**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**
**IN AND FOR NEW CASTLE COUNTY**

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| BRAMBLE CONSTRUCTION CO., INC., A DELAWARE CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. 08C-05-234 WCC |
| EXIT REALTY, LLC D/B/A EXIT REALTY PROFESSIONALS, A DELAWARE LIMITED LIABILITY COMPANY, AND ZOAR ESTATES, LLC, A DELAWARE LIMITED LIABILITY COMPANY, | ) | |
| Defendants. | ) | |

Date Submitted: July 27, 2009
Date Decided: August 27, 2009

**OPINION**

**Following Bench Trial**

Donald L. Logan, Esquire, Logan & Associates, LLC, 100 W. Commons Blvd., Suite 300, New Castle, DE 19720. Counsel for Plaintiff.

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**CARPENTER, J.**

## I. Introduction

Bramble Construction Company ("Bramble") has brought this breach of contract action against Defendants Exit Realty, LLC ("Exit") and Zoar Estates, LLC ("Zoar Estates"). Defendants have countersued for breach of contract. A bench trial was held before this Court on April 1 and 2, 2009 and was followed by post-trial briefing. The issues are: (1) whether a contract existed between any of the parties; (2) whether the Defendants and or Plaintiff breached that contract; and (3) whether damages are appropriate.

Based upon the reasons set forth below, the Court holds that a contract did exist between Bramble and the Defendants; that both Bramble and the Defendants breached that contract and damages are awarded to Bramble in the amount of $112,072.40.

## II. Factual Background

In December of 2006, Samuel Bramble, the owner of Bramble, saw a sign advertising a housing development called Zoar Estates to be constructed on a large parcel of land near his office, outside of Georgetown, Delaware. He called Robert Gress, a real estate broker at Exit whose contact information appeared on the sign and who was the owner of the property, and asked if Mr. Gress was accepting site construction bids for the development. Mr. Gress said that he was and agreed that Mr.

Bramble could submit a bid to him. Mr. Bramble prepared a proposal dated December 27, 2006, outlining the nature of the construction services to be performed on the Zoar Estates property and their respective costs. He based the proposal on the plans dated July 14, 2006 that Mr. Gress had provided to him. The proposal specified that the contract was guaranteed at the price listed and that any change orders would be submitted to Mr. Gress for approval. Mr. Bramble included the cost for paving with the understanding that Mr. Gress might elect to use a different paver, in which case Mr. Gress would pay the paver he selected directly. Mr. Bramble signed the proposal and submitted it to Mr. Gress at his office at Exit. Upon receipt of the proposal, Mr. Gress asked if Mr. Bramble could reduce the cost of the project, in which case he would be inclined to accept Mr. Bramble's bid. As a result, Mr. Bramble reduced the contract price by $30,000 to $778,791.45. Mr. Gress signed the proposal on January 5, 2007, indicating that he accepted the terms of the agreement.

While the agreement did not include any specific information about how the parties intended to handle payment, there is no dispute that invoices would periodically be submitted and upon receipt, Mr. Gress would request a draw from the loan he had obtained from Wilmington Trust. After a field inspection by the bank, the funds would be authorized and transferred to Mr. Gress, who would subsequently issue a check for the invoice.

Mr. Bramble testified that he began working on the Zoar Estates property in February of 2007. The Zoar Estates project progressed smoothly until August of 2007 when a check Mr. Gress had submitted to cover invoices submitted by Bramble was returned due to insufficient funds. While Mr. Bramble testified that he was becoming concerned about the state of Mr. Gress's financing, the invoice was paid shortly thereafter and he continued performing the site work. Mr. Bramble continued to work on the Zoar Estates development, but the relationship between the parties began to deteriorate in December of 2007 when a monetary dispute arose regarding work at a related development.

In May of 2007, while working on the Zoar Estates property, Mr. Bramble was approached about the possibility of him doing some additional work on another development Mr. Gress owned, called Country Meadows. Mr. Bramble submitted a proposal to Mr. Gress dated May 25, 2007 outlining the scope of the work to be performed on that property. He testified that Mr. Gress accepted his proposal and he began working on that property shortly thereafter. Mr. Bramble had submitted an invoice dated July 9, 2007 for work performed on the Country Meadows property but by December it still had not been fully paid.[1]

[1]Mr. Gress disputes Mr. Bramble's testimony and testified himself that he never signed that proposal and he never saw the invoice Mr. Bramble claims he submitted. Trial Tr., Apr. 2, 2009, at 140:17-23.

Subsequently, Mr. Bramble submitted another invoice to Mr. Gress seeking payment for the work he had performed on the Country Meadows property. When Mr. Gress failed to pay the bill, Mr. Bramble sought the assistance of a collection agency called Stevens & James. Stevens & James agreed to contact Mr. Gress regarding payment of the invoice. Upon receiving a phone call and letter from Stevens & James, Mr. Gress sent a letter dated January 11, 2008 to Mr. Bramble accusing him of fraud and otherwise firing him as the contractor for Zoar Estates and Country Meadows. Sometime thereafter, Mr. Bramble sought legal advice and filed a complaint in this Court on June 2, 2008.

## III. Parties' Contentions

Bramble contends that it entered into a contract with Mr. Gress to do site development for a large parcel of land into a housing subdivision and that the Defendants breached that agreement. Bramble further alleges that the Defendants only made four payments toward the balance of the contract price and that it still owes money for the work performed.

The Defendants allege that no contract existed between Exit and Bramble, and asserts that a contract only existed between Bramble and Zoar Estates, the limited liability corporation, created for this development. In addition, the Defendants contest the accuracy of the invoices they received. The Defendant's counterclaim for breach of contract is based upon Mr. Gress's belief that the work Bramble performed

did not conform to the specifications and standards set forth in the contract or the plans.

## IV. Discussion

### a. Bramble's Breach of Contract Claim

In a bench trial, the Court is the finder of fact and the parties must prove the elements of each of their claims by a preponderance of the evidence.[2] This means that the Court shall find in favor of the party upon whose side "the greater weight of the evidence is found."[3]

For a breach of contract claim to be actionable, the plaintiff must successfully prove the following elements: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach.[4] Under Delaware law, a contract exists if there is offer and acceptance: "there must be an offer made by one person to another and an acceptance of that offer by the person to whom it is made."[5] An offer is "the signification by one person to another of his willingness to enter into a contract

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[2] *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Feb. 20, 2009) (quoting *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967)).

[3] *Id.*

[4] *Patterson-Woods & Assoc., LLC v. Realty Enters., LLC*, 2008 WL 2231511, at *4 (Del. Super. May 27, 2008) (citing *McCoy v. Cox*, 2007 WL 1677536 (Del. Super. June 11, 2007)).

[5] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *3 (Del. Super. Mar. 31, 2009) (quoting *Salisbury v. Credit Serv., Inc.*, 199 A. 674, 681 (Del. Super. Nov. 23, 1937)).

with him on the terms specified in the offer."[6] The Court does not consider the subjective intention of the parties when determining whether a contract was formed. Instead, the Court applies an objective test evaluating the parties' "objective manifestations of assent."[7] The Court shall determine whether a contract existed with respect to each property separately.

I. *Zoar Estates*

Applying this standard to the facts of this case, the Court finds that a contract to perform construction services did exist between Bramble and the Defendants as to the Zoar Estates property. Mr. Bramble testified that he believed that Mr. Gress and Exit were the owners of the Zoar Estates development because both names appeared on the plans upon which he based his proposal.[8] Furthermore, Mr. Bramble testified that Mr. Gress instructed him to send the original contract, subsequent invoices and all correspondence to his office at Exit.[9] Mr. Gress agreed that he instructed Mr. Bramble to do so, but disagreed that Mr. Bramble was unaware of the LLC's ownership of the development. However, on cross-examination, Mr. Gress was

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[6]*Id.*

[7]*Grasso v. First USA Bank*, 713 A.2d 304, 308 (Del. Super. Apr. 16, 1998) (citing *Industrial America, Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971)).

[8]Trial Tr., Apr. 1, 2009, at 21:9-17.

[9]*Id.* at 123:23-124:9.

unable to explain how he expected Mr. Bramble to know and understand that he owned the property through an LLC that he allegedly created for that express purpose.[10] Based upon that testimony, it appears to the Court that there was no effort by Mr. Gress to clearly distinguish Zoar Estates as the only legal entity who would be financially responsible for the contract nor frankly any effort to distinguish between his various business entities. The businesses were used interchangeably at the whim and convenience of Mr. Gress and to any reasonable person would simply reflect that he was conducting his businesses as alter egos of each other. To attempt to now argue that Exit has no responsibility to the contract is simply a legal fiction unsupported by the realities of the everyday relationship of these parties.[11] The Court finds that the Defendants breached the contract when they failed to pay for the work substantially completed by the Plaintiff.

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[10]Trial Tr., Apr. 2, 2009, at 161:20-163:21.

[11]In determining the existence of a contract and the identity of the parties to the contract, the Court considers the "objective manifestations of assent" of the parties. *Grasso*, 713 A.2d at 308. Thus, the Court does not inquire into each parties' subjective intent. *Id.* Because of this, it is irrelevant that Mr. Gress did not intend to create the appearance that he was acting on Exit's behalf when he simply wanted to direct correspondence and invoices to his office there. From an objective perspective, a reasonable person would believe that the parties intended to be bound as they presented themselves. *See Loveman*, 2009 WL 847655, at *3 (explaining that "[t]he Court's inquiry is an objective one that determines, 'whether a reasonable man would, based upon the objective manifestation of assent and all of the surrounding circumstances, conclude that the parties intended to be bound by the contract.'" (quoting *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986))).

According to the evidence presented, Mr. Gress made four payments (two $200,000 payments, plus a $77,000 payment and a $91,150 payment) to Bramble for its services on the Zoar Estates property totaling $567,150.00. Additionally, Mr. Bramble should have provided a credit of $109,395.30 for the paving that Mr. Gress arranged. There is some dispute as to the amount of the credit but the Court cannot find support for the credit to be either $96,000 or $103,000 as asserted by the parties as neither of those figures match the amount that Mr. Gress paid the paver he selected.[12] The Court recognizes that Mr. Bramble supervised the paver that Mr. Gress hired, but that was not part of his responsibilities under the contract. Thus, based upon the invoices Bramble sent and the paving credit of $109,395.30, the Court finds that there is an outstanding balance owed by the Defendants to Bramble of $102,246.15 for work performed on the Zoar Estates property.[13]

Finally, Bramble further claims that Mr. Gress owes an additional $153,430.55 for work performed at Zoar Estates based upon four invoices all dated February 12, 2008, after Mr. Gress terminated Bramble. Mr. Bramble testified that the work he

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[12] Jt. Ex. 55.

[13] $778,791.45 (contract price)
- $567,150.00 (paid invoices)
$211,641.45
- $109,395.30 (paving credit)
$102,246.15.

billed for in those four invoices was not part of the contract.[14] Rather, he testified that he did certain "extra" work on the Zoar Estates property in order to establish a positive working relationship with Mr. Gress because Mr. Gress had mentioned that he had a large subdivision (one hundred lots) for which he would eventually be accepting bids.[15] Mr. Bramble hoped to be able to foster a sense of goodwill between his company and Mr. Gress in order to successfully bid his services on the aforementioned subdivision.[16] However, since the relationship has soured he seeks payment for the extra services provided. The work referenced in the invoices Mr. Bramble sent to Mr. Gress in February of 2008 was not part of the contract between Bramble and the Defendants and appear to have been issued by Bramble in retaliation for being terminated from the project. The Court is holding Mr. Gress and his companies to the terms and conditions of the contract he entered here and the same is true for Bramble. If he believed there was a contractual obligation for this work, he should have created one. Since he failed to do so, he cannot now expect the Court to create that obligation. The Court finds the Plaintiff has not met his burden regarding the "extra" four invoices.

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[14]Trial Tr., Apr. 1, 2009, at 122:22-123:11.

[15]*Id.* at 119:19-120:15.

[16]*Id.* at 121:18-22.

*ii. Country Meadows*

With respect to the Country Meadows property, the Court finds that a contract existed between Bramble and the Defendants pursuant to the May 25, 2007 letter Mr. Bramble sent to Mr. Gress as a proposal of the work to be performed. Mr. Bramble testified that he and Mr. Gress signed the letter and he performed the work outlined in it.[17] Mr. Gress disputes this in his testimony, claiming that he never saw the proposal and never signed it. The Court, however, does not find this to be credible in light of the Sussex County Conservation District's Job-Site Inspection Report of May 17, 2007. This report states that the inspector, Charles Parsons, spoke to Mr. Bramble about resolving some issues with the Country Meadows property. The inspection report itself states that Mr. Bramble would submit a proposal to Mr. Gress: "Discussed work that needs to be done as indicated on report dated March 26, 2007. Mitch will prepare an estimate for the work to be done and forward it to Robert Gress."[18] Mr. Bramble billed Mr. Gress for the work completed in the amount of $15,740.00, and even received a partial payment of $5,913.75. Thus, the Court finds that the Defendants breached the contract and owe Bramble $9,826.25 for work performed on the Country Meadows property.

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[17]Trial Tr., Apr. 1, 2009, at 114:4-12.

[18]Jt. Ex. 20.

**b. Bramble's Unjust Enrichment Claims**

In addition to alleging breach of contract, Bramble also asserts claims of unjust enrichment as to both properties. By failing to make regular and complete payments on its invoices, Bramble contends that Exit was unjustly enriched because it benefitted from Bramble's construction services and yet failed to pay for those services.

One of two elements must be proven to succeed on a claim of unjust enrichment. First, there must be either "the unjust retention of a benefit to the loss of another" or "the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[19] In other words, the court must find the following: "(1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law."[20]

The flaw with Bramble's claim is that it does not meet the final element required, as there is, in fact, a remedy provided by law.[21] Bramble may recover any

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[19] *B.A.S.S. Group, LLC v. Coastal Supply Co., Inc.*, 2009 WL 1743730, at *6 (Del. Ch. June 19, 2009) (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)).

[20] *Id.* (citing *Oliver v. Boston Univ.*, 2000 WL 1091480, at *9 (Del. Ch. July 18, 2000)).

[21] *See Addy v. Piedmonte*, 2009 WL 707641, at *22 (Del. Ch. Mar. 18, 2009) (stating "[i]f a contract exists between the complaining party and the party alleged to have been unjustly enriched that governs the matter in dispute, then the contract remains 'the measure of [the] plaintiff's right.'" (quoting *MetCap Secs. LLC v. Pearl Senior Care*, 2007 WL 1498989, at *19 (Del. Ch. May 16, 2007))).

damages to which it is entitled via a breach of contract claim, which it has already successfully alleged here.

**c. Bramble's Claim under 6 Del. C. § 3501 et seq.**

Bramble also asserts that the Defendants violated 6 *Del. C.* § 3507 by failing to pay in a timely manner and claims that damages are due in accordance with 6 *Del. C.* § 3509. These statutory provisions govern the creation of building construction contracts and payment for such services. For the statute to apply to this case, however, the parties must fit within the definitions of "contractor" and "owner", which they do not. Although Bramble can properly be said to qualify as a "contractor" under 6 *Del. C.* § 3501(2), the Defendants cannot reasonably qualify as an "owner" under 6 *Del. C.* § 3501(4) because it is not "a person who has an interest in the lands or premises upon which a contractor has undertaken to erect, construct, complete, alter or repair any building or addition to a building." Bramble, the contractor, was not engaged in the construction of any buildings or additions to any buildings upon the property. Bramble's task was to site develop the land so that buildings could be constructed upon it. Thus, Bramble's claim under this statute must fail.

**d. Exit Realty & Zoar Estates's Countersuit**

Exit Realty and Zoar Estates have countersued for breach of contract against Bramble. They allege that Bramble neither performed the work within the six-month time period as specified in the contract, nor completed the work in the manner specified by the plans. Specifically, it is asserted that: (1) Bramble installed sod over stone instead of installing the sod in accordance with the plans and Mr. Gress's instructions; (2) Bramble made deals with DelDot to avoid properly installing the entrance way; and (3) Bramble failed to clean the property after completion of the project.[22] The Defendants further claim that Bramble's work was not acceptable to inspectors sent by various local and state agencies and that as a result the property failed those inspections.[23]

First, the Court finds that except for the laying of some sod, the testimony offered at trial would reflect that county and state inspections were periodically conducted on site and when changes or modifications were needed, they were satisfactorily performed by Mr. Bramble and accepted by the various government agencies. As such, the construction by the Plaintiff met the standards needed for governmental approvals and there is no good faith basis for refusing to make

[22] Answer and Countercl. at ¶ 5.

[23] *Id.* at ¶¶ 6-8.

payments based upon sloppy or inappropriate construction or for alleged inspection violations.

Secondly, in Delaware, a contract will not be read to include a time-is-of-the-essence clause unless it includes such language: "[w]here the language of a contract does not contain a specific declaration that time is of the essence, the law permits the parties a reasonable time in which to tender performance."[24] Furthermore, "[w]hen determining whether time is of the essence, the Court is free to look at two things: (1) whether the language in the contract specifically states that time is of the essence, and (2) whether the 'course of dealings between the parties must imply that time was of the essence.'"[25] The contract between Bramble and Mr. Gress stated: "Warranting weather job will be completed as close to six months as possible." This does not state that time is of the essence, and there is nothing to suggest that interaction between these parties reflected a need to meet a stringent time table or that it was critical to the development of this project. In fact, it appears that the market had slowed on the mountain of construction of this type in Eastern Sussex County and any delay had little, if any, financial consequences to the developer.

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[24]*Brasby v. Morris*, 2007 WL 949485, *3 (Mar. 29, 2007) (citing *Novozymes v. Codexis, Inc.*, 2005 WL 1278355 (Del. Ch. May 26, 2005)).

[25]*Id.* (quoting *Walker v. Concrete Creations*, 2005 WL 2101191 (Del. Com. Pl. Aug. 31, 2005)).

The one area of dispute that does warrant compensation relates to the failure by Bramble to properly lay the grass strip between the road and the sidewalks of the development. This 18" strip was filled with stone and topsoil and then covered with sod. In addition to not complying with the required specifications of the plans, it failed to pass County inspection. Common sense would have led one to conclude that the sod would die and over time it would have to be replaced, and the County inspectors demanded that it be removed and corrected. While the Plaintiff began to remove the sod and replace it in accordance with the plan, he was terminated from the project before being allowed to complete the work. Even though the cost associated with performing this work is in dispute, the need for it to be done is not. As such, a set off for this amount is appropriate.

In conclusion, the Court finds that Bramble breached the contract only insofar as it failed to properly install the grass strip in accordance with the plans. The Court does not find that Bramble's work failed inspections nor does it find that Mr. Bramble attempted to "cut corners." Although the contract provided that the work was to be completed as close to six months as possible, the Court does not find this to amount to an enforceable time-is-of-the-essence clause. Thus, Bramble was permitted to complete the work in a reasonable time which appears to have occurred here.

## V. Damages

As the Court has previously ruled, Bramble is awarded damages in the amount of $112,072.40 ($102,246.15 for work performed on the Zoar Estates property and $9,826.25 for work performed on the Country Meadows property). The parties have each submitted their positions as to the cost of the removal of the sod that Bramble incorrectly installed. Bramble submits that it will cost $15,727.54 to remove the sod, whereas Exit contends that it will cost approximately $35,000 to remove it. Since Bramble's submission on this issue was presented with more detail and the Defendant's submission reflected an estimate without much support , the Court finds Bramble's value to be more realistic. Upon receipt of the damage award, counsel for Bramble is to put $20,000.00 in escrow to cover the removal of the stone and sod and for putting back topsoil and for re-seeding. The Defendants have three years from the date of this order to have the work performed. Counsel for Plaintiff shall make payment out of this escrow amount upon satisfactory proof of the work being performed. The maximum award for the work is $20,000 and any costs beyond that amount will be the responsibility of the Defendants. If it is not completed within the three year time frame, the Court will consider the issue abandoned by the Defendant and the amount in escrow shall be paid to the Plaintiff.

Bramble has requested pre- and post-judgment interest in addition to damages. Under Delaware law, both types of interest are automatically awarded to prevailing plaintiffs.[26] The Court will award pre-judgment interest accruing from the date payment was due.[27] The difficulty here is determining when a payment was due and on what amount the interest should apply. Since this issue was not presented at trial, the Court is ordering that counsel confer in an attempt to come to an agreement regarding the date interest began accruing and the interest rate to apply. The Court also awards post-judgment interest which shall accrue from the date of this Opinion. If the parties are unable to resolve these issues, they are to submit to the Court their calculations and how they came to that conclusion.

## VI. Conclusion

In conclusion, the Court makes the following findings:

(1) A contract for construction services existed between Bramble and the Defendants as to both Zoar Estates and Country Meadows.

(2) The Defendants breached both contracts.

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[26] *Payne v. The Home Depot, Inc.*, 2009 WL 924515, at *1-2 (Del. Super. Apr. 7, 2009) (citing *Wilm. Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000)); *see also* 6 *Del. C.* § 2301 (2009).

[27] *Rexnord Indus., LLC v. RHI Holdings, Inc.*, 2009 WL 377180, at *9 (Del. Super. Feb. 18, 2009) (quoting *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992)).

(3) Bramble breached the contract to perform work on the Zoar Estates property by failing to properly install the grass strip between the roadway and sidewalk in accordance with the plans.

(4) Damages are due to Bramble in the amount of $112,072.40 ($102,246.15 for work performed on the Zoar Estates property and $9,826.25 for work performed on the Country Meadows property), plus pre- and post-judgment interest.

(5) Twenty thousand ($20,000) of the damages awarded will be placed in escrow by Plaintiff's counsel to be paid consistent with the Court's decision.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.