IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

R. C. FABRICATORS, INC., a corporation of the State of Delaware,	:	C.A. No. 09L-04-011 WLW
Plaintiff,	:	
v.	:	
WEST DOVER PROFESSIONAL PARK, LLC, a Delaware limited liability company, THEODORE A. BOOK, an individual, EXCELL CONSTRUCTION, INC., a corporation of the State of Delaware, KB INVESTMENTS, LLC, a Delaware limited liability company, and KBJ SMYRNA PROPERTIES, LLC, a Delaware limited liability company,	:	
Defendants.	:	

Submitted: September 23, 2009
Decided: September 30, 2009

ORDER

Upon Plaintiff's Motion for Partial Summary Judgment. *Denied.*

Eric J. Monzo, Esquire and Edward Seglias, Esquire of Cohen Seglias Pallas Greenhall & Furman, P.C., Wilmington, Delaware; attorneys for the Plaintiff.

Ronald G. Poliquin, Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorneys for the Defendant West Dover Professional Park, LLC.

WITHAM, R.J.

FACTS AND PROCEDURAL HISTORY

On April 6, 2009, R.C. Fabricators, Inc. ("R.C.") filed a seven-count complaint against West Dover Professional Park, LLC, Theodore A. Book, Excell Construction, Inc., K.B. Investments, LLC and K.B.J. Smyrna Properties, LLC (collectively, "Defendants"). Count II alleges a breach of contract. Specifically, R.C. contends that Defendants breached a March 19, 2008 contract and therefore owe Plaintiff $154,000, plus interest, costs and attorneys fees.

On June 4, 2009, this Court issued a Scheduling Order providing that Discovery would close on August 3, 2009. On July 2, 2009, R.C., via LexisNexis File and Serve, served upon Defendants' counsel written discovery requests, including its First Written Requests for Admission, Directed to Defendants. Copies of these requests were served via first class mail on July 6, 2009.

R.C., when Defendants failed to respond to its written requests, re-noticed its Motion for Partial Summary Judgment as to Count II on September 15, 2009. Defendants eventually responded to R.C.'s Written Requests for Admission on September 22, 2009.

Plaintiff R.C. Fabricators's Arguments

R.C. contends that the matters set forth in its written requests for admission should be deemed admitted pursuant to Superior Court Civil Rule 36. Consequently, R.C. avers that summary judgment is appropriate as to Count II because the Defendants have admitted the necessary elements.

Defendants Arguments

Defendants aver that the requested admissions were denied through the Defendants' verified answer to the complaint. Defendants further contend that R.C. failed to provide adequate time to respond by serving the written requests for admission less than thirty days before the close of Discovery. Defendants conclude that summary judgment is inappropriate because there remain genuine issues of material fact.

Standard of Review

Summary judgment should be rendered only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] The facts must be viewed in the light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[3] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[4]

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[1] Super. Ct. Civ. R. 56(c).

[2] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

[3] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

DISCUSSION

Superior Court Civil Rule 36(a) provides, in pertinent part, that, "[t]he matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ."[5] Rule 36(b) further provides that, "[a]ny matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission."[6]

In the case *sub judice*, Defendants failed to respond to R.C.'s request for admissions within the requisite thirty days. Counsel for Defendants has made no attempt to cure this defect. Instead, counsel for Defendants elected to file responses the night before R.C.'s Motion for Partial Summary Judgment was scheduled to be heard, approximately eighty days after R.C.'s initial request. To date, counsel for Defendants has failed to offer any explanation for this delay.

If the analysis were to end here, the matters addressed in R.C.'s request for admissions would be deemed admitted pursuant to Rule 36(a). It is well settled, however, that "the purpose of Rule 36 is to facilitate the proof at trial by eliminating facts and issues over which there is little dispute, but which are often difficult and expensive to prove."[7] Thus, requests for admission should not be used to establish

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[5] Super. Ct. R. 36(a).

[6] Super. Ct. R. 36(b).

[7] *Thorton v. Meridian Consulting Engineers, Delaware, LLC*, 2006 WL 2126291, at *1 (Del. Super. Feb. 13, 2006) (*quoting* 4A J. Moore, J. Lucas & D. Epstein, *Moore's Federal Practice* P.

the ultimate facts in issue.[8]

R.C. made six requests for admission: [1] A true and correct copy of the Contract between R.C. and Defendants is attached to the Complaint at Exhibit "B"; [2] The Defendants agreed to be jointly and severally liable to R.C. for work performed in accordance with the Contract; [3] The signature set forth on the Contract is that of an individual authorized to legally bind Defendants to the terms of the Contract; [4] Admit that the amount due to R.C. for work performed in accordance with the Contract is One Hundred Fifty-four Thousand Dollars ($154,000); [5] Admit that the Defendants have not paid R.C. for the work performed on the Contract and the work furnished to the Project; and [6] Admit that the Defendants have received the benefit of the work performed by R.C. on the project.

R.C.'s fourth, fifth and sixth requests for admission cannot be deemed admitted because they ask Defendants to essentially state that they breached the contract rather than addressing the facts from which a fact finder could conclude that a breach of contract existed.[9] Defendants, in their answer, have asserted that R.C. was only authorized to draft a drawing, and that no materials were ever delivered to the property. In other words, Defendants allege that they have paid R.C. for the services

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36.02 (2d ed. 1984)).

[8] *See Id.* (*citing Brittingham v. Lankford*, 1987 WL 17179 (Del. Super. Sept. 8, 1987).

[9] *Donegal Mutual Ins. Co. v. Action Bus. Ctr., Inc.*, 1999 WL 1568618, at *11 (Del. Super. Oct. 21, 1999); *see also Calbert v. Volkswagen of America, Inc.*, 1989 WL 147394, at *2 (Del. Super. Nov. 16, 1989) (concluding that Court could not accept as admitted a request that would use Rule 36 to establish the ultimate facts in issue).

authorized and provided.

The Delaware Supreme Court held in *Bryant v. Bayhealth Medical Center, Inc.* that a Rule 36 default admission is an improper vehicle to admit a conclusion of law and an ultimate fact going to the merits of the case.[10] In *Bryant*, the defendant moved for summary judgment based solely on a judicial admission by default pursuant to Rule 36.[11] Counsel for the plaintiff failed to request relief from his Rule 36 default admission.[12] Nevertheless, the Court concluded that the Superior Court erred when it granted summary judgment solely on the plaintiff's Rule 36 default admission.[13]

The case before this Court today is similar to that in *Bryant*. R.C. bases its request for summary judgment solely on Defendants' failure to respond to its written requests for admission within the requisite thirty-day period. As previously noted, however, requests for admission should not be used to determine the ultimate facts in issue. Consequently, because the matters are not admitted, the factual issues of whether the materials were furnished and how much is owed under the contract remain at issue. Because genuine issues of material fact remain, summary judgment is inappropriate at this time.

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[10] 937 A.2d 118, 126 (Del. 2007).

[11] *Id.* at 125.

[12] *Id.*

[13] *Id.* at 126.

CONCLUSION

For the foregoing reasons, R.C.'s Motion for Partial Summary Judgment is, at this time, DENIED without prejudice.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution