IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

WORCESTER COUNTY DEVELOPMENT COMPANY, INC. & OMAR, INC. vs. GEORGE C. ECONOMOS and, NANCY N. ECONOMOS, Defendants.	)))))))))	C.A. No. 05-08-22

Submitted May 7, 2007
Decided August 15, 2007

Robert Pasquale, Esquire, Attorney for Plaintiffs
David N. Rutt, Esquire, Attorney for Defendants

DECISION AFTER TRIAL

Trial in this action for sums allegedly owed on a construction contract was held on April 18, 2007. After considering the evidence and post-trial submissions, the Court finds for the Plaintiff Worcester County Development Co., Inc., upon the findings of fact and for the reasons set forth below.

FACTS

Defendant George Economos is an owner of a real estate lot in Bethany Beach, Delaware. In 2002 he solicited piling work upon the property from Plaintiff Worcester County Development Company, Inc. ("Worcester") for the construction of a home. On November 18th 2002, Worcester submitted a "Proposal" to Economos. The terms of the proposal were, *inter alia*, "to furnish and drive approximately 80 class B piles, length to be determined after 2 40 foot test piles are driven," at a price of $11.00 per foot length of

pile. The proposal further provided for payment in full upon completion, interest at 18% per year on past due amounts, and payment of attorney's fees and costs of any collection efforts. Economos signed the proposal, but added the following hand-written, additional terms before returning the signed proposal to Worcester:

> "20,000# bearing resistance.
> For 11,000# hammer use formula for driven resistance & number of blows.
> 25 foot long piles are to be used 15' into ground minimum.
> Pine tree has an elevation marked at 10 ft. El. for your height use."

Omar Todd, Worcester's principal owner with several decades of experience in pile-driving in coastal areas, testified that, upon receipt of the altered, signed proposal, he knew that the added terms were mutually inconsistent, and that it was impossible to guarantee adherence to all four of these specifications. He did not communicate this to Economos. Nonetheless, Economos, Todd, and Todd's son met on the property site in late November, 2002 to perform the test pile drives called for in the proposal.

On site, Todd determined that half of Economos' property was approximately five feet higher than the other half. This made pile driving under the terms presented by Mr. Economos impossible since his ten foot bench mark, exhibited by a ribbon on a tree, was located on the high side of the property. To reach the ten-foot benchmark on the low side of the property, Mr. Todd would have to drive a much longer piling. Based on the topography of the lot and the test pile drive, Todd informed Economos he needed to use 35-foot pilings to complete the job properly. The Court finds from the evidence that Economos agreed to the use of 35-foot pilings, and Todd began the work. Once the pile-driving on the low side of the property was finished, however, Economos demanded that Todd finish the project using 25-foot pilings on the remaining high side of the property. Todd agreed to do so.

Worcester completed the work, and came back to the site twice to straighten the pilings, which from the evidence is a normal and necessary task when the pilings are left

sitting without stringers and further construction for a length of time. In April, 2003 Worcester last went to the Economos property and aligned the pilings. On April 21, 2003 Economos wrote a letter to Todd thanking him for correcting the "defective" pile alignments. Along with the letter Economos sent a $4,000.00 payment on the remaining balance, and a "Partial Waiver of Lien" form "for the aggregate payments to date." The letter further stated that Economos wanted to meet with Todd on the job site "for final inspection." Todd did not cash the $4,000.00 check. More than two years later, on August 11, 2005, Plaintiff filed this action.

DISCUSSION

A party alleging breach of contract must prove that a contract existed, that the defendant breached an obligation imposed by that contract, and that the plaintiff has suffered damages because of the breach.[1] Neither of the parties dispute that they entered into a contract. However, the parties do dispute when the contract was formed, and in turn, their respective duties under the terms of that contract.

Formation

Formation of a contract requires mutual assent to the terms, and the existence of consideration.[2] Mutual assent exists when there has been an offer and an acceptance of the identical terms of that offer.[3] When the existence of mutual assent is in doubt, the Court must determine if a reasonable person would conclude that, based on the objective manifestations of assent and the surrounding circumstances, the parties intended to be bound to their agreement.[4]

Worcester's written proposal clearly was an offered contract. Economos rejected this offer and made a counteroffer by adding other terms before signing and returning

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[1] *LVIW Technology, LLC v. Hewlett-Packard Co. Stmicroelectronics, Inc*., 840 A.2d 606, 612 (Del. 2003).
[2] *Faw, Casson & Co. v. Cranston*, 375 A.2d 463 (Del. Ch., 1977).
[3] *See, Murphy v. State Farm Insurance Co.,* 1997 WL 528160 (Del. Super.)
[4] *Diamond Electric, Inc. v. Delaware Solid Waste Authority,* 1999 WL 160161, *3 (Del. Ch.).

the proposal. Worcester did not explicitly refuse the counteroffer, and took action upon it by arriving at the work site to perform, thereby accepting the counteroffer.[5] Indeed, both parties' arrival and presence at the job site to commence work when both were in possession of the full terms of the contract (both those in the original proposal and those added by Economos) clearly evidence the mutual assent of the parties.

The Terms of the Contract

If a written contract is clear on its face, the Court must rely solely on the literal and plain meaning of those words in interpreting the contract.[6] If a contract is ambiguous however, the Court can use extrinsic evidence to determine the parties' reasonable intentions at the time of the contract.[7] Ambiguity exists "if the terms of the contract are inconsistent, or when there is a reasonable difference of opinion as to the meaning of words or phrases."[8] Ambiguities are construed against the drafter.[9]

Economos added new terms that were inconsistent with the other terms of the contract, and inconsistent with each other. Those terms required Worcester to use 25-foot pilings, to drive them at least 15 feet into the ground, and to reach a bearing resistance of 20,000 pounds. Finally, the added terms required the pilings to reach a benchmark Economos marked on a pine tree, ten feet above the ground. And yet, the contract continued to contain the original language requiring piling "length to be determined after 2 40 foot test piles are driven."[10] Omar and David Todd, with more

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[5] *1 Williston on Contracts (3d Ed.) § 69AA. See also, Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.,* 768 A.2d 983, 991. (Del. Super., 2000) *(finding that party accepted offer via silence and performance).*
[6] *Interactive Corp. v. Vivendi Universa, S.A.,* 2004 WL 1572932 (Del. Ch.)
[7] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 (Del.1997).
[8] *Mell v. New Castle County,* 2004 WL 1790140, at *3 (Del.Super.).
[9] *Twin City Fire Ins. Co. v. Del. Racing Assoc.,* 840 A.2d 624, 630 (Del. 2003).
[10] To understand the ambiguity in these terms, one must understand the basics of pile driving. First, a pile driver cannot agree to drive a predetermined length of pile to both a specified depth and bearing resistance. When a pile driver drives a piling into the ground, he has no idea how far down it must be driving to reach a specified bearing resistance. The subsurface conditions could allow a pile to sink 10 feet in one area, and 20 feet in another. To determine how long a piling is needed to do the job, they first drive a test piling. The test piling gives them a better idea of how long a piling they will need to reach a proper resistance. After they select the appropriate length of piling, and drive it to its maximum depth, they perform a blow count. A blow count is the number of times the pile

than 70 years combined experience in the field of pile driving, testified that it is impossible to satisfy all of these terms. They testified that they could drive a 25 foot piling and 15 feet into the ground, but it was almost certain to not reach the desired bearing resistance of 20,000 lbs. Likewise, they could drive a 25-foot piling to 20,000 lbs resistance, but could not guarantee that it would be set 15 feet into the ground. In order to accomplish the primary goal of providing a proper base for the home, Worcester had to perform test driving to determine the length of piling needed.

The evidence also established that it would be impossible to use 25-foot piling throughout the property and yet have all the piling reach the 10 foot height benchmark. Sally Ford, a licensed surveyor, testified that Economos property had a difference in elevation from one side of the property to the other of approximately 5 feet. Economos set the 10-foot benchmark on the high side of the property. Since the terms required at least 15 feet of the 25-foot piling to be driven into the ground, Worcester could not possibly reach the 10-foot benchmark with a 25-foot piling on the low side of the property.

Since the contract terms are ambiguous, the Court must determine the intentions of the parties and interpret the contract accordingly.[11] After reviewing the extrinsic evidence presented at trial, the intent of the parties is clear. They intended to contract for the installation of approximately 80 pilings sufficient to properly support the house Economos intended to build on a lot of uneven elevation, and the pilings should all reach a benchmark he placed on a tree 10 feet above the ground. The parties further agreed that Economos would pay Worcester $11.00 per foot of installed piling.

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driver can strike a piling without forcing the piling deeper into the ground. A licensed engineer can then enter the blow count into a formula to determine the bearing resistance. Thus, it would be virtually impossible for Worcester to use a predetermined length of piling, drive it to a certain depth, and guarantee the bearing resistance at the same time.

[11] *See, The Liquor Exchange, Inc. v. Tsaganos,* 2004 WL 2694912, at *2 (Del. Ch. Nov. 16, 2004).

Even if the ambiguity inserted into the contract by Economos' mutually inconsistent terms was not resolved by the evidenced intent of the parties, the course of conduct of the parties after formation of the contract clearly shows agreed modifications of the contract terms to address the inconsistencies.[12] The Court finds the parties twice modified the terms of the original contract during its performance. On the first day at the job site, Worcester performed a test piling, and based on its results informed Economos it would need to use 35-foot pilings to both hit the 10-foot benchmark and provide proper stability for the pilings.[13] The Court finds that Economos agreed to use of the 35 foot pilings, and Worcester began installing 35 foot pilings on the low side of the property. However, as the work came around to the high side of the property, Economos demanded that Worcester finish the high side of the property using 25-foot pilings. Worcester acquiesced to this modification since it could hit the benchmark, and provide apparently minimally sufficient stability with 25-foot pilings on the high side of the lot.

Breach

A breach of contract occurs where a party fails to perform a contractual duty that has become absolute.[14] To recover damages for any alleged breach, the plaintiff also must demonstrate substantial compliance with all provisions of the contract.[15]

Economos' only duty under the terms of the contract was to pay Worcester for the services rendered upon completion. Worcester completed the installation of the

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[12] Post-integration evidence of modification of terms is not excluded by the parol evidence rule. *See, Brandywine Shoppe, Inc. v. State Farm Fire and Casualty Co.,* 307 A.2d 806 (Del. Super., 1973).

[13] According to Omar and David Todd, to provide proper stability for a piling, they must drive the piling to a depth such that every foot of piling exposed above the ground is supported by two feet of piling below the ground. Based on this common practice in the industry, they could not provide proper stability for the pilings using a 25 foot piling to reach the benchmark on the low side of the property. Doing so would leave 15 feet exposed, with only ten feet in the ground. According to their uncontested testimony, using a 25 foot piling would jeopardize the structural integrity of the home.

[14] *Restatement of Contracts, § 312.*

[15] *Emmett Hickman Co. v. Emilio Capaldi Developer, Inc.,* 251 A.2d 571 (Del. Super., 1969).

pilings in January, 2003, and sent Economos a bill dated January 24, 2003 for $12,555.00 remaining due. Economos made no further payments until April 21, 2003, but in the interim complained about the alignment of the pilings, which Worcester adjusted in early April, 2003. The Court finds from the evidence that the piling alignment problem arose from Economos' failure to promptly have stringers attached, which was not Worcester's obligation. Thus, Worcester completed its work and payment was due on January 24, 2003. The $4,000.00 tendered by Economos on April 21, 2003 was less than the amount due, which remains unpaid. Economos thus breached the contract.

Defendant has not proven that Worcester breached the final terms of the contract, as determined by the Court. The mutually agreed terms of the modified contract required Worcester to drive 35-foot pilings on the low side of the property, and 25-foot pilings on the high side of the property. Worcester fully performed under the contract, and Economos has failed to prove that Worcester did not perform in a workmanlike manner.

A claim of failure to perform in a workmanlike manner is essentially an action for breach of an implied warranty[16]. The issue is whether the party "displayed 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.[17] 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."[18] If the work done is such that a reasonable person would be satisfied by it, the builder is entitled to recover despite the owner's dissatisfaction.[19]

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[16] *3 Bruner & O'Connor on Construction Law § 9:68.*
[17] *Shipman v. Hudson,* 1993 WL 54469, at *3 (Del. Super.)
[18] *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 120173 at *3 *quoting Del. Civ. Pattern Jury Instructions § 19:18* (1998).
[19] *Shipman*, *supra,* 1993 WL 54469 at *3.

At trial, Mr. Economos failed to present any evidence that Worcester's work fell below the relevant standard of performance. Further, the overall purpose of the contract was achieved: Economos built his home on the pilings without further correction, and obtained a certificate of occupancy. Economos also failed to offer any credible evidence for the alleged breach of implied warranty, or any damages therefrom.

Damages

The remedy for a breach of contract is generally based upon the reasonable expectations of the parties.[20] Expectation damages are measured by the amount of money that would put the non-breaching party in the same position as if the breaching party had performed the contract.[21] At completion of the work, Worcester presented Economos with a bill for $12,555.00. However, when Economos failed to pay the remaining balance, subsequent invoices from Worcester added new charges for services that had been implicitly included in the original final invoice, such as small tree removal and return shipping costs. These added charges were not a part of the contractual terms, and may not be awarded as damages. Therefore, to place Worcester in the same position as if Economos had performed, Economos must pay Worcester the amount it expected to receive under the terms of the contract.[22] The January 24, 2003 invoice first sent to Economos correctly calculated the amount due based on the length of the test pile and number of 25 foot and 35 foot pilings driven, less payment made, at $12,555.00.

Interest is available to the prevailing party as a matter of right.[23] When interest is awarded, it begins to accrue on the date on which payment was due.[24] In this case, the

[20] *Duncan v. TheraTx., Inc.*, 775 A.2d 1019, 1022 (Del. 2001).
[21] *Id*.
[22] The damages awarded by the Court are the sole liability of Mr. Economos. Generally, the signature of one spouse on a contract with a third party will not ordinarily bind the non-signing spouse to the contract. *41 D.J.S. Husband and Wife § 60; In Re Wilson v. Pepper*, 1995 WL 562235 (Del. Super.) Worcester failed to present any evidence that Mrs. Economos was a party to the contract, and she is not liable thereon.
[23] *See, Superior Tube Co. v. Del. Aircraft Industries*, 60 F. Supp. 573 (D.C. Del., 1945).
[24] *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778 (Del. 1966).

first invoice was sent on January 24, 2003. However, the Court is concerned that Plaintiff sent three invoices, all dated January 24, 2003, but sent on different dates prior to April 21, 2003 and stating different balances due. Plaintiff also failed or refused to cash a $4,000.00 check payment made by Economos on April 21, 2003, which was not tendered as a final payment or payment in full. Indeed, Economos, in tendering the check, requested a meeting with Worcester at the job site for a final inspection, which would presuppose a final payment after inspection. Worcester ignored this overture, did not cash the check, ceased further invoicing of defendant, and took no further action to demand payment for more than two years. The Court finds that the Plaintiff has failed to establish, by a preponderance of the evidence, that it made a clear demand for the actual remaining amount due after failing to cash the partial payment tendered on April 21, 2003. The Court therefore will award pre-judgment interest only from the date of filing of this action, and only on the principal judgment amount less the $4,000.00 payment unjustifiably refused by Worcester. Plaintiff is thus awarded pre-judgment interest on $8,555.00 at 1.5% per month from August 11, 2005 through August 15, 2007, or $3,096.68.

Defendant is liable for reasonable attorney's fees under the terms of the contract. The parties agree that *10 Del. C. § 3912* limits a few award to 20 percent of the amount adjudged for principal and interest. The Court awards attorney's fees to Plaintiff in that amount, $3,130.28, which it deems reasonable in view of the pleadings filed, discovery conducted, length of trial and demonstrated preparation of counsel for trial.

CONCLUSION

Judgment is entered in favor of Plaintiff Worcester Development Co., Inc. and against Defendant George C. Economos in the amount of $12,555.00, plus pre-judgment interest in the amount of $3,096.00, plus post-judgment interest at the contract rate of

18% per annum, plus attorney's fees in the amount of $3,130.28, plus court costs. Judgment is entered in favor of Defendant Nancy N. Economos and against Plaintiff. Judgment on the counterclaim is entered in favor of Plaintiff and against Defendants.

IT IS SO ORDERED this 15th day of August, 2007.

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Kenneth S. Clark, Judge