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

R & L IRRIGATION SERVICES, INC.,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. CPU6-15-000251
	)	
MICHAEL CHADWELL,	)	
	)	
Defendant.	)	

Submitted March 15, 2017
Decided May 15, 2017

Patrick Scanlon, Esq., attorney for Plaintiff
Timothy G. Willard, Esq., attorney for Defendant

DECISION AFTER TRIAL

Robert Frost reminds us of the proverb, "Good fences make good neighbors."[1] In this case, a weak fence divided good friends. Consequently, the Court must resolve a dispute between Plaintiff R & L Irrigation Services Inc. ("R & L") and Defendant Michael Chadwell ("Chadwell") regarding the construction of and the payment for a fence. The Court held trial on March 15, 2017, and reserved decision.

FACTUAL BACKGROUND

Prior to the subject dispute of this action, Chadwell and the owner of R & L, Mr. Richard Williams ("Williams") were friends as well as contractor and customer, socializing frequently. Chadwell utilized R & L for various landscaping and hardscaping projects at his home in Seaford. In the summer of 2013, Chadwell engaged R & L to build a fence around his backyard and pool. R & L provided an initial quote of $24,000,

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[1] Frost, Robert, "Mending Wall," ***North of Boston*** (David Nutt Publ., 1914).

and completed construction that summer. The fence consists of 29 four-and-one-half foot tall "dry stack"[2] stone columns connected by metal fencing.

Chadwell made two $12,000 payments to R & L, one in August 2013 and one on January 6, 2014. In November 2013, Williams sent Chadwell a final invoice for various add-ons in the amount of $9,223.[3] Chadwell withheld this final payment because of the following claimed problems with the fence: Some of the metal fencing and posts were uneven, columns were leaning, the fence railings were separating from the mounting brackets, the electrical conduit was not capped, there were unfilled drill holes, screws were missing, and the gates did not align and close properly. Chadwell submitted in evidence two booklets of photographs depicting some of these concerns.[4] Williams and Chadwell testified that R & L made some repairs, including the adjustment of one column.

In July 2014, Chadwell and his wife e-mailed Williams about the problems, stating they were unwilling to pay the outstanding balance until the fence was fixed. Williams testified he did not return to the property after receiving the e-mail.[5]

On February 23, 2015, R & L filed this action. Thereafter it was brought to Chadwell's attention by Michael Walton ("Walton") and Brian Short ("Short"), both whom testified at trial, that the leaning columns and detached fence railings were attributable to problems with the columns' foundations. Walton, lead hardscaper for Barton's Landscaping, had occasion to examine the columns when Barton's installed

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[2] Evidence at trial established that "dry stack" stone columns are made with mere stacking and sometimes some glue; the stones are not mortared or cemented together, but are held together by their weight and stacking.

[3] The charges listed on the invoice total $9,373. No reason was provided for the discrepancy, but both parties appear to be in agreement that the invoice balance is $9,223. Therefore, the Court will adopt that number. *See* Plaintiff's Exhibit 18.

[4] *See* Defendant's Exhibits 5 and 6.

[5] Defendant's Exhibit 1.

lights on the columns. Short was selected by the parties as a "third party professional" to verify proper completion of work to be done on the fence as part of a failed mediation agreement to resolve the debt action.[6]

In fall 2015, Walton used a four-foot level and tape measure to calculate whether the columns were off plumb and in which directions they leaned. Chadwell recorded Walton's measurements on a diagram.[7] According to their findings, only one out of 29 columns was plumb. Seventeen columns were off-centered by at least one inch in at least one direction; many were off-centered more than one inch and/or in more than one direction. Chadwell re-measured the columns in early 2016. Once again, only one out of 29 columns was plumb. Twenty-one columns were off-kilter by at least one inch.

On February 16, 2016, Chadwell filed a counterclaim against R & L, alleging the fence was negligently constructed or that R & L breached the contract by producing an unworkmanlike fence.

R & L seeks the outstanding balance of $9,223.00, plus interest and costs. Chadwell paid $9,223.00 into an escrow account held by Plaintiff's attorney, pending the outcome of this matter. Chadwell's counterclaim seeks $17,620.00, the amount he alleges is necessary to repair the fence, as well as costs and attorney's fees. No repairs have been made on the fence to date; Chadwell's claimed damages are based upon an estimate from Barton's Landscaping to fully de-construct the fence and columns, pour concrete footers for the columns, and re-construct the fence from the same materials.

DISCUSSION

The Court will first address Chadwell's counterclaim for breach of contract or negligent construction. Chadwell argues R & L breached the contract or negligently

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[6] *See R & L Irrig. Servs. Inc. v. Chadwell*, C.A. No. CPU6-15-000251 (Del. Com. Pl. Jan. 31, 2017).

[7] Defendant's Exhibit 4.

constructed the fence by improperly installing the columns and producing an unworkmanlike fence.

To demonstrate breach of contract, Chadwell bears the burden of proving by a preponderance of the evidence that (1) a contract existed; (2) R & L breached an obligation imposed by the contract; and (3) there were resulting damages.[8] Delaware law implies into construction contracts a builder's warranty of good quality and workmanship:[9]

> [When] 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.[10]

Work is deemed skillful and workmanlike when the contractor "displayed that degree of skill or knowledge normally possessed by members of [its] profession or trade in good standing in similar communities."[11] The work must be performed in a way that would satisfy a reasonable person.[12]

Although a written contract was not entered into evidence, the parties acknowledge they entered into an agreement for R & L to construct a fence for Chadwell and perform the other services outlined in the add-on invoice, in consideration of Chadwell's payment of a minimum of $24,000.00 for same, in accordance with Chadwell's longstanding history of hiring R & L to perform landscaping and hardscaping projects. A contract for services may be formed orally so long as there has been a meeting of the minds, or a "bargain in which there is manifestation of mutual

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[8] *Gibbons v. Whalen*, 2010 WL 8250809 (Del. Super. Mar. 22, 2010) (citing *Gunzl v. Veltre*, 2008 WL 5160137 (Del. Com. Pl. May 22, 2008)).
[9] *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712 (Del. Super. June 9, 1999).
[10] *Bye v. George W. McCaulley & Son Co.*, 76 A. 621 (Del. Super. 1908).
[11] *Gunzl*, 2008 WL 5160137 at *4 (citing *Shipman v. Hudson*, 1993 WL 54469 (Del. Super. Feb. 5, 1993)).
[12] *Coupe v. Resort Repairs, Inc.*, 2009 WL 3288202 (Del. Com. Pl. Oct. 14, 2009) (citing *Shipman*, 1993 WL 54469, at *3).

assent to the exchange and consideration."[13] Since there was a contract, it is governed by the implied warrant of workmanship.

Three potential construction flaws were identified in the evidence: (1) an improper material was used to make the columns' foundations; (2) the columns' foundations should have, but did not, extend at least six inches beyond the columns' bases; (3) the columns were dry stacked incorrectly because glue was not used above the bottom courses of blocks.

Chadwell's expert Walton testified that when he went to Chadwell's home to install column lighting, he noticed some of the columns leaned and that "a lot of them were a little shaky." He further stated that the columns were capable of being toppled if pushed. Walton attributes the unsteadiness of the columns to deficiencies with the foundation and with the failure to use proper adhesive. As part of the light installation process, Walton dug underneath two columns that were not outfitted with electrical conduit. Walton testified the columns were built on a stone dust base. According to Walton, stone dust is essentially sand, and is an inappropriate base for columns of that size. He testified that crush and run is the industry standard, but that concrete would have been most appropriate in this case because the soil on Chadwell's property is sandy. However, on cross-examination, Walton acknowledged crush and run might have been a suitable base. He remained adamant that stone dust was not acceptable in this case because it dissipates over time when used in sandy soil. He also testified that stone dust is not the same as crushed stone or crush and run. Next, Walton testified a base should extend at least 6 inches beyond the footprint of a column. He estimated there was approximately 5-6 inches of stone dust directly beneath the columns he examined,

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[13] There is no Statute of Frauds issue as the agreement could have been performed within one year. *See* 6 *Del. C.* § 2714.

but that no stone dust extended beyond the columns. Finally, Walton testified that another problem he saw was that the columns were not assembled with glue. Walton said a dry stack column is built by stacking blocks without using mortar joints, but that adhesive is required to keep the blocks together.

Short also testified on Chadwell's behalf, but was unable to qualify as an expert witness. The Court therefore disregarded his opinion testimony. Short provided the following fact testimony: Many of the columns appeared off-kilter to the naked eye. When he dug holes adjacent to several of the columns, he discovered stone dust directly underneath the columns but did not find stone dust outside the footprint of the columns. Short testified he dug his holes 6-8 inches from the columns, and that he could distinguish the stone dust from dirt based on differences between color and texture.

R & L's owner Williams testified that, although stone dust is an appropriate base for dry-stack columns, he had advised Chadwell that concrete footers would be best given the sandy soil conditions on Chadwell's property. Williams alleges Chadwell declined to follow the recommendation because he did not want to pay the approximately $2,000 more that it would cost to use concrete, and he was leery of installing a base that would require excavation if he ever wanted to move the fence line. Williams said a stone dust foundation is almost equivalent to one made from concrete, and that he only he recommended concrete because it provides a minimally better foundation and is easier to lay. He agreed crush and run is different than stone dust, but believes stone dust is superior because it dissipates water better than crush and run. Williams also agreed that the columns' foundations should extend at least 6 inches beyond the column footprint. Williams testified he was present for all the work R & L performed, and that R & L ensured the foundations were the correct dimensions by

using as guides 1” X 12” box foundations, pictured in Plaintiff’s Exhibits 1-3. Each column has a diameter of 20” x 20” inches square. By digging holes the same size as the box foundations, Williams said R & L laid foundations that were roughly 35 inches square. Williams could not offer an explanation for why neither Walton nor Short saw stone dust extending beyond the column footprint.

Williams testified that any leaning columns or problems with the gate and fencing were attributable to naturally occurring settlement, and that repairs would be minor. According to Williams, a column that was not maintained over the course of 3.5 years would be within tolerance if it were .5 to .75 inches off-plumb.

James Conley (“Conley”) also testified on behalf of R & L. Conley is employed by Parker Block Company, R & L’s main hardscape materials supplier, and sold to R & L the blocks used in the Chadwell columns. Conley has worked for Parker Block Company for 14 years, has received training on dry stack columns, and has dry stack column construction experience. Conley testified that crushed stone, crush and run, and stone dust are acceptable column foundations. He stated most manufacturers follow the National Concrete Masonry Association guidelines, which allow any compactible material to be used. Conley testified Parker Block Company sells foundation materials, and that the top three products purchased by contractors building dry stack columns are crushed concrete, stone dust, and crush and run. Conley agreed that the foundation of a column must be at least six inches deep and extend at least six inches beyond the column. If a column is out of plumb, it can be shimmed if not more than one inch off-kilter. However, Conley testified if the foundation is weak, the problem would reoccur even after shimming. Finally, according to Conley, glue may be used when building a dry stack column, but is not required.

R & L's final witness was Mr. Shane Ward ("Ward"), an R & L employee. Ward testified he has built at least 50 dry stack columns, all of which were built on foundations of stone dust. He stated stone dust is the same thing as crushed stone, but that it is not the same as crush and run. He also testified that out of all the columns he has built, only one required subsequent servicing. Ward did not work on the Chadwell columns nor did he have knowledge about the project specifics. When asked why Williams had recommended concrete footers he stated that in the past R & L suggested concrete if the soil conditions on the property were sandy. He said that sometimes property owners do not take the advice, but that R & L ultimately does what it feels is "the correct thing to do." Finally, Ward testified neither mortar nor glue is used when constructing dry stack columns.

Chadwell denied that R & L suggested concrete footers. He testified that he would have followed Williams' recommendation, if made, because he trusted Williams' expertise and would not have been dissuaded by the relatively small extra cost, given the scope of the project. However, Chadwell did agree that he asked Williams to make part of the fence removable. Chadwell testified that he planned to build other structures in his backyard, and wanted construction vehicles to be able to gain access. To accommodate this, Chadwell requested the *metal* fencing be removable between several columns on the right and left sides of his house. The Court found Chadwell's testimony more credible than Williams' as to this issue, as well as to other disputed facts.

To fix the fence, Walton testified all the columns and fencing would need to be removed, but that the materials could be saved and reinstalled with proper bases. Chadwell obtained an estimate in the amount of $17,620 from Barton's for the removal of 29 pillars, the excavation of any remaining stone dust, the installation of 30" x 30" x

12” concrete footers, and the reinstallation of the pillars and fencing.[14] Williams testified the pillars and fencing have merely settled, and can be fixed via minor repairs. Williams testified he would straighten and shim columns less than 2.5 inches off-plumb. Columns 2.5 inches or more off-plumb would need to be rebuilt and the foundation repacked. Alternatively, Williams testified the Barton’s bid is too high given the fact that all the materials can be saved and reused. He testified he would charge $7,000-$8,000 to complete the job, which would include the price of concrete footers. Williams explained the job would take approximately two days, and it would cost him about $2,000-2,400 in labor and materials to dig and install the concrete footers.

The Court, as fact finder, is charged with assembling one harmonious story from the information presented before it. To the extent conflicting testimony cannot be reconciled, the Court determines which testimony to credit by considering the following factors:

> [A] witness's means of knowledge; strength of memory and opportunity for observation; the reasonableness or unreasonableness of the testimony; the motives actuating the witness; the fact, if it was a fact, the testimony was contradicted; any bias, prejudice or interest, manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the believability of the testimony.[15]

The Court finds that R & L held itself out as possessing the requisite skill necessary to build columns and install a fence. The Court further finds by a preponderance of the evidence that R & L breached the contract by producing an unworkmanlike fence. Twenty-eight out of 29 columns were out of plumb when last measured. In fall 2015, 17 columns were leaning by at least one inch. As of February 2016, 21 columns were at least one inch off-plumb. The Court found credible Short’s

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[14] Defendant’s Exhibit 3.

[15] *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 545-46 (Del. Super. 2005) (internal citations omitted).

testimony that many of the columns were visibly leaning. Short was chosen by both parties to assess the columns during an attempted mediation, and is the most disinterested of the witnesses who testified; he is not employed by or a customer of R & L nor has he been hired to perform future work by Chadwell. Walton's testimony corroborated that the columns were unsteady and off-plumb. The Court found this testimony more persuasive than the photographs taken by Williams. Finally, Chadwell provided photographs of fence railings that have separated from the mounting brackets and uneven gate posts. A reasonable person would not be satisfied with this performance.

The Court cannot find the problems with the columns and fencing are attributable to naturally occurring settlement. First, approximately 73 percent of the columns were, when last measured, well over the allowable variance of between .5 - .75 inches that Williams testified would be expected. Additionally, Williams' colleague, Ward, testified that out of the 50 columns he has built, only one required subsequent servicing. It is unlikely that 21 columns would "naturally" be leaning by at least one inch.

Despite dissension between the experts over the efficacy (and definition) of stone dust and the necessity of glue, all experts asked agreed that the columns at issue must have foundations that extend at least six inches beyond the column. In this case, Short's inspection of between 3-5 columns revealed no stone dust beyond the footprint of the columns. Short's findings corroborate Walton's testimony that he did not find stone dust extending past the column footers he examined. Based on the testimony and exhibits proffered, the Court finds that R & L improperly laid the column foundations because they do not extend six inches beyond the column base, causing the columns to become

off-kilter and shaky. Several experts testified that leaning columns would or could pull the fencing out of alignment, as occurred here. Since the Court finds the foundations were inadequate due to size, rather than the material used, whether Chadwell declined R & L's recommendation to use concrete footers is immaterial. That said, the Court found Chadwell to be a more credible and consistent witness than Williams on the topic of whether concrete footers were discussed, as well as on other facts in contention between the parties.

The Court is not persuaded by R & L's argument that Walton caused the columns to lean by installing lights. Walton installed lights on 25 out of the 29 columns by removing the caps on top of the columns, and fishing wire through the electrical conduit installed by R & L. He dug underneath only two columns because they were not outfitted with electrical conduit. Plaintiff has not established by a preponderance of the evidence that removing caps or fishing wire through the electrical conduit affected the columns' foundations or contributed to their being off-plumb, nor that Walton's digging underneath two columns gave rise to the complained-of damages. The stone columns are purposed to support long courses of metal fencing between them, and were designed for subsequent lighting installation.

Finally, the Court must consider whether Chadwell adequately proved his damages. "In a construction contract sounding in either contract or tort, the appropriate measure of damages is the cost of remedying the defects if that cost is not clearly disproportionate to the probable loss in value."[16] In this case, repairs have not yet been undertaken. Plaintiff's evidence failed to prove that merely shimming the columns will resolve the problems. Conley testified that shimming would only be a temporary fix if

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[16] *Hadley v. Krolick*, 1999 WL 1847376 (Del. Com. Pl. May 24, 1999) (citing *Council of Unit Owners of Sea Colony East v. Freeman*, 564 A.2d 357(Del. Super. 1989)).

the columns' foundations were deficient. The columns and fencing will need to be taken down and reinstalled. Chadwell provided an estimate from Barton's for the complete reconstruction of the fence. Walton testified about what work would be necessary to repair the fence, but did not explain how the $17,620 figure was calculated. Williams testified the cost to rebuild the fence would be approximately $7,000 - $8,000 as there would be minimal materials expenses. Williams also offered more concrete details about the time and labor necessary to complete the project. In light of the evidence, the Court finds Chadwell has failed to establish damages in the amount of $17,620 by a preponderance of the evidence. The Court does find, however, that the cost to repair the fence is at least the amount that R & L claims is still owed under the contract.

Negligent Construction

Inasmuch as the Court finds Chadwell is entitled to damages for breach of contract, it need not address his alternative negligence claim.

Plaintiff's Claim

R & L initiated this action for $9,223.00 that remains unpaid under the contract. Chadwell acknowledges he withheld payment due to his dissatisfaction with the fence, and has paid $9,223.00 into an escrow account, pending the outcome of this action. R & L has the burden of proving it is entitled to damages. However,

> '[i]t is established Delaware law that in order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance will all of the provisions of the contract.' Likewise, a party in material breach of the contract cannot then complain if the other party fails to perform. Performance under a contract is justifiably excused when the other party to the contract commits a material breach.[17]

[17] *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 (Del. Super. Aug. 31, 2006).

The Court finds R & L's inadequate installation of the fence amounts to a material breach.[18] R & L failed to construct structurally sound columns, which caused the columns to lean and pull the attached fencing out of alignment. Therefore, Chadwell is excused from rendering further payment. Counsel for Plaintiff shall return to Chadwell the $9,223 currently held in escrow.

CONCLUSION

For the foregoing reasons, the Court finds R & L breached its contract with Chadwell and improperly constructed the fence at issue. Accordingly, Plaintiff is not entitled to the $9,223.00 that remains unpaid on the contract, and that escrowed amount is to be returned to Defendant as proven damages for the breach, plus costs of suit. The Court declines to award Defendant attorney's fees as he has not shown there is a contractual or statutory basis for such an award.

IT IS SO ORDERED this _____ day of May, 2017.

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Kenneth S. Clark, Jr., Judge

[18] *See generally Dennis Boggi Enters., Inc. v. Murowany*, 2003 WL 23112743 (Del. Com. Pl. May 12, 2003).