

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>White Rock Construction, Inc.</b>	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	
v.	)	08L-01-069-JOH
	)	
<b>421 Market, LLC, Market Street, LLC,</b>	)	
<b>The Buccini/Pollini Group, Inc., and</b>	)	
<b>GKW Enterprises Group, LLC</b>	)	
	)	
Defendants	)	

***ORDER***

The Court conducted a bench trial in this construction case January 11-12, 2010 followed by post-trial briefing. There are three properties involved; 837, 423 and 421 Market Street. The latter two adjoin. There were no pre-construction written contracts for these properties which has made it difficult for the parties and the Court to sort out the claims, the amounts each seeks from the other and whether either party met its burden of proof.

Plaintiff, White Rock Construction Inc., seeks \$245,518.38 in damages, broken down as follows:

1. On its construction claim: \$90,726.84.

2. On claims it contends are due under the Building Construction Contracts Act:<sup>1</sup>
  - a. double damages: \$90,726.84;
  - b. compounded interest: \$12,054.44;
  - c. attorney's fees: \$51,856.99.

White Rock reaches the principal due figure based on invoices submitted of \$405,174.84 and payments received of \$314,488.00.

In turn, defendant, GKW Enterprises Group, LLC, claims it overpaid White Rock for 837 Market Street in the amount of \$10,930.00. It seeks interest on that sum. It argues that White Rock is owed nothing and disputes that the Building Construction Contract Act is applicable.

### *Findings of Fact*

#### *The Agreement Between GKW and the Buccini/Pollini Group, Inc.*

1. GKW, as general contractor, had an agreement with The Buccini/Pollin Group, Inc., ("BGP"), as owner, whereby GKW was to supply labor and materials necessary to renovate and re-furbish three buildings located on Market Street, Wilmington, Delaware. One building was located at 837 Market (the "837 Project") and the others were adjacent structures located at 421/423 Market Street (the "421/423 Project"). Work began at the 837 Project first in early 2007. Work began at the 421/423 Project in the late spring or early summer of 2007. The time periods that GKW worked on both projects overlapped.

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<sup>1</sup> 6 Del. C. ch. 35.

2. For both projects, significant floor joist, sheathing, rafter replacement and repair work was required.

3. GKW did not have a separate written agreement with BPG for its work on the 421/423 project. It, however, prepared and submitted a budget for the 421/423 Project (“Budget”), which BPG accepted. One line item of the Budget and a line item in the subsequent pay applications simply listed “carpentry” and provided a price of \$385,000.00. GKW and BPG understood “carpentry” to include more than floor joist restoration, sheathing and rafters. It also included additional carpentry work such as window framing, installing doors and door frames, tin ceiling work, and replacing cornices and dormers as well as any miscellaneous work that would be considered carpentry.

### *The 837 Market Street Project*

1. As part of its work at 837 Market Street, GKW entered into a series of subagreements with White Rock whereby White Rock agreed to perform various carpentry services. None of these agreements were reduced to writing before they were performed. Further, there was no single agreement between GKW and White Rock encompassing all of the services and materials that White Rock ultimately provided at 837 Market Street. After White Rock would complete each task it would negotiate a price with GKW and submit an invoice.

2. White Rock filed a Complaint and Statement of Claim for Mechanics’ Lien on 837 Market Street (“837 Claim”).

3. The 837 Claim alleges that White Rock invoiced a total of \$271,977.44 for its work on that project, and was paid \$270,007.44, leaving a balance of \$1,970.00.

4. GKW never responded to the 837 Claim, and therefore, never challenged White Rock's contentions concerning the amounts paid or the amount due in that action.

5. White Rock received payment of the balance alleged to be due for 837 Market Street.

6. The value of White Rock's work on 837 Market Street was approximately \$272,000.00.

7. White Rock was not overpaid for its work on 837 Market Street.

8. GKW accepted all of White Rock's invoices for the 837 Project.<sup>2</sup>

9. In connection with its work on 837 Market Street, White Rock received a check from GKW in the amount of \$10,000.00 (Check No. 2251, dated September 14, 2007).

10. The copy of the check provided in connection with this action included a handwritten notation of the word "Fireproofing," although that word does not appear on the check itself.<sup>3</sup>

11. GKW acknowledges that it was its employee, Gregory Williams, who wrote the word "Fireproofing" on the copy of the check provided in this action.

12. GKW acknowledges that White Rock performed fire proofing on 837 Market

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<sup>2</sup> Ex. B, at 110-11; Ex. D.

<sup>3</sup> Ex. D.

Street.

13. GKW was unable to confirm whether White Rock performed any fire proofing on the separate project located at 421/423 Market Street, Wilmington.

14. White Rock performed no fire proofing work on 421/423 Market Street.

15. White Rock submitted an invoice (No. 4114, dated October 9, 2007) on the 837 Market Street for “Retainage Carpentry” in the amount of \$22,900.00.

16. White Rock submitted invoice 4114 at the direction of GKW.

17. At the direction of GKW, White Rock identified invoice 4114 as “Retainage Carpentry.”

18. GKW acknowledges that it directed White Rock to submit invoice 4114, and that this invoice was for retainage.

19. GKW’s budget for 837 Market Street included a price of \$229,000.00 for carpentry.

20. White Rock’s scope of work on the 837 Market Street included carpentry, fire protection, windows, lock sets and hardware, and roofing.

21. The total amount for all of those line items in the 837 budget is considerably higher than \$272,000.00.

22. GKW has failed to produce any specific evidence that conclusively demonstrates its contention that White Rock was overpaid on the 837 Project.

### *421/423 Market Street*

1. In late spring/early summer 2007, BPG requested that GKW begin work on the 421/423 Project.

2. One of the first tasks that needed to be completed was the replacement and/or repair of the floors in order to address the structural stability of the building and provide a platform for the other work to be completed.

3. While White Rock was working on the 837 Project, GKW and White Rock discussed continuing their relationship at the 421/423 Project.

4. As the parties had operated concerning 837 Market Street, White Rock replaced floor joists and floor sheathing as needed for the 421/423 Project.

5. White Rock agreed to do what was required but did not inspect the site or provide any estimate of the costs of the work to GKW. This was not their course of dealing at 837 Market Street.

6. Again, no written agreement between the parties was ever drafted, but it was anticipated that work would begin soon.<sup>4</sup>

7. GKW and White Rock agreed at that time that only White Rock would do the work, and assumed that a price would be agreed to later on as was their course of dealing with 837 Market Street.

8. GKW and BPG agreed to a carpentry budget of \$385,000.00, but GKW did not

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<sup>4</sup> Ex. B at 210-11.

offer to pay White Rock this entire amount for replacing floor joists, floor sheathing and roof rafters as needed. GKW believed that the two had agreed to a price of \$308,000.00 if White Rock actually did the work.

9. There is no evidence that White Rock discussed or agreed to a price with GKW before it started to perform on June 20, 2007.

10. White Rock was not able to begin work before June 20, 2007. Other entities/persons started working on joist restoration and replacement in early to mid June, including Rocky Crete, King Construction, and Jonas King.

11. White Rock also submitted as evidence its Invoice No. 4155 which sought \$285,750, an amount representing that, by June 20, 2007, White Rock had actually completed 75% of the joist, sheathing and rafter restoration, and replacement work. Enos Smoker, the principal of White Rock, testified that White Rock had done seventy-five percent of the carpentry at 421/423. Other evidence suggests to the contrary.

12. Others had, in fact, been doing the work, not White Rock. While White Rock may have supplied the raw materials at 421/423, others had supplied the labor up until June 20, 2007.

13. There is no documentary evidence acknowledged by both parties supporting White Rock's claims that Greg Williams told Enos Smoker of White Rock on June 22, 2007, that GKW would pay White Rock \$381,000 for joist and sheathing replacement.

14. GKW did not offer to pay White Rock the full carpentry budget that White Rock

claims was already seventy-five percent completed, because, at that time, the joist and sheathing work was being done by others.

15. In and around late June 2007, the project had not progressed as fast as BPG wanted. GKW needed to have the joist work and sheathing work completed soon so that other work could progress. In anticipation of the principal of BPG, Rob Buccini, leaving the country for an extended personal vacation, GKW needed to submit Pay Application No. 1. by the end of June. BPG agreed to allow GKW to bill in advance on the joist work so that GKW could pay the subcontractors and proceed with the job through the summer while Buccini was gone. This was also done because GKW and its subcontractors had been working for two months at 421/423 Market without being paid. Any expectation of being paid for their work over the summer would be slim given that Buccini would not be available to sign a check to GKW.

16. In order to pay for the joist restoration, sheathing and rafter repair work that was to be done while Buccini was away, BPG and GKW agreed that GKW would bill BPG for the work in advance.

17. Greg Williams and Roy Hanna, GKW's independent project supervisor on the 421/423 Project, estimated the cost for joist restoration. Between the two of them, GKW and Hanna decided that the floor restoration and roof rafter work would use up about eighty percent of the total carpentry budget, or \$308,000.00.

18. On or about June 25, 2007, GKW believed that White Rock had agreed to do



the work for \$308,000.00 and requested that White Rock draft an invoice for eighty percent of \$385,000.00. GKW believed, in error, that it needed the invoice as back up to its Pay Application No. 1 that it was to turn into BPG.

19. White Rock did so with knowledge that it had not actually completed that work, and GKW submitted the invoice as back-up for its Pay Application No. 1.

20. The Court finds that there is no evidence that the request for this invoice represented GKW's assent to pay White Rock \$385,000.00 for repairing and replacing the floor joists, sheathing and rafters.

21. There is no evidence of any negotiations or discussions between White Rock and GKW detailing a \$385,000.00 figure for its work.

22. White Rock's contention that GKW, by this communication, unilaterally raised the contract price from \$381,000.00 to \$385,000.00 as a bonus is not convincing given the same reasons stated above and the realities of White Rock's performance at the time.

23. White Rock, for the first time began working on 421/423 Market Street on Wednesday, June 20, 2007. Three of White Rock's employees worked that day and the remainder of the week. Only one White Rock employee worked on Monday, June 25, 2007, the day White Rock submitted the invoice claiming it was eighty percent complete.

24. Three White Rock employees worked the next three days and White Rock did not work on Friday, June 29, 2007.

25. For the next three weeks, from June 26th until July 17th, White Rock had from

two to five employees working on 421/423 Market Street.

26. BPG paid GKW \$456,059.58 on July 9, 2007, representing payment on GKW's Pay Application No. 1 minus ten percent withheld by BPG for retainage. Of that, \$277,200.00 was included for carpentry.

27. GKW paid White Rock \$169,000.00 on July 10, 2007, for the work that White Rock had performed to-date.

28. GKW also paid the others who had performed joist and sheathing restoration and repair.

29. No additional amounts were due to White Rock as of July 10th because White Rock was only to perform joist, sheathing and rafter restoration work at 421/423 Market Street. Its work was not eighty percent completed by July 9, 2007 as evidenced by its own time records.

30. White Rock's own time records indicate that White Rock was working until November 26th.

31. According to White Rock's time sheets, White Rock supplied 460 man hours between June 20, 2007, when it started, and July 17, 2007.

32. White Rock then left the site for two weeks. From July 17th until July 31st, White Rock did not supply any workers for 421/423 Market Street.

33. Between July 17th and September 14th, White Rock only supplied 59 man hours to the project and its time record show this amounted to three carpenters and one laborer

working various hours for four days in the beginning of August. White Rock did not return until September 14, 2007.

34. Between September 14 and November 26, 2007, when it left the job, White Rock supplied another 596.5 man hours.

35. More than half of the labor White Rock supplied to the project was performed in September, October, and November despite White Rock's claim that its scope of work was nearly seventy-five percent complete before it started on June 20, 2007.

36. White Rock's time records show that White Rock left the job to work on a barn project in Pennsylvania after receiving payment in mid-July and did not return for two months. White Rock was not eighty percent complete when it left in July. It expended more than half of its total man hours on the job after it finally returned in mid-September.

37. White Rock claims that it is owed an additional \$20,174.84 for rental of equipment during July, August and September.

38. White Rock has not provided any evidence that it was entitled to submit an invoice and be paid for equipment rental to do its work.

39. White Rock did not submit any invoices for rental equipment it utilized at 837 Market Street. There is insufficient evidence that the parties had such an agreement involving 421/423 Market Street.

40. White Rock's claim that it submitted the invoices because others trades were using the equipment means they would have used it during July and August while White

Rock was not on the site. The invoice White Rock submitted in the amount of \$12,860.00 for July and August was paid in full by GKW and BPG by checks in the amount of \$11,927.92 and \$932.08, respectively.

41. When White Rock was present and working on the site during July and September, it presumably used its own rented equipment.

42. No additional amounts for rental equipment are due to White Rock.

43. While White Rock was absent from the project; the floor joist, sheathing and rafter restoration work was being done by other carpenters. Those carpenters were paid from the amounts GKW received from BPG for that work.

44. GKW held the money that it received from BPG (\$277,200.00) for the floor restoration and rafter work. It paid those individuals who actually did the work as the work was being completed. White Rock did not object to GKW paying those who did this work from these funds.

45. GKW paid \$269,098.92 to the various entities and individuals that completed the joist and sheathing restoration work between July 10, 2007 and September 21, 2007.

46. Due to White Rock's absence from the site for nearly two months while the work was being performed, it did not know each of the individuals paid by GKW for joist work. White Rock's ignorance of what was going on at the Project while it was gone is not evidence that those individuals did not do work considered to be within White Rock's original scope.

47. White Rock only supplied admissible evidence disputing one of these payments from one witness, Jonas King, who testified that he considered approximately \$9,858.00 worth of labor that he provided to be work which White Rock should have done. GKW, in contrast, submitted that \$14,362.00 was paid to King for White Rock's work. While GKW may have believed at the time that the full \$14,362.00 was being paid for joist work, King's testimony only supports \$9,858.00 and that is what should be included.

48. The \$30,182.40 payment to King in October was a check BPG gave to him directly and should not have been included in GKW's spreadsheet.

49. Of the \$269,098.92 GKW paid for flooring restoration and rafter work, GKW paid White Rock directly \$229,857.92.

50. Another \$39,241.00 was paid to other individuals and entities performing joist restoration work including \$14,700.00 to King Construction, \$9,030.00 to Bart Halloway Construction, \$548.00 to T. Miles, \$105.00 to G. Rivera, \$2,500.00 to T. Roosevelt, and \$2,500.00 to Ruiz Construction. This also includes only \$9,858.00 paid to King.

51. Ultimately, GKW paid out the money that it received from BPG to the individuals who actually did the work.

52. GKW's payments to White Rock amounted to \$229,857.92. It is determined by adding the following checks delivered to White Rock.

Check Amount	Check Number	Check Date
\$38,330.00	992	10/8/2007

\$169,600.00	1212	7/10/2007
\$10,000.00	2251	6/14/2007
\$11,927.92	2025	9/26/2007

53. BPG also paid \$932.08 and \$65,000.00 directly to White Rock. In total, White Rock has been paid \$295,790.00 for its work at 421/423 Market Street.

*The Dispute Over Payment*

1. BPG remained concerned with the progress of the 421/423 Project and took on greater involvement with the operations of the trades in October. GKW was officially removed as general contractor from the 421/423 Project on or before October 17, 2007.

2. White Rock's work from that date until November 26, 2007, was performed under agreement and authority of BPG and is not chargeable to GKW.

3. BPG, having recently taken over the project, intervened in the payment dispute between White Rock and GKW.

4. As there was no scope of work or contract between the parties, BPG requested White Rock to list what work it performed and the value of the work.

5. In response to BPG's request, White Rock drafted a series of invoices listing the work performed and assigned its value of that work. According to White Rock, the value of the work performed was \$316,000.00.

6. These invoices can be reasonably read as full scope of work for the flooring and rafter restoration and repair task.

7. The list provided by White Rock makes no provision for the work done by others, and appears to claim credit for the entirety of the flooring and restoration work.

8. Therefore, according to White Rock, the value of the labor and material necessary to repair and/or replace as needed the floor joists, sheathing and rafters at 421/423 Market Street Project is \$316,000.00.

9. As further evidence of White Rock's admission as to the value of its work, White Rock prepared on its own an invoice to BPG in the amount of \$85,272.00.<sup>5</sup> This amount is within \$62.00 of \$316,000.00 when added to the amounts directly paid by GKW, including the \$10,000.00 check on the 837 Project and the \$932.08 check from BPG for the rental equipment.

10. White Rock claims that it prepared this invoice and was given that exact figure by Rod Gerhart of BPG. He testified that he did not direct Enos Smoker of White Rock to provide that invoice nor did he give that figure to him.

### *Conclusions of Law*

The plaintiff in a contract action must prove by a preponderance of the evidence he existence of:

1. an offer of a contract by one party;
2. an acceptance of that offer by the other party;
3. consideration for the offer and acceptance; and

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<sup>5</sup> Ex. C. at 106.

4. sufficiently specific terms that determine the obligation of each party.<sup>6</sup>

In this case, White Rock had the burden of proving:

1. An offer of a contract by GKW;
2. White Rock's acceptance of GKW's offer;
3. Consideration for the offer and acceptance; and
4. Sufficiently specific terms that determine the obligations of GKW and White Rock.

The record in this case shows that the parties had a course of conduct in the work on 837 and 421/423 Market Street. The course of conduct was that White Rock undertook work on both locations without any contract with GKW before it started work. But that course of dealing does not in itself establish that a *contract* existed for the terms of White Rock's work on either location, particularly for 421/423.

If anything, the course of conduct was generally for White Rock to submit invoices and receive payments. But the confused record of invoices for work at 421/423 Market is unpersuasive that GKW agreed to pay White Rock \$385,00.00. The work was not eighty percent complete and invoice representations about percentage completion do not match the actual status of the work.

In sum, the Court finds White Rock has not met its burden that it is owed anything for the 421/423 Market Street work. Necessarily, this finding eliminates White Rock's claim for double damages, compound interest, and attorney's fees which it sought under

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<sup>6</sup> See *Fanean v. Rite Aid Corp. of Del.*, 894 A.2d 812, 822 (Del. Super. 2009).



6 Del. C. ch. 35.

White Rock's action was also for quantum merit. To be successful on this claim, White Rock has to prove by a preponderance of the evidence that:

1. Its services were performed with a reasonable expectation GKW would pay for them;
2. GKW had notice White Rock expected to be paid for its services; and
3. White Rock's services were of value to GKW.<sup>7</sup>

GKW concedes White Rock met its burden of proof on the first two elements of its quantum merit claim. The Court concurs with GKW's view that the evidence shows White Rock performed services for GKW and also BPG after it removed GKW from the 421/423 Project. Further, White Rock's evidence shows that it understood GKW had not been paid for carpentry work. This included the work White Rock performed after the initial payment. White Rock expected to be paid directly by BPG which explains why White Rock submitted all further invoices and communications to BPG. The evidence also shows that White Rock's expectation that it would be paid \$308,000.00 in June 2007, was not reasonable, given White Rock's admission that it did not do any of the work for which it submitted its only invoice and the work was not as complete as the invoice indicated.

White Rock has failed to prove that its services were of value to GKW because the services provided by White Rock were incorporated into a building owned by BPG (not

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<sup>7</sup> *Patterson-Woods & Assoc., LLC v. Realty Enter., LLC*, 2008 WL 2231511, at \* 5 (Del. Super.).

GKW) and GKW did not receive payment above the initial \$277,200.00 and the evidence shows that GKW has not retained any funds paid on account of services provided by White Rock.

Moreover, White Rock did not seek to support the value of the work it provided through evidence or testimony. In the alternative, the only evidence which White Rock submitted to support a finding of the value of the work intended to be within its scope was created by White Rock itself and those documents show a value of \$316,000.00.

Accepting this admission of White Rock and evidence presented, the value of the floor joist and restoration work was \$316,000.00 of which \$39,241.00 worth of labor was completed by others - leaving \$276,759.00 as the value of White Rock's labor and materials.

Since White Rock has been paid directly \$306,720.00 for its work at the 421/423 Project, White Rock has not been damaged by GKW's conduct.

GKW in turn seeks either an offset of White Rock's contract claim or "repayment" of an alleged overpayment for work done on 837 Market Street. GKW had a burden to prove by a preponderance of the evidence that there was an overpayment.

GKW fails to make out its claim. First, as White Rock notes, GKW waived its right to seek recovery on this claim because it did not appear or defend the action in connection with work done on 837 Market Street. Alternatively, the same confusion over bills and invoices rampant for both projects which rendered White Rock unable to meet

its contract claim burden applies with equal force here. GKW has not met its burden of proof that it is entitled to judgment on this claim.

In conclusion, the Court finds:

1. White Rock is not entitled to damages on its contract claim against GKW; judgment is for defendant GKW;

2. White Rock is not entitled to damages for its claim under 6 *Del. C.* ch. 35; judgment is for defendant GKW;

3. White Rock is not entitled to damages for its quantum merit claim; judgment is for defendant GKW;

4. GKW is not entitled to damages for its claim of an overpayment in connection with 837 Market Street; judgment is for plaintiff White Rock; and

5. Each party shall bear its own costs.

**IT IS SO ORDERED**

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J.

DATE: \_\_\_\_\_