

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

THE WOLF ORGANIZATION,)
A Pennsylvania Corporation)
t/a The Lumber Yard)
)
Plaintiff)
)
v.)
)
MCELROY & SONS, INC.,)
A Delaware Corporation)
)
Defendant-Third Party Plaintiff,)
)
v.)
)
DIMENSIONAL STONE PRODUCTS,)
LLC, A Delaware Limited)
Liability Corporation)
)
Third-Party Defendant.)

C.A. No. 2001-10-482

Submitted: July 6, 2006
Decided: April 19, 2007

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DECISION AFTER TRIAL

The Wolf Organization (hereinafter “Wolf”), a Pennsylvania Corporation, t/a The Lumber Yard, a retail supplier of building products, brings this debt action to recover \$7,648.45 from McElroy and Sons, Inc. (hereinafter “McElroy”), a Delaware Corporation, for non-payment on an account due and owing. McElroy brings a counterclaim for \$7,100.00, plus interest and cost against Wolf for breach of contract for the cost to replace granite countertops and to repair damage to McElroy’s personal property and residence, resulting from the counter-top installation. McElroy also brings a Third-Party complaint against Dimensional Stone Products, LLC, a Delaware Limited Liability Corporation (hereinafter “Dimensional Stone”), subcontractor of Wolf who was retained to install the countertops for Wolf for faulty installation. McElroy asserts a claim for contribution if it is found liable to Wolf. A trial was held on July 11, 2006 and the Court reserved judgment. This is the Court’s opinion.

FACTS

Dustin Kauffman, employed by Wolf as a credit analyst, testified Wolf approved a line of credit for McElroy for materials and supplies for use in home remodeling projects. The application for credit indicates that the “applicant agrees to be jointly and severally liable for all charges made on the account and any other credits”¹ A statement of account for McElroy dated December 28, 2000 was admitted.²

Kauffman testified McElroy’s account reflected a balance due as of December 28, 2000 of \$9,000.00. The itemized invoices for the amounts reflected on the statement were admitted as Plaintiff’s Exhibit No. 3. He also testified he called Jim McElroy to inquire of payment. During this call, he was informed by McElroy that there was a problem with the countertop and he

¹ Plaintiff’s Exhibit No. 1

² Plaintiff’s Exhibit No. 2

wanted it resolved before making payment. McElroy told him there was damage to the duct work, the stove and countertops. The countertop is reflected in invoice #90292238 dated August 20, 1999, which Kauffman testified was only for the product cost in the amount of \$4,500.00. However, he informed McElroy to contact a contractor to get necessary estimates to correct the countertop problem, and submit it with the balance due. He stated McElroy did not dispute any of the amounts due on the invoice. Kauffman testified he followed up periodically to determine whether the problem was being corrected for approximately six months.

Kauffman also testified that the Lumber Yard was not involved with installation of the countertop, because in 1999 the Lumber Yard did not provide installation services. However, after investigation, there was a credit to McElroy's account, thereby reducing the amount due to \$7,648.25. The credit is reflected in a letter from the Lumber Yard Credit Department "Flowcard" in the amount of \$1,351.75. This represents, according to Kauffman, a credit of \$500.00 for labor and material to repair the countertop, \$651.75 credit for replacement of down-draft hood, and \$200.00 credit for duct repair. (Plaintiff's Exhibit No. 4).

Kauffman also testified that on May 21, 2000, he wrote a letter to McElroy stating "the Lumber Yard will be responsible for the replacement cost of the damaged stove and for the repair or replacement of your granite countertop." The letter also indicates that any service charges will be removed from McElroy's account. Defendant's Exhibit No. 7. He testified that amounts on Plaintiff's Exhibit No. 2 of \$153.86 and \$106.33 constitute service charges.

Kauffman testified that he had no knowledge of the reasons for the delays and no knowledge of Dimensional Stone's relationship with the Lumber Yard. He was not aware that Dimensional Stone invoiced the Lumber Yard for work referred, but was aware that someone

from the Lumber Yard did inspect the work Dimensional Stone did at the McElroy's, but does not recall any complaints of the work done by Dimensional Stone.

Henry White, former employee of the Lumber Yard and agent for this account was called as a witness for McElroy, testified he was an outside salesman of Lumber Yard in 1999 and was involved in McElroy's kitchen renovation. White testified he had used Dimensional Stone on other projects, and when McElroy wanted a kitchen granite countertop installed, he contacted Dimensional Stone for an estimate and they installed the countertop. He testified after installation, he was contacted by McElroy who indicated the pop-up exhaust hood on the stove was damaged. He testified he went to McElroy's house and observed the stove and countertop were damaged. It appeared the opening in the countertop was too small for the pop-up exhaust fan. The dishwasher was not attached to the countertop. The area above the dishwasher was not polished. Finally, there was a question about a seam that was not level and smooth.

Following the inspection, White testified he informed McElroy he would call Dimensional Stone and get them to fix the problems. Also, he told McElroy that the problems would be taken care of by Lumber Yard. Subsequently, there were three meetings scheduled where Dimensional Stone failed to appear. White testified he understood that at one point, employees of Dimensional Stone appeared at McElroy's house, looked at the countertop and left, but did no work.

White testified on cross-examination by Lumber Yard that the price to the McElroy's was for supply and installation, notwithstanding documents to the contrary. The price of the countertop included installation.

Stanley Piekos called as witness for McElroy testified he worked on the kitchen renovation. Prior to delivery of the stone countertop, he made a template for the kitchen cut out,

but was told by representatives of Dimensional Stone that they make their own template. Also, he has installed more than a dozen granite countertops. He observed gaps in the seams which did not line up properly, and the countertop was not secured. The opening for the vent did not line up properly which caused damage to the stove. He prepared a quote to repair the countertop. (Defendant's Exhibit No. 2). His estimate of \$7,100.00 includes removal and installation of a new countertop. On cross-examination, Piekos testified the pop-up stove vent was damaged because the hole was not large enough for the unit to go up and down. After the repeated dragging and getting stuck, the stove and the vent were damaged and had to be replaced.

James McElroy testified he had done business with the Lumber Yard for several years. On this project, the Lumber Yard referred his wife to Dimensional Stone and she met with them and picked out the stone. He paid Lumber Yard \$2,250.00 deposit on the countertop in 1999. He was present when the countertop was delivered by Dimensional Stone. He questioned the persons when the stone was delivered in three pieces. The workers appeared young and when they began installing the countertop, he asked of their experience, one worker stated he had only been working for three (3) weeks. Fifteen (15) photographs of the kitchen area were admitted, which show the area which abuts the refrigerator. The stone edge was supposed to be square, not round. The stone should be two pieces and not three, as installed. McElroy contacted the Lumber Yard and Mr. White came out to inspect, and he agreed there was a problem and it would be corrected. He was told over and over again by Mr. White that Lumber Yard would stand behind their work. McElroy testified he did not have a contract with Dimensional Stone, and had no experience in cutting stone, thus, relied upon Lumber Yard and Dimensional Stone's expertise in this area.

When Dimensional Stone did come out to inspect, they indicated there was no problem with the installation. The dishwasher was never mounted to the countertop.

Cross-examined by Lumber Yard, McElroy stated he did not pay because of the problem with the countertop. He stated the bill would have been paid if he didn't have a problem with the countertop. He knew that Dimensional Stone was a separate contractor and White nor Lumber Yard was involved in the installation. He testified the credits reflected in Lumber Yard's letter of October 23, 2000, (Plaintiff's Exhibit No. 4) was \$651.75 for the cost of down-draft hood, \$200.00 to repair the duct, and he refused the credit of \$500.00 to repair the countertop.

On re-direct, McElroy testified the countertop could not be repaired because the corner near the refrigerator should be square, not round as installed. There should not be seams in the countertop, and there are many pits in the countertop which cannot be made smooth.

Andrea McElroy testified she selected samples from Dimensional Stone's display on a wall. She took a sample home to make sure it would match the cabinets. She does recall viewing large slabs. When she returned to Dimensional Stone, they indicated her first choice was not available but offered an alternate, to which she agreed. On cross-examination, she agreed that she signed a document of "confirmation and approval of slabs." She testified the document was signed when the slab was available. She was told that they had to cut out for the sink and the stove. Also, she realized that the slab displayed was the item to be used in her kitchen.

George Lasarkis, owner of Dimensional Stone a marble and granite fabrication shop, testified he was hired directly through the Lumber Yard. The procedure is that they would get a fax and a layout. A contract was prepared and faxed back to Lumber Yard. Thereafter, the customer would come in and select the slab for their job. The customer physically selects their

slab and their name is put on the slab selected. A layout of McElroy's kitchen was admitted as Third-Party Exhibit No. 3. The quote to the Lumber Yard was \$3,550.00. Third-Party Exhibit No. 4. Lasarkis also testified McElroy signed the document selecting the stone. He testified he was informed of the problem with the McElroy's down-draft unit and visited the house and discovered there was a scratch on the decorative top of the unit. He ordered a replacement and when it was delivered he called McElroy and was told the unit had been replaced. He received a second call regarding chips in the stone, and the dull finish on the stone, after which he sent someone out to do the repairs. The seam could not be repaired, but the top was rebuffed. A third call about the finish was turned over to scheduling and someone was sent out to rebuff the top a second time, and the McElroy's were informed that the dull finish was the result of soap film.

He also testified it is very difficult to damage the "Santa Cecilia" stone since it is a very hard product. The pitting in the finish is a natural condition in the "Santa Cecilia" stone. Also, when he discovered the McElroy's were using Windex and soap to clean the stone, he advised against such. Windex destroys the sealer and soap leaves a film on the finish. McElroy complained that the seams were too wide. Lasarkis explained that stone cannot be grinded on the top since the stone is polished in Italy. He did recommend the dishwasher be mounted from the side. He also testified they always radius their corners so the failure to have ninety degree angle is not a defect. On cross-examination, however, Lasarkis admitted that the corners on the island area were a straight cut, and not rounded corners.

Lasarkis testified he charged the Lumber Yard \$3,550.00 to provide and install the granite countertop for the McElroy's. The stone was delivered in three (3) pieces because of the size of the stone and the space for installation. Dimensional Stone makes their own templates, but got the McElroy's approval prior to cutting the stone.

DISCUSSION

Wolf's Claim Against McElroy.

In an action for a breach of contract, claimant must prove three elements. There must be shown existence of a contract, breach of obligation imposed by the contract, and damages to the plaintiff. Where there is an implied contract based upon the circumstances, the law permits recovery of that amount which defendant benefited at the expense of plaintiff in order to preclude unjust enrichment. *Spanish Tiles v. Hensey*, 2005 WL 3981740 (Del. Super.) Wolf and McElroy executed a document on October 6, 1998 pursuant to which Wolf would provide materials and services on credit and McElroy would make the necessary payments.

Wolf supplied McElroy with materials and supplies for their kitchen renovations pursuant to a signed agreement. The application signed by McElroy and accepted by Wolf indicates McElroy is responsible for any charges on the account for materials and supplies extended. The invoices itemize the materials and services charged for each item provided. That account which totals \$7,485.00 is due and owing to Wolf for which payment is legally required. However, there is the issue of the letter Wolf sent to McElroy, after learning of their concerns with the countertop. In that letter, Wolf voluntarily agreed to credit McElroy's account for repairs related to the countertop, but did not agree to forgive the total amount due. Thus, Wolf is entitled to the amount owed subject to any credit or adjustment agreed to by its letter of October 23, 2000.

McElroy brings a counterclaim for \$7,100.00 for demolition and replacement of the countertop in their kitchen. To date, the corrections have not been made and the McElroy's are still using the installed countertops. Lasarkis testified the countertops radius cut could not merely be reshaped but the entire counter would have to be removed and replaced. McElroy's

estimate also indicated that that part of the kitchen would need to be demolished to repair damage to the stove exhaust fan.

A unilateral contract is one in which the promisor does not receive a promise as consideration for his promise, *Restatement of Contracts* § 12, and if an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer. *Restatement of Contracts* § 55. Here, the Plaintiff unilaterally offered to be “accountable” for the 1) replacement of the Defendant’s stove and 2) for repair *or* replacement of the Defendant’s granite countertop. I find this promise valid and binding. McElroy paid Lumber Yard \$2,250.00 toward installation and purchase of the countertop. However, the total cost as testified, for the countertop is \$4,500.00. He has refused to pay the balance as a result of this dispute. Lumber Yard agreed to make the necessary repairs which they failed to do. Therefore, I conclude McElroy is entitled to offset against the amount due for replacement, repairs, and late charges.

I find based upon the evidence in the record, McElroy is entitled to late charge credits of \$153.86 and \$106.93. Additionally, McElroy is entitled to the cost of purchase and installation of the countertop in the amount of \$4,500.00, minus the credits previously given. Also, I find that since the McElroy’s have been using the countertop since installation in the year 2000, there is value to the countertop which I find in the amount \$1,500.00. Therefore, I find for Lumber Yard in the amount of \$7,648.25, minus McElroy’s counterclaim amount of \$3,260.79, for a net amount to Lumber Yard of \$4,387.46.

*McElroy's Third-Party Claim And
Claim For Contribution.*

Ordinarily a stranger to a contract acquires no rights thereunder, unless it is the intention of the contracting parties to confer a benefit upon such third party and the conferring of that benefit to such third party is material to the contract's purpose, *Guardian Construction Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378 (Del.Super. 1990). McElroy is a Third-Party beneficiary to the Lumber Yard-Dimensional Stone contract. Lumber Yard and Dimensional Stone contracted in this instance for the sole purpose to cut and install a granite countertop for McElroy. The "agreement" expressly refers to the McElroy's and the project for which Third-Party Defendant was retained and paid. However, the Third-Party Defendant fabricated and installed the countertops according to specifications not approved by the McElroy's prior to installation.

Further, while Dimensional Stone contracted to provide services to benefit the McElroy's, it was not a party to the contract between Lumber Yard and McElroy. [It] is joint and several *liability* . . . which determines the right of contribution," *Lutz v. Boltz*, 100 A.2d 647, 648 (Del.Super. 1953), and contribution is maintained when *partial liability* is shifted from one party to another. *Samoluk v. Basco, Inc.*, 1989 WL 135703 (Del.Super.) McElroy and Dimensional Stone are not jointly liable to Lumber Yard for the debt which is sued upon by Lumber Yard. Only McElroy created the line of credit to which he is liable. Therefore, McElroy cannot maintain a claim against Dimensional Stone for contribution absent some contractual basis.

Accordingly, judgment is hereby entered for Lumber Yard in the amount of \$7,648.25, subject to McElroy's counterclaim award of \$3,260.79, for a net judgment of \$4,387.46. Judgment is entered for Dimensional Stone on McElroy's third-party claim.

SO ORDERED

Alex J. Smalls
Chief Judge

McElroy-OP Mar 07