

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
(302) 856-5257

December 1, 2011

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**In re: Weber v. Patrick Truitt Construction, Inc.;**  
**C.A. No. S09C-01-034**

On Defendants/Third Party Plaintiffs'  
Motion for Summary Judgment: DENIED

On Defendant/Third Party Plaintiffs'  
Motion to Strike: RESERVED

Date Submitted: October 31, 2011  
Date Decided: November 30, 2011

Dear Ms. Weber, Mr. Cochran, and Counsel:

Pending before the Court are Defendants/Third Party Plaintiffs' Motion for Summary Judgment and Motion to Strike. For the reasons stated herein, the Motion for

Summary Judgment is denied and the Motion to Strike is reserved for consideration at trial.

## Factual and Procedural Background

On or about October 17, 2008, Joan C. Weber and “Patrick Truitt, acting on behalf of Patrick Truitt Construction Company” (“Truitt Construction”), entered into a contract (“the Contract”). The Contract called for Truitt Construction to frame a two-story dwelling (“the Dwelling”) in accordance with certain plans provided by Ms. Weber. Ms. Weber was to provide the necessary materials and Truitt Construction agreed to supply labor, tools and equipment. Pursuant to the Contract, Ms. Weber was to pay Truitt Construction in five separate draws of \$4,000.00, for a total contract price of \$20,000. Payments were to be disbursed (a) upon completion of the sub-floor; (2) upon completion of the partitions; (3) upon completion of the exterior sheathing; (4) upon completion of the “house under roof”; and (5) upon the installation of the windows and doors. The Contract provided for Ms. Weber or her designee to inspect and approve the work or request any necessary adjustments in the work after each stage of completion and prior to making payment.

Truitt Construction commenced work soon after the execution of the Contract. Ms. Weber made at least three payments after inspection<sup>1</sup> on the draw schedule. Ms. Weber alleges she had some concerns about the work and voiced those concerns to Truitt Construction but did not initially withhold payment. Ms. Weber avers she was told her

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<sup>1</sup> A fourth payment was apparently sent but Ms. Weber stopped payment on the check.

concerns would be addressed following completion of the project. Truitt Construction complains Ms. Weber barred Truitt Construction from the premises on or about November 20, 2008, and prior to completion of the project. In any event, it is clear that communications between the parties deteriorated. Truitt Construction did not finish the work outlined in the Contract and Ms. Weber did not make the final payment on the draw schedule.

Ms. Weber then hired Daniel Cochran IV and Kevin Moore to repair the alleged defects in Truitt Construction's work and to complete the work outlined in the Contract. Mr. Cochran and Mr. Moore are independent contractors who had been working at the site at the direction of Truitt Construction prior to the termination of the relationship between Ms. Weber and Truitt Construction. Truitt Construction alleges Mr. Cochran and Mr. Moore "worked on every aspect of construction for which [Truitt Construction] was responsible" pursuant to the Contract.

On January 30, 2009, Ms. Weber filed suit against Truitt Construction and Patrick Truitt, individually (collectively, "Defendants"), alleging breach of contract and breach of warranty. Defendants subsequently filed a counterclaim against Ms. Weber to reflect claims previously filed in the Justice of the Peace Court related to the issues underlying the Complaint. Defendants also filed a third party complaint against Mr. Cochran, Cochran Construction, LLC, and Mr. Moore. A default judgment has been granted with respect to Cochran Construction. Mr. Moore has been dismissed from this suit pursuant

to Superior Court Civil Rule 41(e). The matter is scheduled for trial.

Defendants have filed the instant Motion for Summary Judgment and Motion to Strike. The motions will be discussed in turn.

### **Motion for Summary Judgment Standard of Review**

Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The moving party bears the burden of establishing the non-existence of material issues of fact.<sup>3</sup> Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>4</sup> Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.<sup>5</sup> If, after discovery, the non-moving party cannot make a sufficient showing of the

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<sup>2</sup> *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).

<sup>3</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>4</sup> *Id.* at 681.

<sup>5</sup> Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

existence of an essential element of his or her case, summary judgment must be granted.<sup>6</sup> “A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”<sup>7</sup> If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.<sup>8</sup>

### Merits

Defendants argue they are entitled to summary judgment based on three theories:

- (1) Ms. Weber is estopped from seeking damages because she failed to voice her complaints in the manner provided for in the Contract;
- (2) Ms. Weber failed to mitigate her damages as required by law to maintain a breach of contract action;
- (3) Ms. Weber waived any right to recover by making payments pursuant to the draw schedule with knowledge of defects in the work; and
- (4) Mr. Truitt is entitled to summary judgment because he is not a party to the Contract.

The Court finds there are sufficient issues of material fact in dispute such that summary judgment is not appropriate at this time. The parties clearly hold different

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<sup>6</sup> *Burkhardt v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>7</sup> *Id.* at 59 (quoting *Celotex*, 477 U.S. at 322-23).

<sup>8</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

views on what, if any, defects there are in the work and when, if ever, the defective work occurred. These facts are obviously material to the case before the Court and must be fleshed out at trial.<sup>9</sup> The Court also notes that Ms. Weber is proceeding *pro se*. The Court generally adheres to a policy of judicial lenience toward pleadings filed by *pro se* litigants.<sup>10</sup> For those reasons, Defendants' Motion for Summary Judgment is denied.

### **Motion to Strike**

Pursuant to the Superior Court Civil Rules, the Court “may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.”<sup>11</sup> Defendants filed a Motion to Strike in this case because, they argue, Ms. Weber's brief makes improper reference to settlement negotiations. The Delaware Rules of Evidence do not permit settlement negotiations to be admitted to prove or disprove a claim.<sup>12</sup> Such settlement negotiations, if any, were not considered by the Court in the aforementioned Motion for Summary Judgment. Such settlement communications, if any, will not be permitted at trial and the Motion to Strike is reserved for consideration

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<sup>9</sup> *Ebersole*, 180 A.2d at 468-69 (“Under no circumstances... will summary judgment be granted when, from the evidence produced, there is a reasonable indication that a material fact is in dispute. Nor will summary judgment be granted if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application fo the law to the circumstances.”).

<sup>10</sup> *Limehouse v. Steak & Ale Restaurant*, 2004 WL 304339 (Del. Super.).

<sup>11</sup> Super. Ct. Civ. R. 12(f).

<sup>12</sup> D.R.E. 408.

in connection with the presentation of evidence.

**Conclusion**

For the reasons stated herein, Defendants' Motion for Summary Judgment is DENIED and Defendants' Motion to Strike is RESERVED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary