

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

Michael T. Rezak,	:	
	:	C.A. No. 06-10-0032AP
Plaintiff Below,	:	
Appellant,	:	
	:	
vs.	:	
	:	
S & L Contractors, Inc.,	:	
	:	
Defendant Below,	:	
Appellee.	:	
	:	

Decision after trial.

Date of Trial: November 19, 2007

Date Decided: November 27, 2007

Judgment for the Plaintiff.

H. Cabbage Brown, Jr., Esquire, Brown, Shiels & O'Brien, 108 East Water Street, Dover, Delaware 19901, Attorney for Plaintiff Below/Appellant.

Scott E. Chambers, Esquire, Schmittinger & Rodriguez, P.A., Post Office Box 497, Dover, Delaware 19903-0497, Attorney for Defendant Below/Appellee.

Trader, J.

In this civil action for breach of contract, I conclude that the defendant, S & L Contactors, Inc. (S & L), has breached its warranty with the plaintiff, Michael T. Rezak (Rezak). Accordingly, I enter judgment for the plaintiff.

The relevant facts are as follows: on or about February 26, 2004, Rezak entered into a contract with S & L to construct a home for him to be located at 140 Mystic Lane, Magnolia, Delaware. At the time of settlement, Rezak, the homeowner, received a one-year warranty, which covered any and all damage to the house caused by improper drainage and landscaping. After the settlement of the house, there was a large pile of dirt in the back of Rezak's yard. Although most of this dirt was subsequently removed, a small mound of dirt remained. Thereafter, Rezak noticed that both the crawl space below his floor and the house's foundation were wet because of the accumulation of water in the crawl space. Pursuant to the homeowner's obligation set forth in the warranty agreement, Rezak wrote to S & L, within the time frame provided in the agreement, and set forth the problem concerning the substantial amount of water in the crawl space. After S & L received the homeowner's complaint, it cut a hole in the foundation wall and installed a pipe that went out into the yard. Even after this procedure was done, water accumulated in the crawl space. The plaintiff then contracted Kent Construction Company and its employees dug a trench and installed a new drain pipe under the foundation. Although this new temporary drain pipe has significantly reduced the amount of water in the crawl space, the problem still remains. Kent Construction Company also built a patio for Rezak, but any change in grading as a result of this addition directed the water away from the house.

John McKeon, project manager and foreman of Kent Construction Company, testified as an expert witness. Expert testimony is the opinion of persons who are skilled

in some profession or business, whose skill or knowledge is not common to their fellow man, and which has come to such experts by reason of special study, or experience in the profession or business. *See D.R.E. 702.* The value of such testimony depends upon the learning and skill of the expert and varies with the circumstances of each case. I should take into consideration the expert's means of knowledge and the reason he assigns for the opinions he has given. Based on his experience as a contractor and project manager in building homes and the reasons he assigns for his opinion, I find John McKeon's testimony to be both credible and persuasive. He testified that the water was draining toward the house because of the small mound in the backyard of Rezak's property. He also stated that the concrete in the foundation had started to crack and that the crawl space was wet up to the foundation wall. He further testified that although the water was partially draining, the wetness in the crawl space indicated the presence of standing water from time to time. He also noticed that the insulation was wet from the water.

In McKeon's expert opinion, the following things needed to be done to repair the drainage problem at 140 Mystic Lane, Magnolia, Delaware: (1) regrade the rear of the home to drain water away from the foundation; (2) excavate and place a drainage basin in the corner of the crawl space and provide a water pump attached to a discharge pipe; and (3) provide a two-inch concrete mud slab poly-vapor barrier and regrade the crawl space area so that it will drain into the basin. The estimate for this labor and materials in connection with the drainage problem was \$11,900.00 and \$3,702.00 to replace the wet insulation. McKeon indicated that each of the three drainage problem repairs comprised between thirty and forty per cent of the \$11,900.00 estimate.

In contrast to this testimony, David Bret Rogers, owner of S & L, testified that he obtained a certificate of occupancy from Kent County Conservation. He testified that the

property was graded correctly and that the water in the crawl space was due to ground water. Although he inspected the crawl space with the plaintiff and did not find standing water, he only went half-way into the crawl space and he refused to inspect a part of the crawl space requested by Rezak. Thereafter, S & L made a hole in the foundation and had a drain pipe installed in the crawl space. Wayne Mast, an employee of S & L, gave testimony that essentially supported the company owner's testimony.

When the Court sits as trier of fact, it is the job of the Court to determine the credibility of the witnesses and to assign weight and value to their testimony. *See Barks v. Herzberg*, 8 Storey 162, 164, 206 A.2d 507, 508 (Del. 1965). In determining the credibility of the testimony of the witnesses, I consider each witness' means of knowledge, the reasonableness or unreasonableness of his testimony, the motives actuating him, his bias, prejudice or interest, if any, and his manner or demeanor on the witness stand. It is my duty to accept testimony most worthy of belief and disregard testimony unworthy of belief. *See Del. P.J.I. Civ. '23.9* (2000) (Credibility of Witnesses). After considering the above factors, I accept the testimony of the plaintiff and his witness, and reject the testimony of the defense witnesses. As a result of this finding, I conclude that S & L has breached its warranty with the plaintiff.

In a breach of contract case, the amount of damages should place the plaintiff in the same position he would be if the contract would have been fulfilled. *MCCORMICK, DAMAGES*, § 136 at 560 (West 1935). *See Duncan v. Theratx, Inc.*, 775 A 2d 1019, 1022 (Del. 2001); *White, Inc. v. Metro. Merch. Mart, Inc.*, 107 A.2d 892, 894 (Del. Super. Ct.1954). I conclude that it is necessary to regrade the backyard of Rezak's property and bring in six loads of topsoil. I also conclude that it is necessary to excavate and place a drain basin in the corner of the crawl space and provide a water pump with a discharge

pipe. I am not persuaded that it is necessary to provide a poly-vapor concrete barrier. Additionally, the installation of a concrete barrier was not a part of the contract between the parties. I will allow damages for seventy per cent of McKeon's estimate to correct the drainage problem. Seventy per cent of \$11,900.00 is \$8,330.00 and I also allow damages in the amount of \$3,702.00 for the replacement of the wet insulation. I disallow the amount sets forth for Warren Wolf's inspection, the drainage labor, and reimbursement of lawn care.

Based on these findings of fact and conclusions of law, judgment is entered on behalf of the plaintiff, Michael T. Rezak, and against the defendant, S & L Contractors, Inc., for the sum of \$12,032.00, plus costs of these proceedings.

IT IS SO ORDERED.

Merrill C. Trader
Judge