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

COLONIAL CONSTRUCTION, INC., A DELAWARE CORPORATION,	)	
Appellant,	)	
v.	)	C.A. No. 09A-02-008 WCC
CLARENCE ENGLISH AND VICTORIA ENGLISH,	)	
Appellees.	)	

Submitted: July 8, 2010
Decided: November 17, 2010

MEMORANDUM OPINION

Appeal from Court of Common Pleas.
AFFIRMED IN PART. REVERSED IN PART.

James F. Kipp, Esquire; Elzufon Austin Reardon Tarlov & Mondell, P.A., 300 Delaware Avenue, Suite 1700, P.O. Box 1630, Wilmington, DE 19899-1630. Counsel for Appellant.

Robert C. McDonald, Esquire; Silverman McDonald & Friedman, 1010 North Bancroft Parkway, Suite 22, Wilmington, DE 19805. Counsel for Appellees.

CARPENTER, J.

This is an appeal from the decision after a bench trial held in the Court of Common Pleas and from a subsequent denial of a Motion for New Trial and/or Remittitur and/or to Alter or Amend Judgment. For the reasons set forth below, this Court hereby affirms in part and reverses in part the decision below.

Procedural History

A bench trial was conducted on July 8, 2008 addressing whether Defendant Appellant Colonial Construction, Inc. ("Colonial" or "Defendant") breached a construction contract by failing to perform the contract in a workmanlike manner. On January 2, 2009, the Court of Common Pleas issued its Decision After Trial finding a breach on the part of the Defendant and awarded Plaintiffs $18,181.94 in damages.

On January 16, 2009, Defendant filed a Motion for New Trial and/or Remittitur and/or to Alter or Amend Judgment pursuant to the Court of Common Pleas Civil Rule 59(a) and (d). No response was filed by the Plaintiffs, and argument was held before the Court on February 6, 2009 and only the Defendant appeared. Subsequently the Court denied Defendant's motion and this appeal followed.

After reviewing the briefs submitted, the Court took the unusual step of requesting counsel to appear for oral argument to assist the Court in understanding the underlying facts that were presented to the Court of Appeals and the issues that were decided. This is the Court's decision after review of the record, the parties briefs and the benefit of oral argument.

Facts

Clarence and Victoria English (together "Plaintiffs" or "Englishes") reside in a two story home located at 105 Beech Lane, Wilmington, Delaware 19804. On November 14, 2003, the English residence was significantly damaged when a large tree fell on it during a storm. The Englishes were insured by State Farm Insurance Company ("State Farm") who contracted with the Breckstone Group to inspect the damaged house and draft an engineering report and a construction plan. State Farm then referred Colonial Construction, Inc. to the Plaintiffs, and on January 15, 2004, they entered into a contract with Colonial to repair the damage to their house.

After eleven months of reconstruction, the Plaintiffs moved back into their home. Mrs. English testified that after moving back into the house, she noticed the floors in certain rooms were not level, including the master bedroom. According to her, the master bedroom sagged in the middle, and she discovered that as a result of the un-level floors, a golf ball would roll, without force, from one side to the other. Mrs. English testified that she notified Colonial about the master bedroom. Colonial then came to the house, took up the carpet and the wood floors and placed a wood beam in the floor. However, the sagging continued.

Subsequently the Plaintiffs hired Stephen Castiglione ("Castiglione") to inspect the work performed by Colonial. Castiglione had been employed by Woodland

Cleaning and Restoration Company ("Woodland") for seventeen years and is a journeyman carpenter by training and experience. Castiglione testified that he evaluated the English house after Colonial completed work and found that the second floor was un-level and based upon his inspection he believed this condition was a result of cracks in the floor joist.

Scott Berry ("Berry"), the construction manager for Colonial at the site, testified that on the second floor, only joists in the rear bedroom area were replaced and that no joists were replaced in the front of the house which would include the master bedroom. Berry testified that they performed the construction in accordance with the construction drawings and no additional work was performed or additional damage discovered.

Lastly, Frederick Roland ("Roland") was called by the Defendant as an expert witness. He has been a licensed engineer since 1978 and works as a structural engineer for the Breckstone Group. Roland had initially evaluated the house at the request of State Farm, assessed the damage, and prepared an engineering report dated November 19, 2003. He testified that he further approved the plan for reconstruction of the house. Roland also inspected the house after the reconstruction was completed by Colonial. He found that there was a "deflection" in the flooring of the second floor bathroom and rear bedroom that would be "in excess" of what would be considered acceptable.[1] He further opined that while the master bedroom floor

[1] Trial Tr. 174-76, Jul. 8, 2009.

"sloped towards the center partition," that the sag in the floor naturally occurs over a period of time due to a house's age and that despite the deflections in the master bedroom floor, the deflections were within the standards for such construction.[2]

Standard 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.[3] This Court's role is to correct errors of law and review 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."[4]

De novo review will be given to questions of law, whereas questions of fact are reviewed under a "clearly erroneous" standard.[5] 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."[6]

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[2] *Id.*
[3] *Beck and Panico Builders, Inc. v. Straitman*, 2009 WL 5177160, at *5 (Del. Super. Nov. 23, 2009) (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).
[4] *See 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)).
[5] *Id.*
[6] *Trader v. Wilson*, 2002 WL 499888, at *3 (Del. Super. Feb. 1, 2002) (citing *Oceanport v. Wilmington Stevedores*, 636 A.2d 892 (Del. 1994)).

Discussion

I. Substantial Evidence To Support The Lower Court's Findings

As a result of the Court holding oral argument in this matter, it became clear that the real issue in this case relates to whether repairs were needed to be made to the second floor area of the master bedroom. However, the parties disagree over the cause of that condition and whether it was within the scope of work required to be performed by Colonial. Furthermore, if the Court accepts the Plaintiff's expert's estimate to repair the damage to this location, an issue remains whether there is sufficient evidence to support the monetary award ordered by the lower court.

The problem in this case is that it is not one where the work was poorly done and therefore clearly does not meet the standard of implied warranty of good quality and workmanship. Instead, what is at issue is whether the contractor failed to reasonably inspect an area of the second floor that possibly was damaged by the tree incident and if they had done the inspection and discovered damage, there is no dispute it could and should have been repaired as part of the overall insurance claim.

To resolve this dispute, it is first important to put this issue in some historic perspective in the relationship that led up to the contract with Defendant. As previously indicated, the home of Clarence and Victoria English at 105 Beech Lane, Wilmington, Delaware 19804 was significantly damaged on November 14, 2003

when a large tree fell on the home during a storm. English was insured by State Farm Insurance Company and thus filed an insurance claim with that entity. State Farm subsequently contracted with the Breckstone Group to inspect the property, assess the damage and to prepare an engineering report and construction plan. On November 19, 2003 an engineering report was sent to State Farm by the Breckstone group. The relevant portions of the assessment section states:

> 4. A number of the second floor joists are broken above the kitchen and diningroom. Other second floor joists may be broken but remain concealed by the flooring and finished ceiling...
>
> 6. The second floor joist may have been pushed forward but finished surfaces presently conceal the observation of their condition.[7]

As a result of this assessment, the report concluded that "virtually all of the second floor joists on the rear half of the house will have to be removed and replaced with new joists"[8] and that the first floor ceiling in the front half of the home will have to be removed, "so that the joists can be inspected for damage."[9] The report further concluded that if as a result of this inspection damaged joists were found, "they will have to be replaced and/or sistered as determined to be appropriate at the time of discovery."[10]

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[7] App. To Appellant's Opening Br. A110.
[8] *Id.*
[9] *Id.*.
[10] *Id.*

The next step in the process was the preparation of construction drawings that were also done by the construction engineering group. It is these drawings that were the basis upon which the construction was to be performed. Note 2 on these drawings states:

> No. 2 - Remove existing damaged and/or broken second floor joists and install new second floor joists. HEM FIR No. 2, 2" x 8" @ 16" oc.

After the drawings were approved they were used as the basis for Colonial Construction to give an estimate for the repairs. In that estimate, there is a line item for "R&R joists - floor or ceiling"[11] in relation to the front master bedroom. Therefore it is reasonable to assume that at the time the bid was made, the contractor knew that there was possible damage of the floor joists in relation to the master bedroom that needed to be inspected for possible repair.

The Court also knows that based upon the testimony of Scott Berry, the construction supervisor for Colonial Construction at this job site, that they did not replace any floor joists in the front bedroom and as best the Court can determine from the testimony, it appears that they never inspected the joists area under the front bedroom since from their perspective that area had not been damaged by the impact of the tree.

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[11] App. A81.

So in summary, we have the construction engineers indicating that the ceiling in the front of the home should be removed to inspect the front second floor joists, the drawings make reference to the need to possibly replace those joists, the contractor's bid recognized the possible need to replace floor joists, but there appears no effort ever occurred to ascertain whether any joists under the front bedrooms were damaged. The contractor simply replaced those joists that were obviously damaged by the tree and nothing else.

This sequence of events logically leads to the conclusion that the contractor was at a minimum negligent in failing to inspect the area under the master bedroom for damaged joists. However, a finding of negligent conduct by itself does not mandate that the contractor is liable. While the undisputed testimony of Mrs. English that the un-level floor was not present before the tree event is helpful, it too is not dispositive of this issue. There may be many reasons for the present condition of the home, including the age of the residence, that the Plaintiffs are not in a position to explain. As such, if the Plaintiffs' case is to survive, it must be supported by the testimony of their or the Defendant's expert.

In that vein, there are several critical facts that have influenced the Court's opinion. First, Woodland, in its inspection of the project, created a hole in the ceiling below the master bedroom which allowed them to inspect the joists in that area.

Upon doing so they found a cracked joist. While without further inspection it is difficult to know the extent of damage or its cause, there appears to be damage that should have been inspected and a knowledgeable decision made by Colonial and the engineer as to whether it was within the scope of damage caused by the tree. Second, the cover page of Woodland's estimate to make the needed repairs reflects they had some structural engineer reports to support their conclusion that the un-level floor in the master bedroom was related to damaged floor joists.[12] Third, the evidence also established that Colonial, after receiving complaints from the Englishes, attempted to repair the area below the master bedroom. This is inconsistent with the position that they have taken in this litigation that the tree caused no damage to this area. Fourth, we have the report of Mr. Roland regarding his initial assessment highlighted previously in this opinion. Finally, we have the testimony of the homeowner that the un-level condition did not exist before the tree incident and there is nothing to suggest some intervening action would have caused such a dramatic change in the flooring condition. The Court also notes that this was not just a small tree that damaged the roof, but a significantly large tree that caused the demolition of the entire second floor of the residence.

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[12] The report states: Some of those issues being damaged floor joists on the first and second floor as noted in the structural engineers report provided to Woodland by Alpha Engineering. We would suggest that Alpha Engineering re-inspect the property now that the floors and ceilings are open. Upon re-inspection a confirmation of our scope of work could be obtained from Alpha.

Based on the evidence presented, the Court is convinced that there is sufficient evidence to support the contentions of the Plaintiff. It is clear to the Court that this contractor, instead of being concerned with performing a complete reconstruction of the extremely damaged home and to raise issues of concern unearthed during the construction project, simply did nothing more than what was absolutely required to satisfy the insurance company.[13] Perhaps this would keep them on good terms with State Farm as a "preferred" contractor, but it does not protect them from damages for work he should have performed and failed to do. Simply put, the experts who reviewed this project prior to construction clearly articulated a need to review the joist area beneath the master bedroom for additional damage, and this contractor did not perform that task. It is a fair inference based upon the testimony that the present condition in the front of the house is due to damage associated with the tree incident and should have been discovered and repaired. Therefore, the Court finds such conduct to be negligent and supports the Court of Common Pleas decision.

The Court makes this finding mindful that when it reviews the factual findings and legal conclusions of the Court of Common Pleas, it does so in the same manner as the Supreme Court would consider an appeal. The function of this Court is to

[13] Mr. Berry testified during the trial as follows: "Well, we're concerned with just what we have the damage – what the architect is telling us to do and what State Farm has approved to pay for, so, that's what we do. We don't go venturing, you know. Trial Tr. 148

"correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the evidence and are a product of an orderly and logical deductive process."[14] If substantial evidence exists for a finding of fact, this Court must accept that ruling, as it must not make its own factual conclusions, weigh evidence or make credibility determinations."[15] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[16] When the determination of whether substantial facts exist rests on a question of credibility and the acceptance or rejection of the witnesses's testimony by the trial judge, that judge's findings will be approved unless there is no evidence to support those conclusions.[17] When the Court considers these standards, it finds that there is substantial evidence to support the conclusions reached in the Opinion issued by the Court of Common Pleas and it was also appropriate therefore to deny the Defendant's Motion for Judgment as a Matter of Law.

Finally, it is important for the Court to emphasize that by the rulings made above, the Court is not implying that the case could not have been tried better or presented with more qualified and competent evidence. It clearly could have and

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[14] *See 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)).
[15] *Fletcher v. Shahan,* 2002 WL 499883, *2 (Del. Super. Mar. 6, 2002)(citing *Johnson v. Chrysler*, 213 A.2d 64 (Del. 1965)).
[16] *Trader v. Wilson*, 2002 WL 499888, at *3 (Del. Super. Feb. 1, 2002) (citing *Oceanport v. Wilmington Stevedores*, 636 A.2d 892 (Del. 1994)).
[17] *Gordon v. Stickney*, 2000 WL 970717, *2 (Del. Super. May 11, 2002).

should have been. But under the standard of review applicable to these appeals, the Court does not find a basis to overrule the findings of the lower court.

II. Court's Calculation of Damages

Having decided that there was sufficient evidence to establish that additional repairs are needed to the second floor area, the Court now must turn to the calculation of damages awarded by the lower court. Plaintiff was awarded $15,128.61 for the negligent installation of the second floor floors, but other than a general reference to the estimate provided by Woodland, the opinion fails to set forth how that amount was determined. When questioned by the Court in oral argument on this matter, neither counsel was able to articulate how that figure was reached and both have argued to this Court that the calculation is simply incorrect.

The Court has reviewed the estimates provided by Woodland and it too is unable to find substantial evidence to support the damages awarded in this matter. As such, this portion of the Court of Common pleas opinion will be reversed and the award will be modified as set forth below by the Court.

While there are several options available to reach an award supported by the evidence, the Court believes the following calculation is fair and best reflects the repairs which are needed. First, the repairs for all of the second floor reflected in the Woodland estimate is $10,133.37. A 10% addition for both profit and overhead is

then appropriately added to the estimate. This brings the amount to $12,160.03. The contract also has a provision for "general categories" and "debris removal." The amount for these items relate to performing all of the repairs and include repairs to the first floor which are not a part of this dispute. As such, it is appropriate to modify those amounts to only include the portion of these categories that would specifically relate to the second floor. Since these items are not broken out by floors, the Court has taken the percentage of the total estimate that relates to the second floor, which is 54.36% and has multiplied these two categories by this percentage. Finally, there is no dispute that for some repairs on the second floor, the Plaintiff has already received $4,864.00 from State Farm. As such, it would be appropriate to subtract this amount to reach a final award.

So in sum:

$10,133.37 - total second floor repair estimate from Woodland

$ 1,013.33 - profit

$ 1,013.33 - overhead

General categories ($5207.24 x 54.36%) - $2,811.90

Debris removal ($779.05 x 54.35%) - $420.68

Total - $15,392.61

- 4,864.00 - amount previously received from State Farm

$10,528.61 - final award amount

The damage award figure in the lower court opinion is modified from $15,128.61 to $10,528.61.

Conclusion

As such, this Court AFFIRMS the trial court's decision as to the liability of Colonial for additional repairs to the second floor of the residence and REVERSES the damages awarded to the Plaintiffs.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.