

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TAMMY J. HULL,)
) C.A. No. 09C-06-052 (JTV)
 Plaintiff,)
)
 v.)
)
 HERITAGE HOMES, INC.,)
)
 Defendant.)

Submitted: May 14, 2010
Decided: August 31, 2010

John E. O'Brien, Esq., Brown, Shiels & O'Brien, Dover, Delaware. Attorney for Plaintiff.

William S. Hudson, Esq., and Sean M. Lynn, Esq., Hudson, Jones, Jaywork & Fisher, Dover, Delaware. Attorneys for Defendant.

Upon Consideration of Defendant's
Motion For Summary Judgment or in the Alternative
Motion to Dismiss
DENIED

VAUGHN, President Judge

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ORDER

Upon consideration of the Motion for Summary Judgment, or in the Alternative, Motion to Dismiss filed by defendant Heritage Homes, Inc., the opposition of plaintiff, Tammy J. Hull, and the record of this case, it appears that:

1. This case involves a dispute over the construction of a home. The parties entered into a written construction contract dated June 25, 2008.¹ The construction began in July, but by the beginning of November, the plaintiff had become dissatisfied with the progress and quality of the construction. On November 10, 2008, she wrote a letter to Heritage and Clarence Voshell,² stating that she wanted them to stop work on her home.³

2. At the end of November 2008, the parties met in Dover at the law firm of Hudson, Jones, Jaywork & Fisher to discuss the dispute. The following people were present: the plaintiff; the plaintiff's husband's uncle, Dan Irwin; the plaintiff's counsel,⁴ Dominic Balascio, Esq.; Clarence Voshell; and Heritage's counsel, William Hudson, Esq.

¹ Def's Mot. Summ. J., Ex. A. The contract included the following provision: "XIV. Disputes [¶] Should any dispute arise relative to the performance of this contract that the parties cannot resolve, the dispute shall be referred to a single arbitrator acceptable to the builder and the buyer." *Id.*

² Mr. Voshell was, presumably, the general contractor employed by Heritage who was in charge of the construction of the plaintiff's home.

³ Def's Mot. Summ. J., Ex. B (marked "TH5").

⁴ There is some dispute as to the status of Mr. Balascio. Heritage asserts that Mr. Balascio represented the plaintiff at the meeting. The plaintiff refers to him as the attorney of her husband's uncle, but concedes that he represented her at the meeting.

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3. On December 11, 2008, Mr. Hudson sent a letter to Mr. Balascio. Heritage contends that the letter “memorializ[ed] the terms of an oral settlement agreement reached at the November 2008 meeting.”⁵ The letter begins by stating that it is based upon Mr. Hudson’s understanding of the discussions held at the meeting. He wrote that it was “for the purpose of reaching an agreement relative to the settlement on the construction of the property.”⁶ Mr. Hudson continued, “I am enclosing [a document] that was provided and the bottom-line figure is the basis upon which this settlement is to take place.”⁷ Mr. Hudson then detailed the outstanding bills that needed to be paid. Next, he wrote, “[T]he parties stipulate and agree, as part of this correspondence, that settlement shall be made based upon the following items.”⁸ He then enumerated six terms: (1) that Mr. Voshell be “dismissed from any claim whatsoever regarding the construction project”⁹; (2) that Mr. Voshell owed Delaware Building Supply \$5,538.74; (3) that Mr. Voshell would pay half of that amount; (4) “Regardless of the circumstances, the partially-constructed home will be accepted by the present owner and upon receipt of the 50 percent amount of \$5,538.74 shall be paid by Clarence Voshell, as set forth above”¹⁰; (5) Heritage “shall have no further liability regarding any issues that were raised at the time of our

⁵ Def’s Mot. Summ. J. at ¶ 6.

⁶ Def’s Mot. Summ. J., Ex. B (marked “TH1”).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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original meeting in this office”¹¹; and (6) that Mr. Balascio represents the plaintiff. Mr. Hudson then continued: “I am touching on the basic agreement that I feel has been reached by the parties and certainly if any changes or corrections that need to be made with regard to the items set forth in this correspondence. My hope is that this will put the matter to rest.”¹² Mr. Hudson continued, “If, in fact, a further release is needed in order to bring this to a successful conclusion, I trust that the parties will get back to this office as soon as possible.”¹³ Mr. Hudson then stated that the parties should get back to him quickly if they have other suggested terms or feel there is a need for a complete release. Finally, he concluded, “Please get back to me as soon as possible regarding this matter and I hope that if there are any additional details, we can work those out promptly.”¹⁴

4. On December 17, 2008, six days after Mr. Hudson’s letter was sent, Heritage paid Delaware Building Supply 50% of the outstanding bill. On December 22, 2008, Mr. Hudson informed Mr. Balascio by letter that the payment had been made. On that same day, Mr. Hudson sent a waiver of liens, signed by Mr. Voshell, to the bank that had provided financing for the plaintiff’s construction project.

5. On January 28, 2009, the plaintiff paid Delaware Building Supply

¹¹ *Id.* Item number five continues with this curiously placed sentence: “I have taken the time and effort to at least forward this letter to the parties[,] and that it is my understanding that[,] based upon this correspondence[,] that settlement has been reached between the parties’ [sic].” *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

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\$11,632.88. The plaintiff stated that her payment was for two things: one, windows (\$8,863.51); and two, half of the outstanding balance referenced in Mr. Hudson's December 11, 2008 letter (\$2,769.37).¹⁵ Delaware Building Supply's invoice regarding the plaintiff's payment divided her payment the same way.¹⁶

6. On June 24, 2009, the plaintiff filed suit against Heritage for breach of the construction contract. She alleges that Heritage's work was defective and that the building plans were not being properly followed. She further alleged that, as a result of Heritage's breach, she terminated Heritage's services and suffered damages in the amount of \$51,673.¹⁷

7. The plaintiff was deposed on November 12, 2009. When asked whether she viewed the November 2008 meeting and the December 2008 letter as a settlement agreement, the plaintiff responded, "No."¹⁸ The following exchange occurred:

Q. Okay. You had settlement negotiations here in the office, correct, sometime in later November, early December?

A. Settlement, no.

Q. What was your understanding of what occurred here in late November, early December of 2008?

¹⁵ Def's Mot. Summ. J., Ex. B (Hull Deposition at 16:9 - 18:6).

¹⁶ *Id.*, Ex. B at 21.

¹⁷ Specifically, the plaintiff alleges that she suffered \$11,173 in repair damages and \$40,500 in damages due to her payment of the initial draw.

¹⁸ Def's Mot. Summ. J., Ex. B (Hull Deposition at 13:13-16).

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A. Negotiations to get the waiver of liens signed so I could continue with the build on my house [sic].

Q. Okay. What promises were made that resulted in Mr. Voshell executing the release of liens?

A. If I paid his remaining balance, 50 percent of his balance at the Delaware Building Supply, then he would supply the waiver of liens.

Q. [T]here was a promise that you would pay 50 percent of certain sums due to Delaware Building Supply; correct?

A. Yes.

Q. And it's your testimony that those promises were made in order to secure a release of liens?

A. Yes.

Q. Is it your testimony that it was only to secure a release of liens and not a general settlement of your entire dispute with Mr. Voshell?

A. That is correct.¹⁹

Additionally, the plaintiff confirmed that part of her January 28, 2009 payment to Delaware Building Supply was done to pay her half of the \$5,538.74 outstanding bill, as described in Mr. Hudson's letter.²⁰

8. Heritage's motion for summary judgment is based upon the contention

¹⁹ *Id.* at 24:19 - 26:9.

²⁰ *Id.* at 17:3-16.

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that the parties entered into a settlement agreement which became an accord and satisfaction.

9. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.²¹ In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.²² Summary judgment is inappropriate when the record reasonably 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 law to the circumstances.²³

10. Heritage contends that the parties settled this dispute, as evidenced by the payments made by both sides in accordance with the oral settlement agreement reached at the November 2008 meeting (and memorialized in the December 11, 2008 letter). The plaintiff contends that “the letter is not evidence of a settlement agreement,” but was instead Heritage’s “subjective determination [of] what had been agreed to without any further confirmation by the [p]laintiff or further documentation.”²⁴ She further contends that no settlement was reached. In her deposition, the plaintiff stated that she did not recognize the November 2008 meeting and the December 2008 letter as a settlement agreement. She contends that the

²¹ Super. Ct. Civ. R. 56(c).

²² *Pierce v. Int’l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

²³ *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *1 (Del. Super.).

²⁴ Pl. Opp. Mot. at 2.

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November 2008 meeting was for a narrower purpose: to satisfy the demands of the bank so that it would disburse her more money, allowing her to complete the construction of her home.

11. After considering the parties contentions and the record, and viewing all of the facts and circumstances in the light most favorable to the plaintiff, I find that there is enough of a factual dispute about the effect of the November 2008 meeting and December 11, 2008 letter to create a jury issue which precludes summary judgment.

12. Turning to the arbitration issue, when this motion was presented, the parties indicated that they may be able to agree on whether arbitration should occur, and if so, in what manner, after the Court had first addressed the Summary Judgment Motion. For that reason, I do not address the arbitration issue.

13. For the foregoing reasons, the defendant's Motion for Summary Judgment, or, in the Alternative, Motion to Dismiss, is hereby ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File