

May 22, 2007

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Re: *Israel Marcano v. Richard Dendy d/b/a Dendy Construction*
C.A. No.: 2006-01-314

Date Submitted: May 3, 2007

Date Decided: May 22, 2007

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place on Monday, April 30, 2007 and Thursday, May 3, 2007 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's Final Decision and Order.

I. PROCEDURAL POSTURE

The sole issue before the Court following trial on the merits is whether Plaintiff Israel Marcano ("Marcano") has proven by a preponderance of the evidence that he is entitled to Twenty-Nine Thousand, Three Hundred and Forty dollars (\$29,340.00) as damages for breach of contract, negligent performance, breach of the implied warranty of good quality and workmanship, and conversion. (*See* Counts I – IV, complaint). Plaintiff contends in his complaint filed herein that he paid the Defendant to perform certain structural renovations on his home which were un-workmanlike, negligently installed, and constituted a breach of contract.

Plaintiff also contends in his complaint filed herein that defendant's failure to perform the renovations in a workmanlike manner shall require him to incur additional costs to complete and correct the work (§11, Complaint). Plaintiff further claims that the Defendant converted building materials bought by Plaintiff (§20, 21 Complaint). Defendant Richard Dendy ("Dendy") denies all of Plaintiff's claims, alleging that Plaintiff made frequent changes that impeded Defendant's ability to complete the work, and that Plaintiff removed Defendant from job before he could substantially complete the work in the contract. No formal counter-claim or offset was asserted by defendant. Defendant's answer as filed was *pro-se* before counsel was retained. With the conclusion of trial, the matter is now ripe for decision.

II. THE FACTS

After considering all the evidence, the Court finds the relevant facts as follows:¹ On April 4, 2005 Marcano and Dendy executed an agreement ("the contract") whereby Marcano

¹ The Court received into evidence the following items: Joint Exhibit No.: 1 – a copy of a New Castle County Department of Land Use Inspection Advice form dated April 18, 2005; Joint Exhibit No.: 2 – Excerpts of Defendant's Response to Plaintiff's Interrogatories; Joint Exhibit No.: 3 – Repair estimate from Ruiz Contracting, dated November 10, 2005; Joint Exhibit No.: 4 – Copies of building and renovation plans approved by New Castle County Department of Land Use on April 12, 2005; Joint Exhibit No.: 5 – a copy of a check dated May 19, 2005 from Israel Marcano to Richard Dendy Construction for \$18,000.00; Joint Exhibit No.: 6 – a copy of a check dated April 4, 2005 from Israel Marcano to Richard Dendy for \$18,000.00; Joint Exhibit No.: 7 – a copy of a check dated October 2005 from Israel Marcano to Richard Dendy for \$1,400.00; Joint Exhibit No.: 8 – a copy of a check dated August 2005 from Israel Marcano to Richard Dendy for \$1,900.00; Joint Exhibit No.: 9 – a copy of contract between Israel Marcano and Richard Dendy, executed on April 4, 2005; Joint Exhibit No.: 10 – a copy of notes written by Lorraine Santos on or around October 21, 2005; Joint Exhibit No.: 11 – a copy of "Punch List to Do" for Richard Dendy, written by Israel Marcano, Lorraine Santos, and Mario Ruiz on October 19, 2005; Joint Exhibit No.: 12 – a copy of "Punch List for House," written by Lorraine Santos on October 19, 2005; Joint Exhibit No.: 13 – a copy of a "problem list" written by Lorraine Santos on September 1, 2005; Joint Exhibit No.: 14 – a copy of a New Castle County Department of Land Use Revision to Permit Application Form and copies of approved revisions, all dated July 26, 2005; Joint Exhibit No.: 15 – a copy of the New Castle County Department of Land Use Inspection Advice form dated May 18, 2005; Joint Exhibit No.: 16 – a copy of a November 10, 2005 Complaint Statement to the Consumer Protection Unit; Joint Exhibit No.: 17 – a copy of a November 15, 2005 letter from the Consumer Protection Unit to Dendy Construction; Joint Exhibit No.: 18 – a copy of a November 16, 2005 letter to Richard Dendy from Lorraine Santos and Israel Marcano; Joint Exhibit No.: 19 – a copy of a November 21, 2005 letter to Richard Dendy from Lorraine Santos and Israel Marcano; Joint Exhibit No.: 20 – a copy of a New Castle County Department of Land Use Inspection Advice form dated August 10, 2005; Joint Exhibit No.: 21 – a copy of a New Castle County Department of Land Use Inspection Advice form dated August 4, 2005; Joint Exhibit No.: 22 – a copy of a New Castle County Department of Land Use Inspection Advice form dated August 29, 2005; a copy of a June 20, 2006 Proposal from Enhanced Heating / Air Conditioning LLC; Joint Exhibit No.: 24 – a copy of a June 21, 2006 estimate from McGonegal General Contracting; Joint Exhibit No.: 25 – a copy of a New Castle County

would pay Dendy \$56,400.00 to perform certain renovations on Marcano's residence at 31 Memorial Drive, New Castle DE 19720 ("the house"). The job specifications were as follows:

1. Tear down deck in rear of house, Rebuild deck[.]
2. Add 10" x 40" in rear of house.
3. Install a bathroom and a closet in this addition.
4. Add 10" to kitchen, install L or U shape counter top.
5. Install new heater and aircondition [sic].
6. Put down a ceramic tile floor in kitchen and both bathrooms.
7. Tear out wall between kitchen and dining room.
8. Add 10" to dining room, put a half wall between kitchen and dining room.
9. Install hardwood flooring throughout house.
10. Add 4" x 40" to front of house (area included living room and the two bedrooms)
11. Add 8" to left side of house to be turn [sic] into possibly a garage or den[.]²

Under the terms of the contract, Dendy was to furnish materials and labor for all the renovations. In return, Marcano was to pay Dendy "Eighteen Thousand and eight hundred dollars to start and eighteen thousand and eight hundred dollars after the finishing of footing and framing of the 10" x 40" in the rear of house. Eighteen thousand and eight hundred dollars was to be paid to Demby by plaintiffs upon completion of job."³

Lorraine Santos ("Santos") testified at trial. Santos has lived at the house with Marcano and her son for ten years. She and Marcano were interested in expanding their house and contacted Dendy to perform the work. Dendy drafted the actual contract terms which were signed by the parties. Santos testified that the word "fireplace" was handwritten onto the contract because the fireplace was part of the work that she and Marcano originally contracted with Dendy to perform on the residence. The words were "written in and initialed by Dendy"

Department of Land Use Correction Notice dated June 28, 2005; Joint Exhibit No.: 26 – a copy of a New Castle County Department of Land Use Correction Notice dated August 15, 2005; Joint Exhibit No.: 27 – a table of construction receipts; Joint Exhibit No.: 28 – copies of twenty-four (24) construction receipts; Joint Exhibit No.: 29 – photographs taken in and around the residence at 31 Memorial Drive, Newark DE 19720; Joint Exhibit No.: 30 – additional photographs taken in and around the residence at 31 Memorial Drive; Defendant's Exhibit No.: 1 – a copy of a New Castle County Development and Licensing approval permit dated April 21, 2005; Defendant's Exhibit No.: 2 – a copy of a New Castle County Development and Licensing approval permit dated June 2, 2005.

² Joint Exhibit No.: 9. Based on the testimony in the record, it is clear to the Court that the contract mistakenly lists its specifications in inches ("") whereas the parties intended them to be measured in feet. (').

³ *Id.*

with no extra cost required by the plaintiff. Santos testified that a shed and fence also were added terms to the contractual agreement, and that she and Marcano paid Dendy for these “extras” as additions to the original contract.

Santos testified that Dendy was supposed to tear down the old deck adjoining the house and construct a new deck after adding an addition to the back of the house at trial, however, the evidence produced was that Dendy never built the deck. Dendy also never installed a countertop in the kitchen as originally contracted. Santos testified that Dendy was to “rip out the kitchen’s old tile floor” and install a new, ceramic tile floor. Santos also testified that the measurements for the additions to the front and left side of the house per the contract terms should have been “in feet” rather than “inches”. Santos testified that Dendy was “taken off the job” before he was able to work on the front addition because of the unworkmanlike manner on the construction site and performance of the work in question.

Santos also testified to several frustrations she had with Dendy and his employees. Santos had asthma that was exacerbated by Dendy and his workers smoking in the house while performing the contract. The employees continued to smoke even after Santos told them not to and posted “No Smoking” signs throughout the house. The employees also left building materials and a footprint on her dining room table according to Santos. Dendy’s employees also left trash in the backyard, garnering complaints from neighbors.

Santos also testified to several problems with the contract renovations to the residence. The closet in the master bedroom was built “too small” and needed to be enlarged. Poured concrete in the master bedroom was also never cured as required. Santos informed Dendy of these problems in a punch list.⁴ The window in the master bathroom was awkwardly placed, and an air vent was erroneously positioned to direct air into the tub area. Some of the bathroom

⁴ Joint Exhibit No.: 12.

tiling was uneven. Dendy replaced the tub with a “totally different” tub from the kind Santos and Marcano expected. Dendy did not tell Santos and Marcano that some of their chosen bathroom fixtures would be too expensive.

Santos testified at trial that the air conditioner installed in the hallway bathroom caused water to leak through the vents and caused the ceiling to crack. The hallway ceiling was also unfinished. One of the hallway walls protruded further than the other. According to Santos, the employees broke a hallway light fixture but did not fix it. Santos and Marcano had to heat the house with six space heaters because Dendy left the house without heat. In the living room, an area of the ceiling was buckled. Santos wrote up all these concerns in a punch list or otherwise discussed them with Dendy, but they were not fixed.

Santos also testified that water would leak into the kitchen and hallway areas from the den and dining room areas, causing some buckling in the wooden floors. Dendy didn’t fix these problems. According to Santos, Dendy did attempt to straighten one of the hallway walls without tearing the wall, but Santos said the wall still wasn’t straight after Dendy’s efforts to repair the same. The den was supposed to have a bay window, but Dendy didn’t put install the window even after Santos spoke to him. Dendy also did not insulate the doors and windows, even after Santos notified him of the problem through a written punch list. Santos was “unhappy” that Dendy had moved the breaker box to the kitchen. Dendy informed Santos, however that it would cost \$1,500.00 to move the breaker box to the new location. Santos identified several photographs showing that the kitchen tiles were uneven. The kitchen wall next to the laundry room was narrower at the top than at the bottom, so that it was not flush with adjoining walls.

Santos also testified about the condition of the exterior of the residence. Santos testified that the fence was “uneven and too high off the ground” which allowed pets and awards to travel underneath the fence. Dendy was also supposed to add gutters and a drain to the side of the house, but failed to do so as required according to Santos. The roof was supposed to be peaked in a “double-A” style, but Dendy built it flat. The shed Dendy built had an uneven roof and “no vent”. In addition, the shingles on the shed’s roof did not overlap the edge of the roof in some parts. Santos notified Dendy of these problems but they were also never fixed. Santos admitted that she had no construction experience and that some of the concerns in her written communications to Dendy were based on the observations of other people.

With regard to plaintiff’s conversion claims, Santos testified that Dendy took approximately forty-five boxes of laminated flooring materials from the job site. Santos also testified that she and Marcano had to pay to replace them, although she could not remember the cost of these materials. Santos testified that she had called the police regarding the flooring, but did not have an actual copy of the police report.

Santos and Marcano provided Dendy with several written communications⁵ to notify him of problems or express their concerns. However, after becoming dissatisfied with what they perceived as his unresponsiveness to their concerns and after consulting with David Ruiz concerning the quality of Dendy’s work, they notified Dendy, via letter dated November 21, 2005, that his services were “no longer needed or wanted.”⁶

⁵ See Joint Exhibits Nos.: 10-13.

⁶ Joint Exhibit No.: 19.

Marcano and Santos paid Dendy \$18,000 on April 4, 2005, and another \$18,000 on May 19, 2005.⁷ They also paid Dendy \$1,400 for the fence and \$2,900 for the shed.⁸ Santos said they didn't pay him the remainder of the contract price because the work was never finished.

James Johnson ("Johnson") testified at trial. He has approximately twenty years experience in the heating and air conditioning business. He is licensed in New Castle County. Johnson visited the plaintiff's residence in June 2006 to assess whether the heating and air conditioning satisfied the New Castle County "BOCA" standards. Although he admitted he was not an electrician, he testified that an indoor-rated wire had been used outside to hook up the air conditioner unit. An indoor wire should not be used outside unless it is encased because UV light from the sun will cause it to deteriorate. In his inspection of the home Johnson found that there was no insulation on the main duct work of the attic heat pump system. Johnson also found the condensation drain was improperly pitched uphill rather than downhill. Johnson also testified that the pitch of the drain would cause it to inevitably overflow, possibly into the ceiling or insulation. This problem was exacerbated by the absence of an overflow safety switch, although this was not required by the New Castle County "BOCA" Code. Johnson, however, admitted that he didn't observe any leaking during his visit. Johnson also found that several of the registers on the unit were unable to open or close, likely from improper installation. Because of these and other problems, Johnson concluded that the heating and air conditioning units would not meet New Castle County standards. He estimated that it would cost \$2,800 to \$3,500 to repair the systems.

Mario Ruiz ("Ruiz") testified at trial. He has a chemistry degree and eighteen years of experience in construction. Sometime in late October 2005, Marcano and Santos engaged him to

⁷ Joint Exhibits Nos.: 6 and 5.

⁸ Joint Exhibits Nos.: 8-9.

examine the work done by Dendy. They also later contracted with him to repair and finish the renovations on the house required under the contract terms with Dendy.

Ruiz testified about the following tasks/repairs and their estimated costs: The master bedroom closet needed to be resized--\$850; the master bedroom floor was not level--\$1,500; a window in the master bathroom was improperly placed--\$3,500; the vent in the master bathroom was in the wrong place--\$500; the ceiling in the son's bedroom was cracked--\$350; the floor in the hallway bathroom had not been renovated--\$2,500; the kitchen walls were wavy and the hallway walls were crooked and uneven--\$6,000; the living room floors had cracks in the concrete and leaking damage to the hardwood floors--\$4,000; the dining room window needed to be resized--\$900; the deck behind the house needed to be rebuilt--\$3,500; the fence was crooked and too high--\$900; the shed was not ventilated and was improperly shingled--\$500; the roof of the house was improperly installed--\$1,800; a bay window had not been put in the den--\$900; the kitchen floor tiles were neither level nor properly spaced--\$6,000. Ruiz admitted that several of these costs were not in the original estimate he gave Santos and Marcano, since he noticed additional problems while working on the house.

Richard Dendy ("Dendy") testified at trial. Dendy has approximately twenty years of experience running his own remodeling and construction business, and ten prior years of experience performing similar work for other businesses. Dendy testified that the house was somewhere between sixty and sixty-five years old, though he didn't know if Marcano and Santos were the original owners. Dendy said that the structure of the house wasn't square. Moreover, the floor was uneven throughout the house and the backyard was on an incline. However, he said that the house was in pretty good shape.

Dendy also testified that the parties made several oral amendments to the written contract. For example, Dendy didn't order the fence, although he picked it up for Marcano and said he subsequently made an oral agreement to install it for \$500. He also agreed to install the shed for \$2,900.00, which was not listed or required in the original contract.

Dendy worked on the house for approximately seven months, from April 2005 until November 2005 when he was taken off the job. He attributed delays on the construction to changes and additions to the contract requested by the plaintiff. Dendy also explained that because he was the sole director of the job and the cause of the delay was Santos. His employees couldn't start another job if Dendy was required to run other errands when Santos asked for additions or new items for the contract. Dendy explained that he was "taken off the job" before he could finish or correct a lot of the construction. He therefore believes it is the plaintiff who should bear responsibility for the unfinished work.

Under the contract Marcano was to pay Dendy \$18,800 at the beginning of the job and another \$18,800 midway through construction. Marcano instead paid Dendy two payments of \$18,800 each, but Dendy didn't speak to Marcano about this deficiency because he was still working on the house.

Dendy drafted the contract between the parties. Dendy estimated that it would cost \$2,000 to rebuild the deck, but did not know exactly how much it would have cost to build the ten-foot by forty-foot addition per the contract terms. Dendy also admitted that he had not completed the four-foot by forty-foot addition to the front of the house. Nor did Dendy install hardwood flooring throughout the house. Although the contract did not give specific details about the new bathroom to be built in the renovation, Dendy planned to install standard fixtures

like a toilet, sink, and bath or shower. If Marcano and Santos had wanted more specific items for the bathroom Dendy testified he would have required more money to install the same.

Dendy failed a New Castle County Footing inspection on April 19, 2005 because the footings he worked on did not match the approved plans.⁹ Dendy's practice was to install the foundation, walls, and ceilings of an addition before filling in the pre-slab. Dendy did not know the name of the applicable New Castle County Department of Land Use standards for construction. The pre-slab work failed another New Castle County inspection on May 19, 2005 because there was no vapor barrier and the underground pipes needed to be exposed.¹⁰ The County also failed Dendy's "Close-In inspection" with the following commentary:

"Not built per appd. Plan dated 4/12/05. Need to update plans to as built. No appd. Plumbing plans on site. Need proof of underground plumbing insp. Untreated wood on concrete. Missing hangers and hgrs not fully nailed. Need plbg. prot. plts. Improper bearing/nailing of ceiling joist. Needs diverter support. Not weather tight. Wood burning f/p details not on plan and needs header above. Corners not tied in. Needs DWV. Undersize egress window. Too many problems to list."¹¹

Dendy subsequently passed a partial inspection of the work he completed before being terminated from the job, but his work did not pass a final inspection.

III. THE LAW

The question of whether a contract has been formed essentially turns upon a determination of whether the parties intended to bind themselves contractually. *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986). A court determining intention does so from the overt acts and statements of the parties, not from the subjective mind of either party. *Id.* at 1097. The party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform. *Hudson v. D.V. Mason Contractors, Inc.*, 252 A.2d

⁹ Joint Exhibit No.: 1.

¹⁰ Joint Exhibit No.: 20.

¹¹ *Id.*

166, 170 (Del. Super. 1969). In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract. *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, Del. Super., 251 A.2d 571, 573 (1969). Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred. *Delaware Limousine Service, Inc. v. Royal Limousine Svc., Inc.*, 1991 Del. Super. LEXIS 130, at *8.

At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. *Lowe v. Bennett*, 1994 WL 750378, at *4 (Del Super.). Whether a breach is material and justifies non-performance is a matter of degree and is determined by weighing the consequences in light of the contract. *Eastern Electric & Heating v. Pike Creek Professional enter*, 1987 WL 9610, at *4 (Del. Super.). Notwithstanding a material failure to perform, the complaining party may, nevertheless, recover the value of benefit conferred upon the other party. *Heitz v. Sayers*, 121 A. 225 (Del. Super. 1923).

The standard for whether or not the Defendant performed his work under the contract in a good and workmanlike manner is “whether they displayed that degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities.” *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super.). Furthermore, 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 contract is accomplished.” *Del. Civ. Pattern Jury Instructions* § 19.18 (1998). Moreover, a “builder who has performed work under a construction contract is nevertheless entitled to recovery despite the owner’s dissatisfaction, if the work done is such that a reasonable person would have been

satisfied by it.” *Shipman*, 1993 WL 54469, at *3. Under this rule, the owner’s satisfaction is determined by objective criteria. *Id.*

IV. OPINION AND ORDER

At the outset, the Court finds that Plaintiff has failed to meet his burden of proving a Conversion Claim in Count IV of the complaint against Defendant by a preponderance of the evidence. Santos testified that Dendy took flooring materials that she and Marcano had to replace, but the contract between the parties shows that Dendy was the party responsible for furnishing materials. Since Marcano took Dendy off the job before Dendy was paid the full contract price Marcano has not presented any other evidence showing neglect ownership rights to the flooring materials, Plaintiff has failed to prove his conversion claim by a preponderance of the evidence.

Regarding the other claims asserted in plaintiff’s complaint, it is clear to the Court that the work performed by Defendant did not meet the objective standards of good, workmanlike quality. (*See*, Count I – III, Complaint). Notwithstanding any of the house’s structural peculiarities or the changes requested by Plaintiff, the evidence in the record shows that much of the work performed by Defendant fell short of any reasonable standards of workmanship. The Court also finds that the above outlined work was negligently installed and breach the standard of care owed to the plaintiff. Therefore, the Court finds that Defendant materially breached the contract between the parties, justifying Plaintiff’s attempts to mitigate damages by firing Defendant and hiring another contractor to complete the renovations in a workmanlike manner. Plaintiff is thus entitled to actual damages sufficient to return him to the position he would have been in had Defendant not breached the contract and performed the contract items in a

reasonable manner. Plaintiff is also entitled to actual damages caused by Demby's completion of the job specifications and contract terms in an unworkmanlike manner.

Regarding Ruiz's testimony on repair or completion costs, the Court's analysis must take two factors into consideration: first, Ruiz must be treated as a fact witness because Plaintiff never made a motion to qualify him as an expert under the rules of evidence. Second, Ruiz's estimation of damages did not include any written reports or itemizations of labor and materials. Therefore, while the Court gives some weight to his testimony, it must nevertheless arrive at its own measurement of actual damages sustained by the plaintiff. In making this calculation, any award to the Plaintiff must also be offset by the cost of work that Defendant did not do and for which Demby was not paid per the terms of the original contract.. In other words, since Plaintiff only paid Defendant a portion of the total contract price, Plaintiff cannot recover for the cost of the unfinished deck, floor renovations, and wall expansions to the extent that Plaintiff did not actually pay Defendant for this work. The record shows that Plaintiff paid Defendant a total of \$40,300, both under the terms of the original contract and under the oral agreements for the fence and shed.

Finally, considering the quality of the work done and the actual costs of repairing or finishing that work, this Court concludes that Plaintiff has proven by a preponderance of the evidence at trial that he is entitled to \$23,000 in actual damages following trial. The Court makes this finding on credible evidence presented at trial by Ruiz and the documentary evidence introduced into evidence at trial by the plaintiff. In short, Ruiz's testimony, while not as an expert witness, was credible as to the actual costs and damages sustained by the plaintiff. The Court also finds that plaintiff has met this preponderance of evidence standard as to all three (3) theories plead in this complaint: negligent performance; breach of contract; and breach of the

implied warrant of good quality and workmanship. To the extent this Court needs to make such a factual finding, Ruiz's testimony is found credible by the Court and serves as a basis for the actual damages sustained by the plaintiff both to repair the unworkmanlike work and complete the portion of the actual work required under the contract terms.

Therefore, on Plaintiff's claims, judgment is entered for Plaintiff and against Defendant in the amount of Twenty-Three Thousand Dollars (\$23,000.00) plus pre- and post-judgment interest and costs. *6 Del. C. 2301 et seq.* Judgment as to the conversion claim is denied as it was not proven in the trial record by a preponderance of the evidence.

IT IS SO ORDERED this 22nd day of May, 2007.

John K. Welch
Judge

/jb

cc: Rebecca Dutton, Case Processor
CCP, Civil Division