SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

January 16, 2013

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RE: Bennett, Debra and William v. Plantations E. Condominium Assoc., Inc. v. Gross, Carol v. Bennett
Case ID No.: S12C-04-002 ESB

Dear Counsel:

This is my post-trial decision on the issue of damages in this case involving water damage to the plaintiff's condominium unit that happened when the defendants' toilet cracked, causing water to run from their unit into the plaintiff's unit unnoticed for days. The plaintiff's unit is located directly below the defendants' unit. I previously determined that the defendants were responsible for the plaintiff's damages.

The plaintiff seeks the following damages:

1) Repair Costs	$ 59,690.00
2) Loss of Use	87,400.00
3) Replace Personal Property	1,155.00
4) Repair Personal Property	1,360.00
5) Clean Personal Property	800.00
6) Repair Wallpaper	214.00
7) Excess Electric (fans & humidifiers)	116.00
	$150,735.00

The following witnesses testified at the trial:

1) Susan White

2) Carolyn Turner

3) John Steigelman

4) Carol Gross

5) William Bennett

Ms. White works for Sussex Environmental Health Consultants. She conducted a moisture and fungal evaluation of the plaintiff's unit. Ms. White testified that there was mold and elevated levels of moisture at various spots in the plaintiff's unit. She also testified about what would have to be done to repair the plaintiff's unit. Carol Turner is a realtor for Lewes Realty. She testified about what the fair rental value of plaintiff's unit would be. The plaintiff used this information to establish her loss of use claim. Mr. Steigelman works for the AGM group. He testified about how much it would cost to repair the plaintiff's unit. Ms. Gross is the plaintiff. She testified about the damages to her unit. Mr. Bennett is one of the defendants. He testified about the damages to his unit.

The plaintiff uses her condominium unit as a second home, staying in it mostly during the summer and on weekends at other times throughout the year. The plaintiff has not yet repaired her condominium unit. She is unable to do so without taking out a loan and does not want to do that. The plaintiff is instead waiting on the outcome of this case to repair her unit. The defendants' toilet cracked on or about February 12, 2009. The trial was held on August 16, 2012. Thus, the plaintiff had not used her condominium unit for three and one-half years.

The plaintiff and her witnesses, through their testimony and exhibits, offered evidence

adequate to establish, from an evidentiary standpoint, each element of her damages. Moreover, I found the plaintiff and all of her witnesses to be credible. The defendants did not offer any witnesses to contradict the plaintiff's claims for damages. However, the defendants did cross-examine the plaintiff's witnesses and have raised a number of arguments regarding various aspects of the plaintiff's claims for damages.

The defendants argue that the plaintiff's repair costs are speculative because she has not made the repairs yet. While it is true that the plaintiff has not yet repaired her unit, it does not mean that her repair costs are speculative. Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred.[1] The plaintiff, however, has a responsibility of proving damages as an essential element of her claim by a preponderance of the evidence.[2] Damages cannot be speculative.[3] The plaintiff "must prove her damages with a reasonable degree of precision."[4] "Reasonable estimates are permissible even if they lack mathematical certainty if the Court is given a reasonable basis to make a responsible estimate of damages."[5] Thus, a repair estimate may be used to measure damages. The plaintiff offered the testimony of two witnesses as to what must be done in order to repair her unit.

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[1] *Delaware Limousine Service, Inc. v. Royal Limousine Service, Inc.,* 1991 WL 53449, at *3 (Del. Super. April 5, 1991).

[2] *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426, at *3 (Del. Com. Pl. May 19, 2009).

[3] *Id.*

[4] *Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004), quoting *Laskowski v. Wallis,* 205 A.2d 825 (Del. 1964).

[5] *CIT Technology Financing Services v. Owen Printing Dover, Inc.,* 2008 WL 2586683 (Del. Super. April 30, 2008).

Ms. White testified about the mold and moisture problems in the plaintiff's unit and what repairs would have to be done to address them. The other witness, Mr. Steigelman, an experienced building contractor, testified that the repairs would cost $59,690.00. I found their testimony to be credible and have accepted it. Therefore, I have granted plaintiff's repair claim of $59,690.00.

The defendants argue that the plaintiff had a duty to mitigate her damages and that if she had done so, then she would have suffered no loss of use since the water damage and repairs would have occurred during a time of the year when she was not using her unit. The plaintiff argues that she did not repair her unit because she did not want to borrow the money to do so. The plaintiff does have a duty to mitigate her damages.[6] This required the plaintiff to take reasonable efforts to minimize her damages.[7] While it is understandable that the plaintiff would like to wait until this case is over, there was no evidence to support a finding that the plaintiff could not have borrowed the money and used it to make the repairs to her unit years ago.[8] Therefore, I have denied her loss of use claim of $87,400.00.

The defendants argue that the plaintiff's personal property claim of $1,155.00 should not be allowed because she did not take into consideration that these items were used. I agree and have denied this claim because it did not take into consideration the depreciated value of these items.

The defendants argue that certain other aspects of the plaintiff's claims are speculative

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[6] *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1994).

[7] *Id.*

[8] The parties submitted post-trial letter memorandums regarding how the duty to mitigate damages is affected when an injured party lacks the financial ability to mitigate damages. After reviewing the evidence in this case, I concluded that there was no evidence to support a finding that the plaintiff did not have the financial ability to mitigate her damages.

because she recently obtained the repair estimates.[9] The defendants reason that, given the passage of time, it is speculative to conclude that the problems with these items are related to the water that poured into the plaintiff's unit for days. I disagree. The only evidence in the record is that the problems with these items were caused by water pouring into the plaintiff's unit for days. It is the defendants' argument that is speculative. There is simply no evidence at all to support a finding that these damages were caused by any problem other than the water that poured into the plaintiff's unit. Therefore, I have awarded the plaintiff the full amount of her other claims.

Thus, judgment will be entered in favor of the plaintiff and against the defendants, jointly and severally, in the amount of $62,180.00,[10] together with costs and post-judgment interest at the applicable legal rate.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

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[9] The defendants' argument refers to the repair and cleaning of certain personal property and repairs to the air conditioning unit.

[10]

Repair Costs	$59,690.00
Repair Personal Property	1,360.00
Clean Personal Property	800.00
Repair Wallpaper	214.00
Excess Electric	116.00
	$62,180.00