

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

DENNIS BOGGI ENTERPRISES, INC. )  
)  
Plaintiff-Below )  
Appellee, )  
v. ) C.A. No. 98-09-032  
)  
ANTHONY MUROWANY and )  
MARIA MUROWANY, )  
)  
Defendants-Below )  
Appellants. )  
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)  
ANTHONY MUROWANY and )  
MARIA MUROWANY, )  
)  
Plaintiffs, )  
v. ) C.A. No. 2000-10-036  
)  
DENNIS BOGGI ENTERPRISES, INC. )  
and DURO-LAST, INC. a/k/a )  
DURO-LAST ROOFING, INC. )  
)  
Defendants. )

Submitted: December 19, 2002

Decided: May 12, 2003

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DECISION AFTER TRIAL

On September 3, 1998, Anthony Murowany and Maria Murowany, proceeding Pro Se (hereinafter “Murowany”), defendants below, Appellants, docketed this appeal to the Court of Common Pleas from a judgment entered in the Justice of the Peace Court in the amount of \$8,706, court costs and interest at 10 percent in favor of Dennis Boggi Enterprises, Inc. (hereinafter “Boggi”) (C.A. No. 98-09-032). On November 4, 1998, Boggi also pro se, filed its complaint on appeal followed by Murowany’s answer on November 25, 1998. Both parties appeared for the pretrial on March 8, 1999, and because Boggi was not represented by counsel, it was given two (2) weeks to retain representation. Additionally, the Murowanys indicated they were in the process of retaining experts to inspect the roof and additional time was required. On July 5, 2000, Murowany, through its attorney with stipulation with Boggi’s attorney, filed an amended answer, which included a counter-claim against Boggi Enterprises, Inc., and attempted to add Duro-Last, Inc. a/k/a Duro-Last Roofing (hereinafter referred to as “Duro-Last”) as a third-party defendant. On September 22, 2000, Duro-Last moved to dismiss the claims against it on the basis that an appeal from the Justice of the Peace Court may not add new parties.

On October 4, 2000, Anthony and Murowany (hereinafter “Murowany II”) brought a second separate action against Dennis Boggi Enterprises, Inc. and Duro-Last

a/k/a Duro-Last Roofing, Inc.. In this action filed under C.A. No. 2000-10-036, Murowany set forth allegations against Boggi for breach of contract, negligence, and consumer fraud. The allegations against Duro-Last were also breach of contract, negligence and consumer fraud.

On January 2, 2001, the Court granted Duro-Last's motion to dismiss it as a party defendant in C.A. No. 98-09-032 on the basis that the mirror image rule prevents a party from being added in a J.P. Court appeal. Duro-Last's motion to dismiss as a party defendant in the separate action filed under C.A. No. 2000-10-036, the second suit was denied. Boggi Enterprises' motion to dismiss all claims brought in C.A. No. 2000-10-036 was granted and the cases pending under C.A. No. 98-09-032 and C.A. No. 2000-10-036 were consolidated for trial.

While motions for reconsideration of the Court's January 2, 2001 order were pending, the parties agreed to submit the case for mediation. The Mediation Conference was concluded by former Judge Vincent A. Bifferato, Sr.. The decision to mediate was voluntary and all parties signed a mediation agreement. A tentative agreement was reached, but the parties were unable to reach a final agreement.

On September 21, 2001, Boggi and Duro-Last filed cross motions to enforce the mediation settlement agreement. The Court rendered an opinion on August 5, 2002 denying the motions for reconsideration and also held it found no basis on which it could enforce the tentative agreement. The pending proceedings went to trial on December 19, 2002 on the original complaint filed by Boggi against Murowany, the amended answer and counter-claim were filed by Murowany on July 5, 2000, and the complaint filed by Murowany against Duro-Last under C.A. 2000-10-036.

In its original complaint, Boggi seeks the balance due under a contract for the installation of a roof on the primary residence of the Murowany's in the amount of \$8,706, and interest at 10 percent from the date of the judgment below, which was entered on August 24, 1998. Murowany denies liability for the balance due and seeks return of the amount paid in the amount of \$9,000, compensation for damage to his primary residence as a result of the roof leaking and cost to replace the roof in the amount of \$36,000. In the second suit, Murowany seeks to hold Duro-Last liable on the theory that Boggi was the contractor for Duro-Last, who manufactured a roofing system and Duro-Last was required to ensure its proper installation. Murowany alleges Duro-Last breached this duty to ensure competent installation of the roof, and as a result thereof, the roof leaked from which they sustained damage to their primary residence. Duro-Last argues that there is no privity of contract with Murowany, thus there is no basis to hold it contractually liable. Additionally, Duro-Last argues there is no proof of negligence; therefore, there is no basis for this claim by Murowany. At the conclusion of the trial, on December 19, 2002, the Court reserved decision. This is the Court's decision on the allegation and the merits of these proceedings.

## FACTS

Anthony Murowany testified that on September 17, 1999, they entered into a contract with Boggi for the installation of a Duro-Last designed roof on their residence, 3 Carriage Road, Greenville, New Castle County, Delaware. The house was built around 1968 and has a roof with five elevations consisting of five rectangular sections specifically designed to hold water for heat in the winter and cooling in the summer. Water drains from one section of the roof to another and eventually is drained off the roof. The roof had been worked on previous to the Murowanys' purchase in April or May 1986, and had experienced problems with leaking. Specifically, it appears from Anthony Murowany's testimony that the leaks began in 1987, a year after they purchased and moved into the house. These leaks, however, were repaired by a contractor retained by the realtor who sold them the house.

In 1991 and 1992, the leaks appeared again in the dining room and the master bedroom under the skylight. Mr. Murowany attempted to fix the leaks by putting tar on the roof, without success. At the same time, there were leaks from the mansard roof and chimney. Even though they had never had a mason to repair the chimney, Mr. Murowany attempted to fix the problems on the mansard roof and the chimney himself on several occasions. He testified that on one occasion, he put some screws from underneath the roof to where it has fallen down and did some caulking on the mansard. On a separate occasion, he put sealer on the chimney and tried to seal the bricks by painting around the chimney. However, his efforts failed and the chimney continued to leak.

The testimony indicates that in the spring of 1997, water was leaking into the dining room, foyer, master bedroom and hallway area of the house. About this time, Mr. Murowany testified he started to investigate the installation and replacement of the roof. After contacting various roofing contractors and comparing estimates, the Murowanys contacted (“Boggi”), a certified installer of Duro-Last roofs in the area. He testified he was initially given information about this type of roof from a representative at 84 Lumber Company.

In response to Murowany’s request, Dennis Boggi and his foreman, John DuBeau (“DuBeau”) inspected and measured the roof and told the Murowanys that they are able to install the Duro-Last material over the old roof without removing the existing material. Additionally, they indicated the Duro-Last material would be installed in five sections, and would provide a fifteen-year guaranty. The Murowanys accepted the Boggi’s proposal, he testified, because of the fifteen-year guaranty and the fact that their old roof would be left intact and the Duro-Last material would not change the aesthetic roof design.

The Murowanys entered into a contract with Boggi on September 9, 1997 for Duro-Last roof installation for a total price of \$16,500.00. (Murowany’s Exhibit 1). DuBeau testified that the contract price included \$5,000 or \$6,000 material costs, \$3,500 to \$4,000 labor costs and \$2,400 for the insulation separately purchased.

DuBeau testified regarding the process and practice of installing Duro-Last roofs, and explained that a Boggi worker would go out and measure the roof to be installed and make a projection. They would give the projections to the Duro-Last manufacturer, where the materials would be made at a factory site. Then Duro-Last

would ship all the parts, including fasteners, screws and additional hardware installers needed to complete the job in one bundle. They purchased the insulation separately from a different contractor. They used a close-cell installation with fiberglass backing on both sides. When Boggi assembled everything needed for the installation, they shipped the material out to the job site.

Under the written contract, Boggi was to install the Duro-Last material over Murowany's old roof, which was designed as a depression area behind the lead mansard roof. The lead mansard roof, as shown in the pictures introduced by the Murowanys (Murowany Exhibit 4), goes around the entire perimeter of the house. The initial contract did not provide for the installation of a skylight. However, the Murowany's requested the installation of a skylight, and Boggi presented a written proposal detailing the total cost of labor and material for the skylight installation (Murowany Exhibit 2), which was accepted.

The Murowanys paid Boggi \$9,000 as down payment for the roof installation. (Murowany Exhibit 1). The balance of \$7,500 was to be paid at the completion of the installation. It is unclear from the record whether any part of the Murowany's down payment to Boggi was for the installation of the skylight. However, DuBeau testified that the Murowanys did not pay and still have not paid for any part of the skylight installation. According to DuBeau, the balance due for the skylight is \$1,206.90. Documents admitted show that the written proposal for the skylight (Murowanys' Exhibit 2) as \$2,056.00. The difference between these two figures was not explained by any testimony.

The day the Boggi workers commenced installation of the roof, it was a very cold, and there was ice on the roof. Anthony Murowany testified he was on the roof for at least two to three hours during installation. He testified that the workers removed ice from the roof prior to putting the tapered insulation and Duro-Last sheets down. They moved very rapidly and made a lot of noise as they loaded the insulation material onto one section of the roof.

According to the Murowanys, at the end of the first day, four sections of the roof were welted down and completed. The unfinished fifth section of the roof, over the dining room, was covered by insulation screwed to the old roof but did not have the rubber rooftop. However, DuBeau testified that they completed three sections of the roof, the ones over the master bedroom, family room and living room, on the first day and did not touch the remaining two sections of the roof until the next day.

Mr. Murowany testified that throughout the two-day installation work, DuBeau was present but Mr. Boggi was never present. The Murowanys also recall seeing an inspector from Duro-Last. They testified they were told by Boggi that the Duro-Last inspector was there to supervise and ensure the installation was performed properly and efficiently. However, on cross by Duro-Last, Mr. Murowany agreed that in his deposition, he indicated he did not speak with the Duro-Last inspector. He also agreed that he did not hear the Duro-Last inspector say he was there to certify Boggi's installation work, nor did he hear him instructing the Boggi workers on the process of installation. DuBeau testified that John Sullivan, the Duro-Last inspector, was on site both days of installation and inspected some of Boggi's field welds. However, DuBeau does not believe that Sullivan made any comments regarding Boggi's performance.



DuBeau also testified that there was a severe rainstorm on the evening after the first day of installation. When the Boggi workers returned for the second day of installation, they pushed the water off the roof before they continued working on the remaining two sections of the roof. The roof installation was completed October 1997.

Regarding the skylight installation, the record reflects a dispute about the type installed and whether the leaks were caused by improper installation. Mr. Murowany testified Boggi did not complete the installation as proposed. According to Murowany, Boggi did not install the downspouts and 6 elbows, the scupper boxes, or the electrical part of the skylight which allows the skylight to function as it was designed - i.e. to move up and down by remote control.

According to DuBeau, the type of skylight installed at the Murowanys is designed with a double-sealed dome skylight, which comes from the factory in one piece that fits in the existing curb. He disagrees with Mr. Murowany about the fact that the skylight should have been able to move up and down with a remote control. He testified that the skylight installed by Boggi was a fixed type similar to the old one, and it is impractical for the Murowanys to get a movable electrical skylight because of the roof design. DuBeau testified that Boggi took measures to install the roof system around the skylight to prevent any leaks.

Maria Murowany testified that when she returned the evening of the second day after the installation work had been completed, she discovered the dining room wet. She testified the water leaked through the chandelier hanging from the ceiling, and soaked and damaged the table, oriental rug and her six dining room chairs. Additionally, her urns and bowls were filled with water. She went on to testify that though they had

prior leaks in the dining room, they have never had leaks from the chandelier. The prior leaks were from a corner of the dining room.

Since the Boggi roof installation, the Murowanys had various new leaks appearing next to some old leaks in their kitchen, dining room, music room, two bedrooms and hallway (gallery) area, whenever heavy rain occurs. Pictures (Murowanys' Exhibits 8 -14) taken on March 22, 2000 showed that there is water damage to the ceilings, closet, and continued damage to the Murowanys' dining room furniture, which was not repaired after the initial post-installation leak. Additionally, Murowany testified that there was a leak in the skylight seal, which should have been, but was not waterproof. He believes the leaks were coming from the area where the Duro-Last product is attached to the mansard.

DuBeau returned to the Murowanys' residence three times to inspect for leaks after the installation. He testified that while he was there, he repaired problems that were not caused by Boggi's installation and did not charge the Murowanys.

On DuBeau's first call back, the Murowanys complained about a leak on the left side of the house by the garage apparently coming down from the skylight. DuBeau testified that when he was upon the roof, he found a hole in the lead mansard roof that was causing the leak. He caulked the hole and advised Murowany of his findings. On DuBeau's second call back, a couple of days later, the Murowanys complained about a leak in the front dining room. He went up to the roof and saw a crack in the roof cement and tar covering the horizontal part of the mansard. Again, he fixed the crack and informed Murowany about the problem. On DuBeau's third call back, a week after the second call back, the Murowanys complained about another leak in the

music room by the fireplace. DuBeau examined the chimney and found an opening in the brickwork allowing water to come in. He informed the Murowanys that they needed a mason to fix the chimney.

DuBeau testified that he did not return to the Murowanys after the third time because the leaks complained by the Murowanys were not caused by Boggi's installation, instead, were caused by the defective lead mansard and chimney areas which were outside Boggi's contract.

In March 2000, the Murowanys hired Leonard Bafundo ("Bafundo"), a licensed general roofing contractor and consultant d/b/a Bafundo & Associates, to inspect the work done by Boggi and determine the source of the leakage. Mr. Bafundo has been a roofer for more than a decade and had prior experience in installing Duro-Last type roofs

Mr. Bafundo testified that through his inspection and findings, he believes Boggi's installation was defective and improper and was in violation of the Duro-Last specifications. Bafundo testified that when he went up the roof and probed the seams done by Boggi with a screwdriver, he found some of the field welds were open and others could be torn apart easily. He also found that Boggi did not install wood nailers in the insulation around the perimeter of the roof to secure the termination bar tightly to the roof as required by the Duro-Last specifications. Further, Boggi did not continuously caulk to make the seals tight. Bafundo did some core cuts in different areas of the roof and found moisture in the roof insulation sheets and leakage through screws that had punctured the eroded plywood in some areas. He conducted a water base test on the roof to assimilate heavy rain and found leaks starting in several areas of the house..

A video of Mr. Bafundo's inspection was shown at trial. In the video, admitted as "Murowany's Exhibit 16," water came out of the seams as Mr. Bafundo probed the open field welds done by Boggi. Mr. Bafundo explained that water was trapped in between the old roof and the new one as result of Boggi's poor field welding.

On cross, Bafundo admits that he was uncertain whether the eroded plywood underneath the two roofs and the leaks in the house were caused by the vaporization of moisture already in the old roof or by water coming in through the defective seams of the Boggi roof. He does not know how much moisture, if any was trapped in the old roof before Boggi's installation. He agrees that he did not perform a thermo-imaging/infrared study of the Murowany's roof to determine the moisture level in the roof, nor did he perform a thermographic study of the heat loss in the Murowanys' house due to wet insulation. Bafundo explained that the reason he did not do a thermo-infrared test because of the cost and core cuts would still be needed to determine the exact locations of the wet spots.

Regarding the chimney leakage, Bafundo testified it was caused by the growth of lycopod and moss on the brickwork of the chimney. He was of the opinion that Boggi had violated the standard of care of a roofer by failing to address the chimney problem with the Murowanys and putting the Duro-Last sheets down without first making sure the chimney's lycopod and moss were cleaned off. However, on cross, he agrees that he did not know the condition of the chimney at the time Boggi installed the roof in October 1997. Boggi's foreman, DuBeau, testified that they did not see any lycopod or moss on the brickwork of the chimney when they attached the Duro-Last roof to the chimney.

Regarding the mansard, Bafundo testified on direct that he does not believe any leak in the house was coming from the mansard roof since the mansard is out beyond the brick line of the building and it is not part of the interior structure. On cross, Bafundo nonetheless agreed that he had testified in deposition that when he water tested the mansard roof, leaks were found inside the front hallway leading to the master bedroom and in a valley where the mansard turned. He later testified he found the bend seams of the mansard cracked and fractured and did some repair to the mansard using cement membrane and silicone caulk.

Bafundo concludes that the defects in Boggi's installation included the false seams, lack of wood nailer, and non-continuous caulking, plus the lycopod and moss problem in the chimney. These defects, in his opinion, resulted in water leaking into the Murowanys' house.

In his testimony, DuBeau disputed Bafundo's inspection process and findings. DuBeau testified, after seeing Bafundo's video, that Bafundo had improperly inspected the field welds with a sharp screwdriver instead of a recommended tack claw. He testified that it is proper to have seams open on the edges to let water drain and Bafundo forced open seams that were intact in the back. Also, DuBeau disputes Bafundo's finding that it was improper for Boggi not to put wood nailers in to secure the insulation underneath the Duro-Last material. According to DuBeau, the requirement of wood nailers for insulation more than one inch thick on the Duro-Last manual was appropriate in circumstances where the termination bar had been pressed into the roof for only one inch. He testified that in this instance, the termination bar was compressed down into the roof approximately three inches. Therefore, because of this detail

difference with the Murowanys' roof and the pressure exerted onto the roof with the termination bar, wood nailers were not necessary.

Although Boggi disputed the basis of Bafundo's testimony, DuBeau did testify on cross that Duro-Last does not support the practice of installing a roof over an area which is saturated with free water. Additionally, Duro-Last specifications require installers to do core cut samplings of the existing roof to determine the presence of any water. There is no evidence in the record that Boggi took core cuts of the Murowanys' roof prior to their installation.

As to Duro-Last's participation, Bafundo testified that based on his experience for commercial installations, Duro-Last usually send inspectors to train and supervise the installation at the first one or two installation jobs. At the completion of installation, Duro-Last always came back and inspected the job done. As part of their inspection, they would try to rip open all the field welds. After they tested the seams, the installers would patch them up. After everything is completed, Duro-Last would issue a warranty for the roof. However, for residential installation jobs, Duro-Last usually does not send inspectors to inspect the work. The installers are required to do their own inspection.

Bafundo advised the Murowanys that to solve their leakage problem it would require tearing off their existing roofs and replace it with a new roof. He estimated the cost at \$36,000, which included labor and profit. He explained there is a lot of trapped water in the Murowanys' existing roof system putting a lot of pressure onto the plywood structure of the roof with the vaporizing in the heat and freezing into solids in

the cold. Since it is not a good practice to re-roof over a wet roof, the entire roofing system needs to be replaced.

Mary Beth Berry of Calico Corners (“Calico”) testified regarding the damage to the dining room furniture. She testified based on an estimate prepared by Calico’s former employee, Jason Riggs. (Murowany Exhibit 3) She indicates that the total costs for re-fabrication and repair of the chairs damaged at \$1,863.84. Murowany testified that for purpose of matching the chairs in the set, she had to replace all eight chairs including the two that were not damaged by the leak.

Regarding damages to and estimated repairs for the ceilings, the Murowanys testified that they obtained a written estimate from Paul’s Plastering. (Murowanys’ Exhibit 17). Based on the estimates, the total costs for Paul’s Plastering to replace and repair the ceilings in the Murowanys’ house would be \$19,095. Regarding his estimates, Mr. Lloyd testified that the ceilings in a few rooms have only minor water damages and can be easily patched. However, there are a few ceilings that are damaged beyond patch and have to be removed and redone entirely.

Boggi’s expert, Clifford Conover (“Conover”), a licensed engineer and roofing consultant testified about his findings and conclusions based on his review of relevant documents and Bafundo’s inspection video, and on a visual inspection of the Murowanys’ house on October 25, 2000. Conover testified that by simply looking at the stains in the ceiling and examining the leakage areas, he could not determine which leaks were pre-existing at the time of Boggi’s installation.

Conover also went up to the roof, inspected the roof surface and all the detail work of Boggi, and took pictures of different sections and areas of the roof.

(Boggi's Exhibit 2). He did not perform moisture study or destructive testing of the roof. Based on his visual inspection, Conover concluded that Boggi's installation work, with regard to the welds, the wood nailer, and caulking, was proper and was not the cause for the leaks in the Murowanys' house. However, Conover did observe patches done by Bafundo and his men over many of Boggi's welds and seams.

Specifically as to the cause of the leaks in the house, Conover testified that the leaks in the dining room came from a gap in the flashing sheet of the chimney. It is a masonry defect. The leaks in the music room came from the cracks in the lead copper mansard and roof cement put on the mansard. The roof cement was put on improperly and further deteriorated the mansard and caused it to crack. The defective assembly of the skylight caused the leaks in the master bedroom around the perimeter of the skylight - where the gasket seal at the perimeter of the skylight dome was defective. Conover does not know what caused the leaks in the living room.

Conover testified, regarding Bafundo's video of inspection, that Bafundo had used improper inspection methods and his results were unreliable. Regarding Bafundo's inspection of Boggi's welds, Conover stated his use of screwdriver was improper. According to Conover, the screwdriver asserts too much force on the membrane. He found that it was not clear on the video whether the welds were defective in themselves or Bafundo had simply ripped them apart with the screwdriver. Conover said the industry recommends the use of a less assertive tack claw for inspection of welds.

As to Bafundo's proposal for a new roof, Conover does not agree that a new roof is necessary and believes that the existing roof is repairable. He testified the



leaks are coming from the mansard and chimney and recommended masonry repairs. He also indicated the termination bar adjacent to the chimney by the dining room was loose and in need of repair. Conover also testified that Bafundo's asking price for replacement of the roof is too high and estimates it should cost in the middle to high \$20,000 range given the original costs of insulation and current market rate for roofs. On cross, Conover indicated he did not review the Duro-Last specifications and had never installed a roof. He does not know whether the screws that came through the plywood were from the old or the new roof. He did not go into the attic to inspect the structure of the roof, nor did he inspect beneath the termination bar to see if there was any moss and lycopod growth. Nonetheless, he did admit seeing moss growth on top of the termination bar and on the chimney.

Additionally, Conover agrees that it is not a good practice to attach the Duro-Last sheets to the chimney where there is moss and lycopod on the chimney and not cleaned off. Regarding the leaks in the dining room, Conover said the gap in the flashing that caused the leaks was from a loose fastener on the Duro-Last insulation.

Lastly, Conover testified that not only is it a Duro-Last requirement, it is a general industry standard that an installer should not install a new roof over a wet roof. Where a new roof is installed over a wet roof, such would not be in compliance with the Duro-Last requirement and the Duro-Last warranty would become void since the moisture would affect the performance of the Duro-Last system.

The only witness called by Duro-Last was its quality assurance manager, Mark Rose ("Rose"). He testified Duro-Last stopped sending field inspectors to residential jobs after June 1993 for economic reasons. However, the installer/dealer

could still request technical assistance from Duro-Last on residential jobs but in those instances, Duro-Last does not warrant the workmanship. Regarding Sullivan's presence during Boggi's installation of the Murowanys' roof, Rose testified his records do not reflect why he was present. According to Rose, Sullivan is no longer employed by Duro-Last.

### Analysis

At the end of Plaintiff's case-in-chief, Defendant Duro-Last moved for a directed verdict on all claims in C.A. 1998-09-036. (Court had previously dismissed all claims against Duro-Last in C.A. 2000-10-032). The Court granted Duro-Last's motion on the consumer fraud claim and denied the motions on the contract claim and the negligence claim. At the conclusion of the evidence, the Court entered judgment for Duro-Last on the contract claim.

Based on all evidence on the record, the Court is unable to find Duro-Last liable to the Plaintiff under a theory of negligence. The testimony indicates Duro-Last's policy and practice is not to inspect residential jobs. They discontinued any warranty practice in June 1993. Plaintiff contends that by Duro-Last inspector, John Sullivan's mere presence at the site of the installation, Duro-Last had voluntarily assumed a duty to inspect Boggi's work and to ensure the installation was done properly according to the Duro-Last specifications. To support its contention, Plaintiff relies on *Guardian Construction Co. v. Tetra Tech Richardson, Inc.*, Del. Super., 583 A.2d 1378 (1990), where the Court found that the design engineer owed a legal duty to the project bidders to

supply correct information based on a foreseeable reasonable reliance by the bidders on the information supplied.

The Court cannot agree with Plaintiff's contention here, and finds that Sullivan's mere presence at the site, without more, does not give rise to a voluntary assumption of legal duty as it was defined in *Guardian Construction Co.* Id. The record indicates that no one knows why Sullivan was at the Murowanys' residence during Boggi's installation and he did not issue any type of written report about his inspection. Murowany testified that the Boggi people told him that Sullivan was there to ensure the installation process is performed properly. However, he did not have a conversation with Sullivan to independently verify this fact. DuBeau from Boggi did see Sullivan looking at some of the works done by Boggi. However, he did not hear any comments made by Sullivan about Boggi's workmanship, nor did he rely on Sullivan's inspection.

In the absence of any evidence of actual or foreseeable reliance on Duro-Last's "inspection" by either the Murowanys or Boggi, I find that Duro-Last did not assume a legal duty to inspect Boggi's work and cannot be held liable to the Murowanys for Boggi's negligence. Thus, I find in favor of Duro-Last on the negligence claim.

On Boggi's' breach of contract claim against the Murowanys, C.A. 1998-09-032, I find that the evidence in the record indicates Murowany did not pay the balance under the contract, but because I conclude Boggi breached its duty to provide a roof that did not leak, I find for Murowany on this claim.

"The primary goal of contract interpretation is to satisfy the reasonable expectations of the parties at the time they entered into the contract . . . This process often requires courts to engage in analysis of the intent or shared understanding of the parties at

that time.” *Demetree v. Commonwealth Trust Co.*, Del. Ch., C.A. No. 14354, Allen, Ch., 1996 WL 494910 at 3, (August 27, 1996).

Based on the evidence, it is undisputed that the Murowanys contracted with Boggi for the installation of the Duro-Last roof over their old roof with intent to stop the leaks in their house, and Boggi was aware of their intent at the time of contract. The evidence in the record indicated that Boggi told the Murowanys that the Duro-Last roof was reliable and offered a warranty. The Murowanys, based on Boggi’s representation and their own cost-benefit analysis, chose to enter into a contract with Boggi instead of with other contractors with whom they had spoken because they thought Boggi’s proposal was more than just “a quick fix”.

The facts in the record indicate the roof leaked after the installation was completed and continued to leak. This indicates Boggi failed to fulfill their obligation as contracted with the Murowanys. “It is established Delaware law that in order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance with all provisions of the contract.” *Evans v. Savage*, Del. Com. Pl., 1998 WL 1557442 at 4 (October 21, 1998). “If plaintiff has committed a material breach, he cannot complain if the non-breaching party subsequently refuses to perform.” *Id.* Here, Boggi’s failure to deliver a non-leaking roof amounts to failure to adequately perform as contracted. As a result of Boggi’s breach, the Murowanys, the non-breaching party, are relieved of any obligation to perform under the contract. Boggi’s claim for the balance due on the contract is hereby denied.

On Boggi’s claim for payment of the skylight installed, there is a dispute in the record as to the extent of its completion. The Murowanys contends that the skylight

installation was incomplete since the electrical part is not installed to allow the skylight to function properly. Boggi disputes this and contends that the skylight is a fixed unit and does not have an electrical component. Boggi argues installation is complete. As to the skylight installation, the record shows that water leaked from the defective seals around the perimeter of the skylight dome. Based on these facts, I find that Boggi is entitled to recover only the cost of material for the skylight, which includes \$500 for the skylight and \$460 for 9 sheets facier, a total of \$960. (See Murowany Exhibit 2). Boggi is not entitled to recover for the downspouts and 6 elbows and the scupper boxes since the testimony in the record indicates they were not installed. Nor is Boggi entitled to recover the labor and profit since their installation was defective and caused leaks in the master bedroom. “Delaware Law recognizes that where the plaintiff has failed to perform through not fault of the defendant, the plaintiff may nonetheless recover the reasonable value of the benefit conferred on the defendant less the damages resulting from plaintiff’s breach.” *Id.* On this claim, Boggi is awarded the sum of \$960.

On the Murowanys’ breach of contract claim against Boggi, I find, as previously discussed, Boggi breached in failing to perform as expected under the contract. *See supra.* Thus, the only issue remains and relevant to the contract claim is the issue of damages.

“The settled law of this state is that damages for breach of contract is an amount sufficient to return the party damaged to the position they would have been in had the breach not occurred.” *Delaware Limousine Service, Inc. v. Royal Limousine Service, Inc.*, Del. Super., 1991 W.L. 5344 (April 5, 1991). “The measure of damages is the loss actually sustained as a result of the breach of the contract.” *Id.* In cases involving

the breach of a contract for the construction of improvements to real property, Delaware courts specifically require that the amount of damages sufficiently remedying the defective performance be “reasonable or practical.” *Shipman v. Hudson*, Del. Super, 1995 WL 109009 at 3 (Feb. 17, 1995).

On its initial claim, I find the Murowanys are entitled to repayment of the \$9,000 paid on the contract. They are also entitled to a portion of the expenses incurred for repair of their property as a result of Boggi’s breach. Specifically, I find that the repair costs incurred by the Murowanys for damage of six dining room chairs in the amount of \$1,397.88 is a result of leaks after the roof installation for which Boggi is liable. This finding is supported by the fact that Boggi’s own expert testified that the leaks in the dining room were coming from a gap in the flashing created by a loose fastener in the Duro-Last sheet. Therefore, Murowany is awarded damage on this claim in the amount of \$1,397.88.

As to the \$36,000 sought by the Murowanys for replacement of the roof, I find no basis for this claim. Under the law, a non-breaching party is to be put in their original position at time of contract. There is no basis to support a claim for an entirely new roof. The Murowanys were aware that their roof needed to be repaired or replaced prior to their contract with Boggi. Thus, I am unable to conclude that Boggi’s breach was the cause for the need to replace the Murowany’s roof. I find to conclude otherwise, would be permitting an unjustifiable windfall to the Murowanys.

On the Murowany’s negligence claim against Boggi, I find that the evidence in the record is not sufficient to support this claim, and I find for Boggi.

As to water damages to the ceilings in various rooms of the house, it is unclear which leakage is pre-existing and which is directly caused by Boggi's defective installation. However, because the post-installation leaks appeared in a different place than the pre-installation leaks in at least in some of the rooms, the record is clear that the improper installation contributed in part to the leaks, and caused wider damages to the property. Therefore, the Court finds that it is fair to attribute to Boggi some of the ceiling damages caused by the leaks. Paul's Plastering estimates the cost of repairs at \$19,095. In apportioning this cost to the damaged area, the testimony indicates there was water damage to six (6) rooms. It is also clear that one area started leaking after the new roof was installed. Therefore, Boggi is responsible for a pro rata share of cost. Some areas are required to be replaced and others repaired. The new area has not leaked as long and is able to be repaired, so I award the sum of \$900.00.

I find no basis to award any amount for the expenses incurred by the Murowanys in having Bafundo inspect and repair their roof. This claim is denied.

As to Murowanys' claim of consumer fraud against Boggi pursuant to 6 Del. C. §2511 et seq., I find no evidence on the record to support this claim. The Court finds in favor of Boggi on this claim.

Accordingly, judgment is awarded for Murowany in the amount of \$11,297.88, minus the award to Boggi in the amount of \$960, for a net judgment of \$10,337.88, with post-judgment interest from the date hereof at the prevailing rate.

SO ORDERED this 12<sup>th</sup> day of May, 2003

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Alex J. Smalls  
Chief Judge

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