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

BECK AND PANICO BUILDERS, INC.	)	
	)	
Defendant Below/ Appellant,	)	
	)	
v.	)	C.A. No. 08A-08-014 PLA
	)	
RICHARD A. STRAITMAN and NINA STRAITMAN,	)	
	)	
Plaintiffs Below/ Appellees.	)	

ON APPEAL FROM A DECISION OF
THE COURT OF COMMON PLEAS
REVERSED in part and
JUDGMENT VACATED

Submitted: September 22, 2009
Decided: November 23, 2009

Michael W. McDermott, Esquire, PARKOWSKI, GUERKE & SWAYZE, P.A., Wilmington, Delaware, Attorney for Defendant Below/Appellant.

Richard A. Straitman and Nina Straitman, Plaintiffs Below/Appellees, *pro se*.

ABLEMAN, JUDGE

I. Introduction

Defendant Beck & Panico Builders, Inc. ("Beck & Panico") appeals the July 18, 2008 opinion of the Court of Common Pleas requiring it to pay damages in the amount of $2,250.00 to Richard and Nina Straitman ("the Straitmans"). Beck & Panico acted as general contractor on renovations in the Straitmans' home. After the statute of limitations for contract claims had expired, the Straitmans experienced problems with tiling work performed by a subcontractor during the renovation. The Straitmans filed suit for negligence against Beck & Panico, seeking to hold it responsible for failing to select a competent subcontractor and failing to supervise or inspect the subcontractor's work.

Following a trial, the Court of Common Pleas found that Beck & Panico was not negligent. The trial court nevertheless awarded final judgment, plus costs and witness fees, in favor of the Straitmans on the theories of promissory estoppel and unjust enrichment. Beck & Panico's appeal asserts that the trial court erred in awarding judgment to the Straitmans for claims never raised or argued during the course of the litigation by either party. Beck & Panico further argues that no factual or legal basis existed to support claims for promissory estoppel and unjust

enrichment, even assuming they had been properly raised before or during trial.

After reviewing the record, the Court agrees with the appellant that the trial court erred by providing the Straitmans with recovery on claims that were never raised and that were inapplicable to the case. Accordingly, for the reasons explored herein, the opinion of the Court of Common Pleas must be **REVERSED in part** to the extent it concluded that promissory estoppel and unjust enrichment were properly considered and applied against the appellant. Because the trial court found that Beck & Panico was not liable for negligence and the Straitmans did not properly present any other claims for trial, the judgment against Beck & Panico will be **VACATED**.

II. Factual and Procedural Background

In 2001, the Straitmans hired Beck & Panico to act as the general contractor on renovations of their master bathroom and laundry room. The parties had developed a positive relationship over the course of several previous projects undertaken during the 1990s.

Under the parties' contract,[1] Beck & Panico was to supply "labor for the tile floor and base in the master bath . . . and the tile shower (including

[1] The trial court's opinion indicates that the contract was a proposal that neither party signed, possibly because the trial court's copy did not include a signature page; it appears undisputed that the document was actually signed by both parties.

floor, walls and ceiling)."[2] Beck & Panico subcontracted with Dino and Sons for tile masonry. The bathroom tile work was performed by Dino and Sons employee Joseph Fiasco. The renovation took place from March 25 to June 12, 2002.

The Straitmans first noticed problems with the tile-work in their shower during Fall 2004, when six tiles in the shower enclave cracked. Richard Straitman notified Beck & Panico of the problem in November 2004. Beck & Panico instructed him to contact Joseph Fiasco. At a scheduled appointment that winter, Fiasco could not identify a cause for the damage and recommended that the Straitmans wait to see if any other tiles were affected.

As the Straitmans waited, further damage developed. By March 2005, twenty-eight tiles were cracked and the Straitmans again contacted Beck & Panico about repairs. The Straitmans consulted with Dino and Sons regarding replacements for the damaged tiles, but Dino and Sons could not obtain an exact color match for the existing tile-work. Because the damage occurred in disparate portions of the shower enclosure, the Straitmans

[2] Opinion at 2, *Straitman v. Beck and Panico Builders, Inc.*, C.A. No. 2007-01-511 (Del. Com. Pl. July 18, 2008) [hereinafter "Op."].

requested that Beck & Panico re-tile the entire shower to avoid an unwanted patchwork effect.

By the Spring of 2005, cracks began to show in the parties' relationship as well. Beck & Panico offered in April 2005 to replace the affected tiles, but refused to reinstall tiling for the entire shower and disclaimed responsibility for the damage. The Straitmans filed a claim with their homeowners' insurance in October 2005, which was denied based upon a one-year statute of limitations. An inspection related to this claim, however, identified problems with the renovated bathroom framing as the source of the damage. Beck & Panico challenged this explanation and suggested that construction related to an addition to the house, which was performed by another builder, caused the cracking.

In 2006, the Straitmans hired a structural engineer, John Rzasa, who concluded that the cement board backing the tile work in the bathroom had been improperly installed during the renovation. Tape had not been applied to some joints between backing pieces, and the spacing of nails exceeded recommendations. Rzasa concluded that cracked tiles most likely occurred because of the omission of tape in areas where the cement boards joined. Rzasa discounted the Straitmans' new addition, which was at the opposite end of the house, as a contributing cause.

The Straitmans initially filed suit against Beck & Panico in the Justice of the Peace Court on December 5, 2005. Their claim was dismissed on the basis of the two-year statute of limitations under 10 *Del. C.* § 8106. The Straitmans appealed this dismissal to the Court of Common Pleas. Beck & Panico sought dismissal of the Complaint on Appeal, arguing that the appeal violated the mirror-image rule and that the statute of limitations still barred the Straitmans' claim.

The Court of Common Pleas found no violation of the mirror-image rule and determined that the relevant statute of limitations was tolled by the discovery rule. The Court of Common Pleas predicated this decision on the fact that the Straitmans, in multiple Complaints filed in Justice of the Peace Court and the Court of Common Pleas, never asserted any claim for breach of implied warranties of quality or workmanship under the parties' contract. Rather, in their Complaints and via oral and written representations to the Court of Common Pleas, the Straitmans "stated that they are suing [Beck & Panico] under a theory of negligence."[3] The three-year statute of limitations for negligence claims could be tolled if the Straitmans demonstrated that the injury they suffered was "inherently unknowable" and that they were

[3] Order on Def.'s Mot. to Dismiss at 2, *Straitman v. Beck and Panico Builders, Inc.*, C.A. No. 2007-01-511 (Del. Com. Pl. May 23, 2007).

"blamelessly ignorant" of it. The court could not determine whether the facts supported such a conclusion until trial, and the parties agreed to waive argument on the tolling issue.

A one-day bench trial was held on May 19, 2008. At trial, repeated reference was made to the fact that the Straitmans' claim was before the trial court on a theory of negligent supervision or inspection. As Mr. Straitman explained upon cross-examination, the Straitmans instituted their lawsuit on the grounds that "[Beck & Panico] were negligent in not supervising the job adequately, even if Mr. Fiasco had performed negligently, it was [Beck & Panico's] job to catch it."[4]

Vince Panico, one of Beck & Panico's owners, testified that Beck & Panico had hired Joseph Fiasco as an independent tile masonry contractor for a decade or longer without any previous incidents that would lead to questions regarding Fiasco's competence.[5] Panico also confirmed that fiber tape had been ordered for the Straitmans' shower renovation and explained that because the tape is installed simultaneously with the laying of tile, Beck & Panico would not necessarily have an opportunity to confirm that all joints were taped unless they conducted constant monitoring of the

[4] Trial Tr. at 365, *Straitman v. Beck and Panico Builders, Inc.*, C.A. No. 2007-01-511 (Del. Com. Pl. May 19, 2008) [hereinafter "Trial Tr."].

[5] *Id.* at 95.

subcontractor.[6] Although Beck & Panico personnel were generally on-site "everyday" and never saw any problems with Fiasco's work on the Straitmans' shower, they did not "instruct Mr. Fiasco how to perform his trade" or "stand over his shoulder."[7]

At the conclusion of the trial, the Court of Common Pleas reserved judgment. On July 18, 2008, the trial court issued the opinion now challenged on appeal. The trial court concluded that Beck & Panico were not negligent. In reaching this conclusion, the trial court relied upon the approach set forth in the Restatement (Second) of Torts, and explored in considerable detail in *Bowles v. Whiteoak, Inc.*, which states that a general contractor will not be held liable for an independent subcontractor's negligence in the performance of his work unless certain exceptional circumstances apply.[8] Those exceptions fit within three broad categories:

> 1) Negligence of the employer in selecting, instructing, or supervising the contractor.
> 2) Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff.
> 3) Work which is specially, peculiarly, or "inherently" dangerous.[9]

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[6] *Id.* at 93-94.

[7] *Id.* at 94-95.

[8] 1988 WL 97901, at *2 (Del. Super. Sept. 15, 1988).

[9] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 409 cmt. b).

The trial court considered the second class of exceptions inapplicable, and found no evidence that Beck & Panico failed to exercise reasonable care in selecting the subcontractor, given the builder's prior positive experience with Joseph Fiasco.[10] The trial court found that the work at issue, "while requiring the skill of a mason, is not of a type which one would classify as specialty or peculiarly or inherently dangerous."[11] Invoices for the project indicated that fiber tape was purchased, and Beck & Panico had no reason to believe the tiling would be installed without proper taping. In short, the evidence at trial suggested no factors "which would put [Beck & Panico] on notice that there was cause for on site supervision."[12] The trial court therefore agreed with Beck & Panico that, pursuant to Restatement (Second) of Torts § 411, it could not be held liable on a negligence theory because the alleged negligence of its subcontractor was unforeseeable.[13]

After expressing its opinion that "the negligence theory may not provide a vehicle to recover," the trial court nevertheless proceeded to award

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[10] Op. at 6-7.

[11] *Id.* at 8.

[12] *Id.*

[13] *Id.*

judgment of $2,250.00 in favor of the Straitmans. The trial court explained its rationale as follows:

> The facts of this case indicate the consumer trusted the [general] contractor after a period of professional relationship and found that trust misplaced and wanting. The Straitman's [sic] relied on the professional expertise of [Beck & Panico] to their detriment. The theory of detrimental reliance is embodied in the doctrine of promissory estoppel. While this theory is traditionally argued on the basis of contract, there is credible argument that it is sufficient to be applied to the principles of torts. It is clear that the Straitmans were damaged at the hands of [Beck & Panico], because they had no relationship with Fiasco. To allow [Beck & Panico] to bring Dino and Sons and Fiasco into the relationship and profit, but later walk away from the damages would allow them to be unjustly enriched at the hands of the Straitmans. The amount charged to the Straitmans . . . was $4,500.00 for the tile job. It is reasonable to conclude that [Beck & Panico] paid Fiasco at least 50% of this amount, so [Beck & Panico] received $2,250.00. I find that [Beck & Panico] was unjustly enriched in the amount they received of $2,250.00.[14]

The trial court also awarded costs of $180.00 and expert witness fees in the amount of $220.00 to the Straitmans. Beck & Panico filed a motion for reargument or clarification regarding the judgment, which the trial court denied as untimely. The instant appeal followed.

III. Parties' Contentions

The gist of Beck & Panico's appeal is that the decision below was complete at the point the trial court concluded it was not negligent. Beck &

[14] *Id.* at 9.

Panico argue that the trial court's discussion of detrimental reliance and unjust enrichment injected principles into the case that were never pled or raised by either party at any point in the litigation and erroneously permitted recovery on those principles. Furthermore, even if promissory estoppel and unjust enrichment had been properly raised, Beck & Panico submits that neither principle would apply to its relationship with the Straitmans. Finally, Beck & Panico challenge the trial court's damages calculation, which it argues is based upon assumption and speculation, rather than evidence.

In response, the Straitmans contend that they "put forth facts and arguments supporting a finding of promissory estoppel" and unjust enrichment even though, as *pro se* litigants, they lacked the knowledge to label them appropriately.[15] Specifically, the Straitmans argue that they established promissory estoppel by presenting evidence that: (1) they developed a "relationship of reliance" on Beck & Panico; (2) they were deprived of contractual protection because of the expiration of the limitations period for contractual claims; (3) Beck & Panico promised to reinstall damaged tiles, but did not; and (4) they were injured as a result by having to pay for expert investigation of the defective installation and replacement of the shower tiling. The Straitmans also urge that Beck &

[15] Appellees' Answering Br., 6.

Panico were unjustly enriched by taking a mark-up on Dino and Sons' subcontractor charge. Finally, the Straitmans seek review of the trial court's determination that Beck & Panico was not negligent in its supervision of Fiasco.

IV. Standard and Scope of Review

In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court, and its function mirrors that of the Supreme Court.[16] This Court's role entails correcting errors of law and reviewing the trial court's factual findings "to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."[17] Questions of law receive *de novo* review, whereas questions of fact are reviewed under a "clearly erroneous" standard.[18] The trial court's findings must be supported by substantial evidence, which means such evidence as a "reasonable mind might accept to support a conclusion."[19]

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[16] *See, e.g.*, *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985).

[17] *See, e.g.*, *J.S.F. Props., LLC v. McCann*, 2009 WL 1163494, at *1 (Del. Super. Apr. 30, 2009) (quoting *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002)).

[18] *Id.*

[19] *Trader v. Wilson*, 2002 WL 499888, at *3 (Del. Super. Feb. 1, 2002), *aff'd*, 804 A.2d 1067, 2002 WL 1924649 (Del. Aug. 15, 2002) (TABLE).

V. Discussion

Upon review of the record, the Court finds that the trial court committed legal error in permitting the Straitmans to recover damages for promissory estoppel and unjust enrichment. Because neither theory of recovery was requested by the Straitmans before this appeal, Beck & Panico was denied both its right to notification of the claims upon which the Straitmans were awarded judgment and the opportunity to provide a response.

The rules of civil procedure for the Delaware courts have followed the federal model in adopting a liberal notice-pleading standard.[20] Unless specificity is required by the rules, a plaintiff need merely offer general allegations to state a claim.[21] By way of relevant example, Court of Common Pleas Civil Rule 8(a) requires only that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief," as well as a demand for judgment.

This liberality is only equitable because the notice-pleading standard, as its title suggests, places the defendant in a civil case on notice of the claims asserted. As a matter of procedural due process, the defendant "is

[20] *Read v. Harding*, 1994 WL 1547775, at *1 (Del. Com. Pl. Aug. 1, 1994).

[21] *Id.*

entitled to be apprised of the nature of the claim with such definiteness that a person of reasonable intelligence is able to understand the allegations and respond to the complaint."[22] The rules of civil procedure are also designed to afford the defendant an opportunity to present that response.

In effect, the trial court *sua sponte* amended the Straitmans' Complaint after trial to add claims for promissory estoppel and unjust enrichment. The trial court's decision deprived Beck & Panico of notice of the nature of the claims upon which the Straitmans were permitted recovery as well as the opportunity to present a defense. Prior to the trial court's opinion, the Straitmans had repeatedly represented, both prior to and during trial, that their claim was *solely* for negligence—a fact the trial court itself reiterated in its opinion.[23] This was not, therefore, a situation in which the Court was merely amending the Complaint pursuant to Rule 15(b) to conform to the evidence.[24] Neither party expressly or impliedly consented to trial on the issues of promissory estoppel or unjust enrichment. As a

[22] 16D C.J.S. *Constitutional Law* § 1768 (2009).

[23] Op. at 2.

[24] Ct. Com. Pl. Civ. R. 15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.").

result, Beck & Panico had no opportunity to muster a legal or factual response to either issue. The leniency accorded *pro se* litigants cannot extend to depriving their opponent of due process.

These procedural defects would be fatal to the Straitmans' recovery even if the evidence presented at trial suggested a basis for promissory estoppel or unjust enrichment, and the trial court's error should not be viewed as an opportunity for the Straitmans to retrospectively construct evidentiary support for claims that they never raised. Nevertheless, it is worth noting that neither theory appears applicable to the facts of this case.

Promissory estoppel "may . . . be applied to prevent injustice where [the defendant has made a promise inducing reasonable reliance by the plaintiff but] the element of consideration is not established"[25] so as to support a breach of contract claim. A plaintiff seeking to establish promissory estoppel must show, by clear and convincing evidence, that the following elements are met: (1) the defendant made a promise; (2) the promise was made with the reasonable expectation of inducing action or forbearance by the plaintiff; (3) the plaintiff reasonably relied on the promise to her detriment; and (4) the Court can only avoid injustice by finding that

[25] *Paoli v. Whispering Pines*, 2006 WL 2165690, at *2 (Del. Com. Pl. July 31, 2006).

the promise is binding.[26] Because promissory estoppel substitutes the plaintiff's detrimental reliance for consideration to salvage an otherwise unenforceable promise, it will not apply where the alleged promise was bargained for as part of a contract.[27]

The trial court did not precisely identify the promise it intended to enforce by recourse to promissory estoppel. The record is clear that the relationship between Beck & Panico and the Straitmans was contractual, and the evidence at trial does not suggest any relevant promises regarding the tile work made outside that contract. It appears that the trial court contemplated enforcing an implied promise pertaining to the competence of subcontractors selected by Beck & Panico and the quality of work. The trial court seems to suggest that this promise was rooted in the parties' past relationship, upon which the Straitmans state they relied in contracting with Beck & Panico.

The problem with this approach is that a past relationship, without more, is not a promise of future performance. Any implied promises regarding the quality of Beck & Panico's work on the 2002 renovation, and their use of expertise in selecting and supervising subcontractors, would be subsumed into the implied warranties of good quality and workmanship, and

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[26] *Id.*

[27] *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000).

the Restatement principles regarding liability for negligent hiring, inspection, or supervision of subcontractors. Applying promissory estoppel to implied warranties that are barred by the statute of limitations for breach of contract actions would serve to completely undermine the limitations period. Similarly, promissory estoppel cannot resurrect a failed tort claim. Whatever reliance the Straitmans reasonably placed upon Beck & Panico's "professional expertise" in choosing and supervising its subcontractors was satisfied, as the trial court concluded that Beck & Panico was not liable for negligent selection or supervision. The only remaining detrimental reliance argument would be that the Straitmans depended upon Beck & Panico to ferret out *unforeseeable* subcontractor negligence. It would say much of the Straitmans' former confidence in their builder if they expected Beck & Panico to prevent the unforeseen, but this is not a form of reliance that the Court is willing to label "reasonable."

The Straitmans, in their Answering Brief, appear to suggest that promissory estoppel should apply to enforce Beck & Panico's offer to replace the cracked tiles, but the Straitmans themselves refused that proposal. The trial court's opinion also makes no reference to this particular offer in its discussion of promissory estoppel.

Moreover, this situation is not one in which promissory estoppel was the only means to avoid injustice to the Straitmans. Contrary to what the trial court stated in the challenged portion of its opinion, the Straitmans had a "relationship" with Dino and Sons and with its employee, Joseph Fiasco. Regardless of whether they knew the subcontractor when the work was performed, Beck & Panico named Dino and Sons as the tile masons as soon as the Straitmans reported problems. The Straitmans contacted Dino and Sons and consulted with Fiasco. Assuming that the discovery rule tolled the limitations period, the Straitmans were aware both of the subcontractor's identity and of its alleged negligence within the statute of limitations period for negligence actions. The Straitmans' choice to pursue a claim solely against Beck & Panico is not an "injustice" that must be remedied by applying promissory estoppel against the appellant.

Turning to the trial court's unjust enrichment theory, the award of damages for unjust enrichment contradicts its conclusion that Beck & Panico was not negligent. As Beck & Panico argues in its appeal, unjust enrichment will not be applied where the source of the plaintiff's claim is a contract between the parties.[28] In other words, as with promissory estoppel, unjust

[28] *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009) ("A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim."); *SinoMab Bioscence Ltd.*

enrichment does not provide an end-run around the statute of limitations to salvage a time-barred claim for breach of implied warranties in the parties' renovation contract. An unjust enrichment claim may also be grounded in tort,[29] but in that context, the theory operates as "essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched)."[30] Where the plaintiff cannot satisfy the elements required to make out a tort claim, an argument that the defendant has been unjustly enriched by tortious conduct necessarily fails as well.[31]

In this case, the trial court's conclusion that Beck & Panico was not negligent foreclosed the use of unjust enrichment as an "alternative vehicle" for recovery. Beck & Panico could not receive the "benefit" of its tortious

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v. Immunomedics, Inc., 2009 WL 1707891, at *21 n.117 (Del. Ch. June 16, 2009) ("[U]njust enrichment is inapposite where there is an operative agreement between the parties.").

[29] *See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 936-37 (3d Cir. 1999) (noting that unjust enrichment is a restitutionary theory of recovery, whereas tort claims typically seek compensatory damage awards).

[30] *Republic of Pan. v. Am. Tabacco Co.*, 2006 WL 1933740, at *8 (Del. Super. June 23, 2006).

[31] *Id.* (dismissing unjust enrichment claims because underlying tort claims were subject to dismissal for failure to establish essential element of proximate cause); *see also Steamfitters Local Union No. 420 Welfare Fund*, 171 F.3d at 937 ("We can find no justification for permitting plaintiffs to proceed on their unjust enrichment claim once we have determined that the District Court properly dismissed the traditional tort claims because of the remoteness of plaintiffs' injuries from defendants' wrongdoing.").

conduct because the trial court concluded that there was none. Even assuming, as seems quite reasonable, that *Fiasco* acted negligently, this does not imply that Beck & Panico was unjustly enriched by receiving a mark-up on Dino and Sons' tiling work[32] in the absence of any negligence on its own part.

Finally, because the Straitmans did not file a cross-appeal, their request for "review" of the portion of the opinion below finding that Beck & Panico was not negligent is not properly before the Court.

IV. Conclusion

While this Court is sympathetic to the Straitmans' travails, the trial court erred in its effort to rescue them from the consequences of their own choices in how to pursue this litigation. The trial court concluded that Beck & Panico was not negligent in selecting Dino and Sons as a subcontractor, nor in supervising or inspecting Fiasco's work, and those findings have not been properly challenged. Having reached that conclusion, and in light of the fact that the Straitmans had not brought any additional claims, the trial court lacked a legal or factual basis to consider promissory estoppel or

[32] Although it will not delve deeply into the issue after concluding that the Straitmans were not entitled to any recovery, the Court agrees with Beck & Panico that the trial court lacked the facts necessary to determine the amount, if any, of that mark-up. Therefore, its damages calculation based on its projection of a "reasonable" mark-up was speculative and unsupported by substantial evidence.

unjust enrichment. Accordingly, the trial court's opinion is **REVERSED in part** as to its application of promissory estoppel and unjust enrichment. The award of $2,250.00 in damages for unjust enrichment, as well as the imposition of costs and expert witness fees against Beck & Panico, is hereby **VACATED**. Consistent with the trial court's conclusion on the issue of negligence, judgment is entered in favor of Beck & Panico.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Michael W. McDermott, Esq.
Richard A. Straitman
Nina Straitman