certainty. Recovery is not available to the extent that the alleged damages are uncertain, contingent, conjectural, or speculative."[73]

Plaintiff requests $23,262 in damages, which represents her $13,082 deposit to Defendant for his original work, $493 she paid to Defendant to install piers that she claimed he did not install, $7,187 she paid to Precision Cuts to repair her backyard patio, and $2,500 she claimed she paid to repair her front yard and front walkway after Defendant ceased communication and work on the project.

The Court finds that Plaintiff has proven by a preponderance of the evidence that Plaintiff and Defendant entered into a contract; Defendant breached that contract by failing to construct her backyard patio in a workmanlike manner, failing to finish the project in a reasonable time, and abandoning the project; and Plaintiff suffered economic damage because of Defendant's breaches. Plaintiff has also sufficiently proven that she paid $13,082 to Defendant and $7,187 to Precision Cuts to repair Defendant's work.

Because Defendant materially breached the construction contract, Plaintiff is entitled to the $7,187 she paid Precision Cuts to fix Defendant's poor workmanship. Plaintiff is not entitled to the amount of $13,082 that she paid

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[72] *See id.*

[73] *Dill v. Dill*, 2016 WL 4127455, at *1 (Del. Super. Aug. 2, 2016) (footnote omitted).

Defendant under the original contract, as this would provide Plaintiff a windfall. Plaintiff is also not entitled to the contract's remaining sum of $3,507 that Defendant failed to collect when he abandoned the project. In regards to the remaining $493 and $2,500 amounts, Plaintiff has failed to prove she was owed these amounts by a preponderance of the evidence. While she testified in detail regarding the former amounts, and provided receipts for those amounts, she mentioned the remaining amounts in her final comments on the stand.[74] The Court finds that her last-minute testimony does not satisfy the preponderance burden.

VI. Conclusion

For the foregoing reasons, the Court hereby enters judgment and award of $7,187, plus pre- and post-judgment interest at the legal interest rate of 5.75% according to 6 *Del. C.* § 2301, *et seq*.

IT IS SO ORDERED this 30th day of January, 2017.

John K. Welch, Judge

cc: Ms. Tamu White, Chief Civil Clerk

[74] *See* Plaintiff's Exhibits 2 and 3.