

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE  
ONE THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947

March 22, 2010

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**Re: *John & Patricia Gibbons v. John Whalen, III, t/a Whalen Contracting***  
**C.A. No. S09A-09-003**

Date Submitted: December 30, 2009

Date Decided: March 22, 2010

On Appeal from the Court of Common Pleas:  
AFFIRMED

Dear Counsel:

Pending before the Court is an appeal from a decision rendered by the Court of Common Pleas that denied Plaintiffs/Appellants' claim for breach of contract and awarded damages as to Defendant/Appellee's counterclaim. For the reasons set forth herein, the decision of the Court of Common Pleas is affirmed.

**FACTUAL BACKGROUND**

On or about May 7, 2007, Patricia and John Gibbons ("Appellants") and John Whalen, III, t/a Whalen Contracting, ("Whalen") entered into a contract ("the Contract") for the construction of an addition to Appellants' home. Pursuant to the Contract, Whalen was to erect a two-story addition to Appellants' existing house. A building permit was issued and work on the project commenced

soon thereafter. Appellants paid Whalen the first and second payments pursuant to the Contract (a total of \$42,496.00). Communication between the parties broke down sometime between August and October of the same year. Appellants failed to make the third and final payment. According to the Contract, the final payment of \$10,624.00 was due “upon completion” of construction.

Thereafter, Appellants filed suit in the Court of Common Pleas against Whalen for breach of contract. Whalen countered with a breach of contract claim against Appellants for failure to tender the final payment due under the Contract. After a two-day bench trial, the trial court found that Appellants had breached the Contract and awarded damages to Whalen. This appeal followed.

## **DISCUSSION**

### ***1. Standard of Review***

This Court sits as an intermediate appellate court when reviewing appeals from the Court of Common Pleas. *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. Ct. 2002). The Court will review questions of law *de novo* and review the lower court’s factual findings pursuant to a “clearly erroneous” standard. *J.S.F. Properties, LLC v. McCann*, 2009 WL 1163494, at \*1 (Del. Super. Ct. Apr. 30, 2009). The Court will “correct errors of law and ... review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.” *State Farm Mut. Auto. Ins. Co. v. Dann*, 794 A.2d 42, 45 (Del. Super. Ct. 2002) (internal quotation marks and citation omitted). “When a trial judge bases findings of fact on the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced.” *J.S.F. Properties*, 2009 WL 1163494, at \*1 (internal quotation marks and citation omitted).

## 2. *Merits*

Appellant asserts four instances of error: (1) the lower court erred in failing to conclude that Whalen had breached the Contract because the completed construction was not in compliance with the Sussex County Building Code; (2) the lower court's finding that there was no credible evidence of damages presented by Appellants was not supported by the record; (3) the lower court's conclusion that construction was substantially complete is not supported by its findings; and (4) the lower court's interpretation of Appellants' duty to mitigate damages constituted legal error. In sum, Appellants argue they successfully produced evidence of a breach of contract claim while Whalen did not. The Court will address Appellants' claim first and then discuss Whalen's counterclaim.

### **a. Appellants' breach of contract claim.**

To recover for breach of contract, a plaintiff must establish the existence of three elements: "(1) the existence of a contract; (2) the breach of an obligation imposed by that contract; and (3) resulting damage to the non-breaching party." *Gunzl v. Veltre*, 2008 WL 5160137, at \*4 (Del. Com. Pl. Ct. May 22, 2008). There is no dispute that the parties entered into a legally binding contract. Although the lower court acknowledged the respective parties' experts agreed that there were some deficiencies in the construction, the trial court concluded these minor deficiencies did not constitute a breach of Whalen's contractual duties. To the contrary, the lower court found that the work was "completed in a substantial workmanlike manner" as required by the Contract. However, the lower court went further and found that, *even if the lower court were to conclude there had been a breach of contract*, Appellants had "failed to introduce any credible evidence as to the value of damages." *Gibbons v. Whalen*, 2009 WL 3014325, at \*3 (Del. Com. Pl. Ct. Sept. 21, 2009).

At trial, Appellants relied upon the testimony of Stephen Myers to establish proof of the damages suffered by Appellants as a result of Whalen's alleged breach. The lower court found Mr. Myers' testimony as to damages not credible because, among other factors:

- 1) Mr. Myers does not hold a license in Delaware.
- 2) Mr. Myers testified he is not knowledgeable of the Sussex County building practices.
- 3) Mr. Myers used a rate of \$50.00/hour for projecting labor costs, as compared to the rate of \$25.00/hour charged by Whalen.
- 4) Mr. Myers concluded Appellants would need \$57,777.50, a sum in excess of the original amount of the Contract, to reconstruct the addition.
- 5) Mr. Myers could not articulate how he arrived at his estimates, including his estimates for landscaping, which was not included in the Contract, and grading.
- 6) In contrast to Whalen's expert, who itemized repair costs for each item, Mr. Myers grouped the repair costs for multiple items together, "making it impossible for the court to conclude whether the repair costs provided for each item are reasonable." *Gibbons*, 2009 WL 3014325, at \* 3.
- 7) Mr. Myers' estimate included the cost of raising the floor joist four inches to eliminate the elevation discrepancy between the original house and the addition. However, Whalen's unrefuted testimony established that raising the addition's floor by four inches would not be possible.

After making the observations enumerated above, the trial court concluded:

Overall, Mr. Myers did not provide the Court with any credible testimony as to the amount of time, number of workers, or materials he would need to complete the repairs claimed to be required. Additionally, Mr. Myers did not and could not

indicate the amount of money he believed he could save by utilizing existing materials or how this affected his overall repair cost. Furthermore, despite his testimony to the contrary, Mr. Myers [sic] report indicates that he was redoing work two and three times (i.e., removing siding and decking several times).

*Gibbons*, 2009 WL 3014325, at \*4.

Appellants make much of the fact that both parties' expert witnesses testified to deficiencies in construction that constitute technical violations of the Sussex County Building Code. For the purpose of reviewing the trial court's decision as to Appellants' breach of contract claim, it is simply not necessary for this Court to revisit the issue of whether Whalen breached the Contract where, as here, the lower court found that damages had not been established. As stated above, a plaintiff has the responsibility of proving damages as an essential element of his claim by a preponderance of the evidence. *Gunzel*, 2008 WL 5160137, at \* 5 ("Damages are an essential element of plaintiff's breach of contract claim, and by failing to prove the existence or amount of damages by a preponderance of the evidence the Court must enter judgment for defendant."). Even assuming Whalen's breach of the Contract, therefore, the trial court held Appellants were not entitled to recover.

The lower court found Appellants' expert on damages not credible. Credibility is, to put it bluntly, a matter reserved for the discretion of the finder of fact. *Richardson v. A&A Air Servs., Inc.*, 2007 WL 2473284, at \*5 (Del. Super. Ct. July 31, 2007). "This Court will not disturb these factual findings made by the lower court, which heard and weighed the credibility of conflicting evidence." *Id.* When this Court reviews decisions based on the live testimony of witnesses, credibility determinations, or presentations made by expert witnesses, it gives the lower court's decision substantial deference. *See Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999). The lower court's determination that Appellants' expert was not a credible witness is based upon the findings of the

trial court set out, *supra*, and those finding are sufficiently supported by the record.<sup>1</sup> Appellants argue the fact that Ron Hamblin, Whalen’s expert, provided an estimated cost for the repair of some alleged deficiencies in the construction means that Appellants must be awarded, at a minimum, the sum identified by Mr. Hamblin.<sup>2</sup> In reviewing the record, the Court is satisfied that Mr. Hamblin did not admit the presence of any deficiencies but, rather, provided the estimates in an effort to counter Mr. Myers’ testimony as to the cost of repair *should the lower court find the existence of said deficiencies*. The lower court did *not* find the existence of such deficiencies and the record supports that finding. In sum, the lower court’s finding that Appellants failed to establish the necessary elements of a breach of contract case is supported by the record and is free from legal error. The trial court’s decision is affirmed in this regard.

**b. Whalen’s counterclaim, for breach of contract.**

Before Appellants filed their action in the Court of Common Pleas (“CCP”), Whalen had sued Appellants for payment of the final draw in the Justice of the Peace Court (“JP Court”). After Appellants filed this action in CCP, Whalen abandoned his initial suit in JP Court and filed a counterclaim in the CCP action, alleging breach of contract and seeking damages. The lower court found that Whalen had substantially completed construction, as required by the Contract, and

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<sup>1</sup> The lower court also found that Appellants had failed to prove that they mitigated damages in any way. *Gibbons*, 2009 WL 3014325, at \*4. This Court agrees that, generally speaking, one has a duty to mitigate further damages that occur as the result of a breach. However, the Court is reluctant to hold that here, where communications between the parties had broken down and the Contract did not contain a cure provision, Appellants were under an obligation to provide notice and opportunity to cure to Whalen. Nevertheless, as stated above, it is unnecessary to analyze this point as the evidence supports the lower court’s finding that Appellants failed to prove damages, as they were required to do.

<sup>2</sup> That sum is \$2,440.00.

awarded him the final payment amount of \$9,344.92 plus post-judgment interest and costs. Additionally, the lower court awarded expert witness fees to Whalen. Appellants appeal this decision.

As stated previously, a party seeking to recover for breach of contract must establish “(1) the existence of a contract; (2) the breach of an obligation imposed by that contract; and (3) resulting damage to the non-breaching party.” *Gunzl*, 2008 WL 5160137, at \*4. Again, the existence of a legally enforceable contract is not at issue. Similarly, the amount of damages to which Whalen would be entitled in the event of Appellants’ breach is clearly established by the Contract, itself: the amount of the final draw. Thus, the focus of the Court’s inquiry is whether the lower court’s finding that Appellants breached the Contract is supported by the record and free from legal error. Phrased another way, the issue is whether the trial court properly concluded Whalen substantially completed the work required per the Contract. Appellants argue that the testimony concerning the alleged various deficiencies found at the construction site renders the lower court’s finding of substantial completion unsupported by the record. I disagree.

“The general rule is that construction is substantially completed when the builder finishes all the essentials necessary for the full accomplishment of the purpose for which the building has been constructed.” *Wilmington Parking Auth. v. Becket*, 1993 WL 331072, at \*2 (Del. Super. Ct. Apr. 26, 1993). In this case, the uncontroverted evidence showed that Appellants have been using the addition to their house as it was intended to be used as of August 2007. Moreover, both experts testified that Appellants are able to use the space as it is intended to be used. Appellants compiled a punch list and presented it to Whalen. Evidence presented below supported the lower court’s finding that a punch list is created toward the end of a construction job so that *minor* defects may be

corrected. Nevertheless, before this Court, as below, Appellants argue the job cannot be considered to be substantially complete where there exist apparent violations of the Sussex County Building Code. As the trial court observed, however, many of the violations of which Appellants complain had already passed inspection conducted by agents of Sussex County. Moreover, the record is replete with evidence that most, if not all, of the violations alleged are disputed in either existence or in scope. Accordingly, the lower court's finding that Whalen substantially completed construction of Appellants' addition is supported by the record and free from legal error. The trial court's decision is affirmed.

### **CONCLUSION**

For the reasons set forth herein, the decision of the Court of Common Pleas that denied Appellants' breach of contract claim and awarded damages for Whalen's breach of contract claim is **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

T. Henley Graves

oc: Prothonotary  
cc: Court of Common Pleas