IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSE CABREJA, t/a Millennium Floors,	)	
	)	
Plaintiff-Below, Appellee,	)	
	)	
v.	)	**C.A. No.: 2005-10-336**
	)	
ELKTON CARPET & TILE, a/k/a AZ Investment Co., Inc.,	)	
	)	
Defendant-Below, Appellant.	)	
	)	

Date Submitted: May 10, 2007
Date Decided: June 15, 2007

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DECISION AFTER TRIAL

Plaintiff, Jose Cabreja t/a Millennium Floors (hereinafter "Cabreja") brings this action against Defendant, Elkton Carpet & Tile a/k/a AZ Investment Co., Inc., (hereinafter "ECT") for breach of contract and quantum meruit. Plaintiff alleges he contracted to perform work which included approximately twenty-four flooring contracts, and that Defendant owes $4,564.28 for such work. Defendant admits

owing Plaintiff $1460.19 but denies owing any additional amount. Defendant also alleges Plaintiff improperly installed hardwood flooring on four separate jobs, for which Defendant brings a counterclaim of $13,633.03. Following trial on May 10, 2007, the Court reserved decision. This is the Court's final decision.

FACTS

After hearing testimony and examining all evidence in the record, the Court finds the relevant facts as follows:

Jose Cabreja testified he has approximately twelve years of experience doing flooring work and had been operating as the sole proprietorship Millennium Floors for nine to ten years. Prior to May 2004, Cabreja stated he knew Charles Platt (hereinafter "Platt") for approximately one year. Platt became manager for ECT in May 2004, and shortly thereafter Cabreja met with Platt and Clifford Moore (hereinafter "Moore"), owner of ECT. Cabreja testified this meeting took place on the day of his first job with ECT. Cabreja testified for new construction, he charged $2.00 per linear foot for hardwood floors and $6 per foot for vinyl. Because flooring jobs in previously existing residences were more complicated, Cabreja indicated he told Platt and Moore he charged $2.50 per linear foot of hardwood and $7.00 per linear foot for vinyl. He told them he charged $15 per sheet of luan in both new or existing residences.

Cabreja testified he always submitted invoices to ECT by fax. Cabreja submitted two invoices on May 14, 2004 and another on May 17, 2004; they

purported to bill ECT for $793.17, $477.50, and $300.00, respectively. Sometime after May 21, 2004 Cabreja received a check from ECT for $1,045.37. Because the check did not specify what jobs were being paid, Cabreja asked an employee of ECT what the check represented but the employee did not know. Cabreja continued to perform jobs for ECT, submit invoices, and receive checks. ECT's practice was to issue checks on a periodic, rather than per job, basis. Sometime between May 2004 and January 2005 Cabreja's bookkeeper, Christine Galvez (hereinafter "Galvez") informed him that the checks were not matching the invoices. Cabreja testified he spoke with Platt several times and was told that ECT would specify what each check was for, but this was never done. Cabreja never sent a letter to ECT to follow up on his concerns.

Cabreja testified that the January 5, 2007 invoice charged ECT a hardwood rate of $2.25 rather than his usual $2.00 new construction rate because ECT agreed to compensate him for the difference. Additionally, in an invoice dated October 8, 2004, Cabreja charged ECT a hardwood rate of $2.00 rather than $2.50 because the parties made specific arrangements on this job. In the invoice dated May 14, 2004 Cabreja charged ECT $5.80 per foot for vinyl rather than his stated rate of $6.00 because he specifically discussed the price with them and "gave them a break." He said that any deviation in billing rate was the result of specific discussion. However, several times during his testimony Cabreja seemed confused about his various billing rates, occasionally forgetting why he had billed a certain job at a certain rate, or giving different rates for the same type of installation work.

Christine Galvez testified she worked as a part-time secretary for Cabreja during the entire period he was working with ECT. She was responsible for sending out invoices and depositing checks. When preparing invoices, she would consult with Cabreja before faxing the invoice to ECT. She began work on each invoice shortly after the job was completed, generally faxing them to ECT within a few days but always within a week. She never received anything from ECT indicating that any of the invoices were incorrect. After receiving three or four checks, Galvez noticed the checks did not match the invoices, and none of the checks included an invoice number or indication of what job the check was paying for. Believing that ECT was underpaying, Galvez called ECT two or three times asking what job each check was supposed to be for, but the ECT employees she talked to did not know. She then notified Cabreja of the problem.

Clifford Moore testified, he owned and operated ECT for approximately twenty-three years. He initially met with Cabreja sometime in May 2004. Platt was also present at the meeting. Moore informed Cabreja ECT generally paid $1.75 per square foot of hardwood in new construction, and $2.00 per square foot of hardwood in existing residences. These were the rates ECT paid all its other installers at the time. Moore testified he also told Cabreja that ECT paid $5.50 per square yard of vinyl, and $10.00 per sheet of luan. However, because Cabreja made a good impression, Moore agreed to pay Cabreja the following rates: $2.00 per foot of hardwood in new construction; $2.25 per foot of hardwood in existing residences; $2.00 per foot of laminate flooring; $5.50 per square yard of vinyl in new

construction; $6.00 per square yard of vinyl in existing residences; $10.00 per sheet of luan for new construction; and $12.00 for existing residences. Moore said he would not have agreed to pay Cabreja more for vinyl installation because of the retail pricing for such flooring.

Charles Platt also testified he had been manager of ECT since May 10, 2004. In that capacity he was responsible for sales, installation, scheduling, payroll, claims, and invoices. Prior to working for ECT, Platt knew Cabreja as an installer for Air Base Carpet Mart (hereinafter "ABCM"). When Platt and Cabreja initially discussed Cabreja doing work for ECT, Platt told Cabreja that he would not be paid as much as at ABCM, because the nature of the work was different and ECT had a different pay scale.

At the initial meeting Cabreja did not indicate to Moore that he wanted to be paid at higher rates, although Cabreja asked for more money on at least five subsequent occasions. Moore did not agree to pay Cabreja more, telling Cabreja that ECT could not pay him anymore, and that ECT could get someone else to do the job for ECT's stated rates. Moore testified he remembered agreeing to pay Cabreja at a different rate on one or two specific jobs.

Moore testified the two Cabreja invoices, both dated November 11, 2004 related to a job for customer Debbie Ewing (hereinafter "Ewing job"), but there should only have been one invoice. There were several discrepancies between the invoices and the original work order issued for this job. The work order indicated installation of: two hundred and ten feet of laminate, two end caps, one transition,

and eight quarter rounds. The invoices submitted by Cabreja billed ECT for these items, but also billed ECT for: two hundred and ten feet of hardwood flooring, three additional end caps, fifty additional quarter rounds, and a charge of $25.00 "To cut carpet and level floor before installation."

Sometime around January 2005, Moore testified he called Cabreja and informed him that the work performed for two job sites had an installation problem and the flooring needed to be replaced. When receiving a complaint about his work, Cabreja testified his practice was to personally inspect the job to determine whether the installation had been done properly. He had no written agreement with ECT regarding the replacement of faulty work, but Cabreja's practice was to perform the replacement labor for free. Moore agreed that Cabreja could inspect the job site. When Cabreja arrived, he discovered that one of ECT's workers had removed all the flooring materials and taken them back to the store. Cabreja was told that the flooring had been improperly installed, running parallel to the floor joists. Cabreja's general practice was to install flooring perpendicular to the joists, which prevents the flooring from separating. Cabreja asked Moore if the flooring had been removed and taken back to the store so that ECT could claim a manufacturing defect for reimbursement purposes while simultaneously refusing to pay Cabreja because of an installation defect. After the falling out between Moore and Cabreja, ECT sent Cabreja two letters, both dated January 28, 2005, informing him of complaints ECT received regarding improper installation of the two jobs.

Moore received complaints on two new construction lots for where Cabreja had performed work—lots 188 and 41 (hereinafter "Lot 188" and "Lot 41" respectively). Moore and Platt inspected both lots personally. They both observed the floor on both lots was installed parallel to the floor joists, which could cause squeaking, gaps, and subfloor sagging. Moore telephoned Cabreja, who had already left the job. Cabreja refused to pay for the flooring materials, telling Moore, "You make the big bucks. You pay for it." The homebuilder, and not Moore, arranged for one of the homebuilder's workers to remove the flooring so that the job could be finished quickly, but this was not done until at least three people had observed the faulty installation. Moore did not claim a manufacturing defect on the flooring. Cabreja did not perform any further work for ECT. After the heated exchange in which Moore told Cabreja he didn't want him on the job anymore. Although Platt had no further oral discussions with Cabreja, he sent Cabreja two letters, both dated January 28, 2005, attempting to set up a meeting to discuss the replacement costs of Lot 188 and Lot 41.

Moore admitted he owed Cabreja $1,460.19, which includes $517.50 for one of the Ewing invoices, and $942.69 for an invoice dated January 5, 2005. The January 5, 2005 invoice was for work done in November 2004, but Cabreja had not billed ECT until January. Moore never paid on these invoices because he received complaints regarding Cabreja's work in November. Moore did not receive the other Debbie Ewing invoice for $543.00 until late March 2005. Moore never contested any of Cabreja's invoices in writing.

Platt testified that upon receiving invoices from Cabreja, he made handwritten adjustments of the rates claimed by Cabreja to reflect the rates ECT agreed to pay. He also adjusted charges on the invoice where they did not reflect the work listed in the works orders given to Cabreja. Platt denied that he and Cabreja specifically discussed price prior to every job, but confirmed that he made specific agreements on certain jobs. For example, on the invoice dated May 31, 2004, Platt agreed to pay Cabreja $2.50 per foot of hardwood for new construction rather than the general $2.00 rate because the particular job involved more expensive, specialty wood. However, Platt did not agree to pay Cabreja a trip charge for the job, so he crossed this additional charge out before paying the invoice.

Platt testified that though Cabreja submitted two separate invoices for the Ewing job, he was given only one work order for the job. In rebuttal testimony Cabreja explained that, although the invoices he submitted to ECT for the Ewing job were given the same date, he had actually worked on the Ewing job on two separate days. Cabreja explained that the flooring originally installed according to the work order was not what the customer had wanted; therefore, the first flooring was removed and Cabreja replaced it with a different type of flooring.

After Cabreja filed suit against ECT, he submitted an invoice dated January 5, 2005 in which he purported to bill ECT for $1,108.52. As he did with the prior invoices, Platt adjusted the billing rates to reflect the rates ECT had agreed to pay Cabreja, and authorized payment in the amount of $942.69.

Charles Duker (hereinafter "Duker") testified at trial. He had been employed by ECT as an estimator for seven years. In that capacity he would measure job sites to see how much square footage of materials was needed. After ECT sent him to look at Lot 188 and Lot 41, Duker observed that the flooring in both lots was improperly installed, running parallel to the floor joists.

DISCUSSION

Defendant admits to owing $1,460.19, which includes $517.50 for one of the Debbie Ewing invoices, and $942.69 for the invoice dated January 5, 2005. Therefore, Plaintiff has met his burden of proving these damages.

During closing argument Plaintiff argued that the contracts between the parties were governed by 6 *Del. C.* § 3508, which determines the procedure for disputing building construction invoices. It states that if an owner or contractor disputes any amounts stated in an invoice for payment, then: "(1) The party disputing the invoice must notify the other party in writing within 7 days of the receipt of the disputed invoice; and (2) the party disputing the invoice must be specific as to those items within the invoice that are disputed." 6 *Del. C.* § 3508(a). However, if the owner or contractor does not give notice of dispute within seven days of receipt of the invoice, "then the invoice is deemed to be accepted as submitted." 6 *Del. C.* § 3508(b). On the other hand, failure to give timely notice of dispute "does not constitute acceptance of the work performed." The statute does not apply to "contracts for the erection of 6 or fewer residential units which are

under construction simultaneously, or for the alteration or repair of any single residential unit."

Testimony and evidence in the record, including Plaintiff's own invoices, show that all the jobs in dispute concern residential units. The new construction jobs for which ECT employed Cabreja were always for less than six units at a time, while each alteration or repair job concerned a single residential unit. As such, I conclude 6 *Del. C.* § 3508 is inapplicable to the issues raised in this case.

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 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). However, a party cannot complain about a failure to perform or to complete an agreement when that party precipitates a situation that effectively frustrates the other party from performing or completing the agreement. *Pollock Construction, Inc., v. Parramore*, 2006 WL 3770832, at *2 (Del. Com. Pl.).

Both Moore and Platt testified that they told Cabreja the rates they paid their other installers and both testified that they agreed to pay him slightly higher rates. The Court finds credible Platt's testimony that he personally told Cabreja that ECT would not pay Cabreja the same rates he had been paid by ABCM. Since Platt was the manager of ECT, with responsibility over the company's finances, the Court also finds credible his testimony regarding the general rates he told Cabreja ECT would pay for Cabreja's services: $2.00 per foot of hardwood in new construction; $2.50 per foot of hardwood in existing residences; $5.50 per yard of vinyl in new construction; $6.00 per yard of vinyl in existing residences; $10.00 per sheet of luan in new construction; and $12.00 in existing residences. After both Moore and Platt told Cabreja the rates they were willing to pay, Cabreja's objective conduct in taking jobs from ECT formed an implied contract to work for the rates offered, regardless of

what Cabreja subjectively believed or understood about what he would be paid. The evidence is clear that the parties occasionally deviated from these general terms by specific agreement, but Plaintiff has not otherwise met his burden of proving by a preponderance of the evidence that ECT agreed to pay him at rates higher than the ones Moore and Platt offered him.

The Court finds that Plaintiff has met his burden of proving by a preponderance of the evidence that he performed the work listed in the two invoices for the Ewing job. As the one responsible for completing the flooring for the job, Cabreja is credible in his testimony that the flooring had to be redone per the customer's wishes, and that he in fact performed this work. Therefore, although Defendant already admits to owing $517.50 for one of the Ewing job invoices, the Court finds that Plaintiff is also entitled to payment of $543.00 for the other invoice.

Regarding Defendant's counterclaim against Plaintiff, the Court notes that although Defendant presented three witnesses who testified that Lot 188 and Lot 41 were improperly installed, Cabreja was never given an opportunity to remedy either job. Not only was the flooring removed before Cabreja even had a chance to examine his own work, but Moore's harsh words with Cabreja indicated that he no longer desired Cabreja to work for him. Since ECT and Cabreja had no oral or written agreement regarding the replacement of purportedly faulty installation, and since Moore effectively precluded Cabreja from working on Lot 188 and Lot 41, ECT is not entitled to collect damages for these claims. Since Defendant presented

no other evidence in support of the other issues raised in its counterclaim, the counterclaim fails.

CONCLUSION

Based on these findings of fact and conclusions of law, I find Defendant Elkton Carpet & Tile liable to Plaintiff Jose Cabreja for the total amount of $2,003.19

Accordingly, judgment is hereby entered for Plaintiff and against Defendant for costs, the amount of $2,003.19, with pre-judgment interest at legal rate from January 5, 2005 and post-judgment interest at the legal rate until paid.

IT IS SO ORDERED

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Alex J. Smalls
CHIEF JUDGE

Cabreja-OP Jun 07