IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

GEORGE COUPE,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 2006-12-213
	)	
RESORT REPAIRS, INC.	)	
	)	
	)	
Defendant.	)	

Submitted: September 18, 2009
Decided: October 14, 2009

David C. Hutt, Esquire, counsel for Plaintiff.
Dean A. Campbell, Esquire, counsel for Defendant.

DECISION AFTER TRIAL

In this action, the Court is called upon to determine whether Defendant is liable to Plaintiff for damages incurred when Plaintiff contracted with Defendant to install replacement windows and hardware on Plaintiff's house in South Bethany, Delaware. Additionally, this Court is asked to calculate appropriate damages. On September 2, 2009, the Court conducted a trial and took testimony and evidence. This is the Court's decision.

FACTS

The Court makes the following findings of fact after reviewing the testimony and exhibits submitted. George Coupe ("Plaintiff") is a resident of Virginia and owns a beachfront home at 700 South Ocean Drive, South Bethany, Delaware 19930. Plaintiff indicated that he purchased the home in 1982 when it was four years old. During the course of his ownership, Plaintiff testified that he hired Ron Gay of Resort Repairs, Inc.

to perform miscellaneous repair and maintenance work at the home. Resort Repairs, Inc. ("Defendant") is a Delaware corporation located in Ocean View, Delaware that engages in repair and remodeling work predominately in Sussex County, Delaware. Mr. Gay is the owner and registered agent of the corporation.

In July 2003, Plaintiff contacted Defendant about replacing the windows and a sliding door in his home. On July 2, 2003, Defendant submitted an estimate of $22,800 to repair the sliding door, and replace and install twenty-four (24) new windows in Plaintiff's home. In preparing that estimate, Mr. Gay obtained a cost sheet from his supplier. Defendant's Ex. D. This proposal notes that corrosion resistant hardware was to be installed with the windows. Mr. Gay testified that it was his practice to include corrosion resistant hardware for a beachfront home, because the hardware will rust without protection in that environment. However, Plaintiff did not accept this estimate. Rather, Plaintiff decided to have Defendant repair the sliding door at a cost of $800, but not make the window improvements at that time.

Subsequently, in June of 2004, Plaintiff again contacted Defendant to perform the window installation. After deducting costs for the sliding door repairs, Defendant submitted a second estimate of $22,000 for the window installation. However, the parties dispute how that figure was reached, and what products and services were included in that price. Mr. Gay testified at trial that Plaintiff wished to proceed with the job at the July 2003 estimate and inquired as to whether there was any change in price. Mr. Gay explained to Plaintiff that there would be an increase in cost because materials and the cost of doing business had increased during the course of the past ten months. In order to offset this increase in price, Mr. Gay testified that Plaintiff asked if anything could be

done to have the price reflect the original estimate. Subsequently, Mr. Gay stated that the parties came to an agreement where Defendant would not install corrosion resistant hardware because it was more expensive than regular untreated hardware. Essentially, the cost difference between corrosion resistant hardware and regular steel hardware would be equivalent to the price increase. Plaintiff contends no such negotiations took place and the type of window hardware was never a topic of discussion between the parties. Thereafter, Plaintiff accepted the 2004 estimate and entered into a contract with Defendant. Acting pursuant to their agreement, Defendant installed new windows and completed the project in approximately September 2004.

In October 2004, Plaintiff notified Mr. Gay that water condensation was forming on the inside surface of the kitchen window and requested that he come to the home to inspect the work. Accordingly, Defendant's employee Eric Gay inspected the window and reported that there were no problems with the installation. Moreover, Eric Gay informed Plaintiff that condensation on the window was a common occurrence in this type of window model. Approximately one month later, despite Plaintiff's apparent dissatisfaction with Defendant's work, Plaintiff hired and paid Defendant to paint exterior trim on the home and put in some electrical work. Additionally, Plaintiff paid the remaining balance of $11,000 to the Defendant for installing the new windows after having an opportunity to inspect the window installation.

In the summer of 2005, Plaintiff noticed that the window hardware installed was showing signs of rust and notified the Defendant of the problem. Defendant informed Plaintiff that the hardware was rusting because corrosion resistant hardware was not installed pursuant to their June 2004 agreement.

On April 17, 2006, Plaintiff met with the President of Boardwalk Builders, Inc., ("Boardwalk") Patty McDaniel, to discuss resetting the windows in his home, replacing the current window hardware with corrosion resistant hardware and replacing the siding on the home. At that time, Boardwalk informed Plaintiff that the company's practice for a siding application requires that all windows must be taken out and reset in order to insure a proper waterproof seal is formed under the siding. Mrs. McDaniel testified at trial that this procedure would have been done regardless of the current condition of the window or the window flashing. In fact, Mrs. McDaniel's testimony was that in her experience, Boardwalk had to reset every window they encountered when re-siding a house because home windows never satisfied Boardwalk's standards for flashing.

On May 9, 2006, Plaintiff's attorney sent a letter to Mr. Gay informing him of problems with the windows including rusting and insufficient insulation. This letter requested that Mr. Gay contact Plaintiff's attorney to arrange a time to inspect the windows in order to determine what repairs may be necessary. Mr. Gay did not respond to the letter.

Acting on recommendation of his counsel, Plaintiff hired American Home Inspection Technologies ("American") to inspect the condition of the Andersen windows installed by Defendant. Specifically, Plaintiff noted problems with the rusting hardware and installation of the windows, but did not note problems with water intruding into the home. Steve Szypulski, owner and operator of American, conducted the home inspection on June 26, 2006. In his report, Mr. Szypulski concludes the windows were deficient for eight (8) reasons. The report also notes that the hardware installed was not the proper type for a beachfront home because saltwater exposure would produce rusting in the

unprotected hardware. However, the inspection report provides there were no elevated moisture levels detected in the walls where the windows are located. Additionally, the report notes that there were no visible water stains on the interior walls.

On January 23, 2007, Plaintiff contracted with Boardwalk to reside the house and perform the window resetting. However, while conducting inspections prior to installation, Boardwalk discovered a problem. The Plaintiff's home contained a soft, fiberboard sheathing instead of plywood sheathing that was required to provide adequate support for the new siding. After learning of the necessary improvements, Plaintiff elected to allow Boardwalk to replace the sheathing, install new siding on the house and reset the existing windows. Similar to Boardwalk's business practice of resetting the windows when residing a house, Mrs. McDaniel testified that it is also necessary to reset the windows when replacing the house sheathing. Both Plaintiff and Boardwalk proceeded accordingly with the project knowing Plaintiff was preparing for litigation.

Plaintiff asserts that he incurred damages totaling $28,750 to remediate the improper installation of the windows by the Defendant. Accordingly, Plaintiff filed a Complaint against Defendant on December 22, 2006. Plaintiff's Complaint asserted the following four counts: Count I, Breach of Contract; Count II, Breach of Express Warranty[1]; Count III, Negligence; and Count IV, Breach of Implied Warranty.

[1] Count II for Breach of Express Warranty was withdrawn prior to trial because Plaintiff never received an express warranty from Defendant.

DISCUSSION

This Court must decide three issues upon conclusion of the trial. First, Plaintiff contends that Defendant is liable under breach of contract. Additionally, Plaintiff alleges that Defendant breached the implied warranty of good quality and workmanship. Finally, Plaintiff asserts that Defendant was negligent.

Breach of Contract

There is no dispute that the parties entered into a contract to install replacement windows. Thus, the issue presented for this Court is whether the Defendant satisfactorily performed its duties under the contract. To establish a prima facie case of breach of contract, the Plaintiff must prove three things by a preponderance of the evidence. First, the Plaintiff must show that a contract existed. Second, the Plaintiff must establish that the Defendant breached an obligation imposed by the contract. Finally, the Plaintiff must prove that it suffered damages as a result of the Defendant's breach. *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

"[C]ompliance with applicable laws and regulations is a requirement and condition of building contracts for work to be performed in this State unless the contract expressly provides for a different measure of performance." *Koval v. Peoples*, 431 A.2d 1284, 1286 (Del. Super. 1981). Here, there is no contract language showing that the parties intended the contractual obligation to depart from the requirements of the law. Thus, Defendant was contractually obligated to comply with the Sussex County Code. *See Bougourd v. Village Garden Homes, Inc.*, 2002 WL 32072790, at *2 (Del. Com. Pl. Dec. 31, 2002).

Plaintiff contends that Defendant breached the contract by failing to: (1) select appropriate window hardware for a beachfront home, and (2) install the windows in a workmanlike manner required under the contract. The Court finds that Plaintiff did not establish by a preponderance of the evidence that Defendant breached the contract with Plaintiff.

Window Hardware

First, Defendant did not breach the contract by failing to install appropriate window hardware, because the decision to not include corrosion resistant hardware in the order was made by the Plaintiff. The Court heard conflicting testimony from the parties regarding whether the inclusion of corrosion resistant hardware was discussed. Plaintiff alleges that there was no discussion between the parties regarding hardware. Rather, it is Plaintiff's position that he informed Defendant to replace the existing windows with the same Andersen windows, except that the replacement windows were to be the color white. Conversely, Defendant contends there is no liability for damages, because the windows were properly installed and the installation process conformed to the guidelines provided by Andersen windows. Additionally, Defendant argues that the hardware provided to the Plaintiff was installed at his request, because Plaintiff wanted to reduce costs of the project by contracting for the less expensive hardware. After weighing the testimony and evidence submitted at trial, the Court finds Defendant's testimony to be a credible account of the parties' dealings.

In the present case, the contract between the parties does not contain an order for corrosion resistant hardware. Plaintiff's Ex. B. Further, Mr. Gay testified at trial that he recommended that Plaintiff purchase the corrosion resistant hardware, due to the home's

location. However, it is Mr. Gay's testimony that Plaintiff was planning on selling the home, so the durability of the window hardware was not an important concern to him. This testimony is substantiated by the fact that Defendant included corrosion resistant hardware in the 2003 proposal submitted to Plaintiff. Defendant's Ex. D. It follows that Plaintiff had sufficient knowledge regarding the selection of hardware and made an informed decision not to purchase corrosion resistant hardware. Although the window hardware did rust in approximately two years, Plaintiff was aware of the potential consequences in selecting the less expensive hardware. Accordingly, the Court finds Defendant did not breach the contract by installing non-corrosive resistant hardware.

Implied Warranty of Good Quality and Workmanship

Second, Defendant did not breach the contract because the replacement windows were installed in good quality and in a workmanlike manner. Delaware law recognizes an implied builder's warranty of good quality and workmanship. *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712, at *3 (Del. Super. June 9, 1999) (citing *Smith v. Berwin Builders, Inc.*, 287 A.2d 693, 695 (Del. Super. 1972)). This implied warranty arises by operation of law. *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. May 16, 2002). "Where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner." *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908).

In determining whether the contractor's work was performed in a workmanlike manner the standard 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. *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. Feb. 5, 1993). 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." *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at *3 (Del. Com. Pl. May 9, 2007) (quoting Del. Civ. Pattern Jury Instructions § 19:18 (1998)). Therefore, 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. *Shipman*, 1993 WL 54469, at *3.

In the case at bar, it is evident that Defendant held itself out to possess the requisite skill to competently perform a window installation. As a result, the Court finds that Defendant's work is covered by the implied warranty of good quality and workmanship. Therefore, the remaining issue before this Court is whether the implied warranty of good quality and workmanship was breached.

The Court concludes that Plaintiff has not shown by a preponderance of the evidence that Defendant's performance would not satisfy a reasonable person. The Court heard testimony from Defendant's expert witness Ronald Hamblin. Mr. Hamblin is certified as a home inspector in Maryland, and has a Delaware business license that allows him to perform home inspections in Delaware as well. The Court finds Mr. Hamblin's testimony to be both credible and informative. His testimony was particularly helpful in explaining developments regarding the procedures and techniques used to

install and flash windows. Mr. Hamblin testified that when Plaintiff's windows were installed in 2004, Tyveck tape was the industry standard for properly flashing windows. Additionally, Mr. Hamblin testified that it is common to have standing water in the bottom sill of an Andersen window. He further testified that finding condensation on the interior window pane is a common occurrence, particularly in beachfront homes. Thus, in accordance with Mr. Hamblin's testimony, the Anderson windows installed in Plaintiff's home were in compliance with industry standards of that time period, and functioned in a manner that was common with this type of window in a beachfront environment.

Mr. Hamblin's testimony was supported by Defendant's employee, Mr. Eric Gay. Eric Gay, a certified Andersen window technician, supervised the window installation at Plaintiff's home. Mr. Gay also testified that Tyveck taping was the appropriate standard required for Sussex County, Delaware in 2004. Moreover, Mr. Gay stated that he went to the job site several times to observe the installation of the windows and reported all installations were proper. After the project was completed, Mr. Gay inspected Plaintiff's windows when he expressed concerns with water and condensation in the window. Upon investigation, Mr. Gay found that the window was not properly latched shut, which would allow water to collect in the bottom sill of the window. Further, Mr. Gay testified that he found no signs of water leakage and informed Plaintiff that condensation forming on the windows was a common characteristic of this Anderson window model.

In fact, Plaintiff himself testified that the windows never leaked water into the home. This observation was furthered by Mr. Szypulski's inspection report providing

that there was no evidence of water intrusion through a defect in the window or how it was installed.

Therefore, pursuant to the parties' agreement, there was no breach of contract for good quality and workmanship because the Defendant installed the windows in accordance to industry standards and the windows performed in a manner that would be satisfactory to a reasonable person.

Negligence

To prevail on a claim of negligence Plaintiffs must establish that: (1) Defendant owed Plaintiffs a duty of care; (2) Defendant breached the duty; (3) Plaintiffs were injured; and (4) Defendant's breach was the proximate cause of Plaintiffs' injuries. Campbell v. Disabatino, 2008 WL 1810085 at *1 (Del. Apr. 23, 2008).

The Court finds that Defendant did not have the duty to install corrosion resistant hardware on Plaintiff's beachfront home. As previously stated above, Defendant recommended corrosion resistant hardware and installed the replacement windows with the quality of workmanship that is expected of a skilled contractor at that time.

Additionally, the Court finds that Plaintiff did not sustain any damages in Defendant's performance of the contract. It was established at trial by Mrs. McDaniel that it was necessary for Plaintiff to replace the siding and sheathing. However, there was no testimony indicating that Defendant knew that Plaintiff was planning on replacing the siding or sheathing on his home. Moreover, Mrs. McDaniel testified that Boardwalk Builders has never performed a siding job where the windows of a house did not have to be taken out and reset. It follows that regardless of the condition of Plaintiff's windows, they would have been removed and reset when Boardwalk replaced the sheathing.

Plaintiff was aware at the time he contracted with Boardwalk that he intended to pursue litigation against Defendant. Nonetheless, Plaintiff decided to proceed with the improvements that essentially cured any deficiency that may have been present with the installation of the windows.

Accordingly, the Court finds Defendant is not liable under a theory of negligence because the Plaintiff did not suffer damages as a result of the contract.

CONCLUSION

The Plaintiff has failed to establish liability on the part of the Defendant by a preponderance of the evidence. Therefore the Court enters judgment in favor of the Defendant, Resort Repairs, Inc. and awards the Defendant costs. Defendant may submit an affidavit supporting a claim for expert fees within 30 days.

IT IS SO ORDERED, this ____day of October, 2009.

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The Honorable Rosemary Betts Beauregard