IN THE SUPERIOR COURT OF THE STATE OF DELA WARE

IN AND FOR KENT COUNTY

BOARD OF EDUCATION OF :
CAESAR RODNEY SCHOOL : C.A. No. 99C-08-032
DISTRICT, :
:
Plaintiff, :
:
v. :
:
NEW CASTLE ROOFING & :
WATERPROOFING, INC., :
:
Defendant. :

Submitted: July 2, 2001
Decided: August 29, 2001

O R D E R

Upon Plaintiff's Motion for Partial Summary Judgment
on the Issue of Liability. Granted.
Upon Defendant's Motion for Summary Judgment.
Denied in part; Granted in part.

Noel E. Primos, Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware, attorneys for the Plaintiff.

Jonathan L. Parshall, Esquire, Murphy, Spadaro & Landon, Wilmington, Delaware, attorneys for the Defendant.

WITHAM, J.

On this 29th day of August, 2001, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's Motion for Partial Summary Judgment on the issue of liability and the parties' oral argument, the Court finds that:

In July of 1997, the Board of Education of Caesar Rodney School District ("School Board" or "Plaintiff") contracted with New Castle Roofing & Waterproofing, Inc. ("New Castle Roofing" or "Defendant") for the installation of a new roof over the school's gymnasium. The contract contained specific details that required the Defendant to carefully remove and replace the old roof throughout the construction to ensure that the gymnasium remained waterproof during the entire roof replacement process. Specific to the controversy presently before the Court, the contract called for New Castle Roofing to (1) protect the interior of the gymnasium building during all phases of the roof replacement, and (2) inspect roofing drain lines and clean them to assure proper rainwater flow. In March of 1998, New Castle Roofing subcontracted with Plymouth Environmental Company, Inc. ("Plymouth Environmental") for routine demolition and asbestos removal from the existing roof. Plymouth Environmental claims that the contract it signed with New Castle Roofing was very specific and limited their obligations to removal and disposal of asbestos roofing material and did not bind them to any of the terms of the original contract between the School Board and New Castle Roofing.

Work began on the roof in April of 1998 and the School Board had numerous complaints with New Castle Roofing's job-site practices. The record shows that Plymouth Environmental completely fulfilled all of its obligations by August 5, 1998.

On August 10, 1998, severe thunderstorms with heavy rain struck Kent County. During these rainstorms the drains on the gymnasium roof backed up and water entered the building damaging the interior of the gymnasium. Because of the amount of water that entered the gymnasium the floor became saturated causing it to cup, buckle and warp.

The School Board then contracted to have the gymnasium floor replaced and installed a new, lighter Scissor-Loc flooring system. Apparently, the lighter nature of the Scissor-Loc system was not compatible with the old, heavy, pull-out style bleachers in the gymnasium. Originally, the School Board planned to have the old bleachers removed during the installation of the new floor and then re-installed, but during the floor's replacement the School Board contracted to replace the old bleachers with new, lighter, electronically controlled plastic chairs in the school's color scheme. The School Board claims that both the gymnasium floor and bleachers were damaged in the rainstorm and had to be replaced because of said damage. The factual record indicates that some minor damage occurred to the bleachers but was easily repaired by the school's maintenance staff. The School Board sued New Castle Roofing for (1) the replacement cost of the old floor: $170,000; (2) the demolition cost of the old bleachers: $12,500; (3) the installation cost of a new air flow system: $5,550; (4) the replacement cost of additional square footage of flooring that was required: $3,195; and (5) the replacement cost of the bleachers: $157,862. The replacement cost for the floor totaled $191,245 and the replacement cost for the bleachers totaled $157,862. After being sued by the School Board, New Castle

Roofing brought a third-party claim of negligence against Plymouth Environmental. New Castle Roofing claimed that the drains became clogged during the rainstorm on August 10 because of Plymouth Environmental's asbestos removal.

New Castle Roofing brought this motion for summary judgment claiming that the proper measure of damages under Delaware law is the before and after value of the floor–that is the difference between the value of the floor prior to August 10, 1998 and the value of the floor after the water damage on August 10, 1998. (The same argument applies to the bleachers, except that New Castle Roofing additionally argues that they did not damage the bleachers.) Third-party defendant, Plymouth Environmental also brought a motion for summary judgment claiming that there is no proof that they were negligent or that the bleachers needed to be replaced. Plymouth Environmental points to the contract between New Castle Roofing and the School Board which states that it is New Castle Roofing's responsibility to keep the drains clear. Plymouth Environmental also strenuously argues that the School Board may not recover for the replacement and upgrading of their bleachers. In response to these summary judgment motions the School Board argues they are entitled to the cost of the new floor and the new bleachers. The School Board also brings their own motion for partial summary judgment on the issue of liability. Only the School Board and New Castle Roofing remain as parties in this matter as a Stipulation of Dismissal was filed releasing Plymouth Environmental from the dispute.

Superior Court Civil Rule 56(c) states that summary judgement should be granted "if the pleadings, depositions, answers to interrogatories and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] Summary judgment cannot be granted unless after viewing the record in light most favorable to the non-moving party, there are no material issues of fact.[2] The moving party bears the burden of showing that there are no material issues of fact; however, if the moving party "supports" the motion under the Rule, the burden shifts to the non-moving party to show that material issues of fact do exist.[3] In *Merrill v. Crothall-American, Inc.*, the court stated that the "role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues."[4] Summary judgment will not be granted in cases where 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

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[1] **Sup. Ct. Civ. R. 56(c).**

[2] ***Moore v. Sizemoore*, Del. Supr., 405 A.2d 679, 680 (1979).**

[3] ***Id.***

[4] ***Merrill v. Crothall-American, Inc.*, Del. Supr., 606 A.2d 96, 99 (1992).**

application of the law.[5]

The case *sub judice* is a property damage case involving breach of contract and negligence. The Court will first address Plaintiff's motion for partial summary judgment on the issue of liability and then address the Defendant's motion for summary judgment.

I. Plaintiff's Motion for Partial Summary Judgment on the Issue of Liability.

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[5] ***Ebersole v. Lowengrub*, Del. Supr., 180 A.2d 467, 468-469 (1962).**

In their motion for partial summary judgment on the issue of liability, Plaintiff argues that the Court should find that New Castle Roofing breached their contract with the School Board, acted negligently and thereby caused the flooding and damage to the gymnasium. While, "[n]egligence issues generally are not fodder for the summary judgment cannon,"[6] this case presents duties that the parties act reasonably and abide by the terms of the contract. It is uncontroverted that the gymnasium flooded because the drains backed up during the severe weather causing water to pool on the roof which eventually poured into the interior of the gymnasium. The terms of the contract specifically state that keeping the drains clear and protecting the interior of the gymnasium from water damage was New Castle Roofing's responsibility throughout the roof replacement process. Pursuant to § 01045, paragraph 1.3(C) of the contract, New Castle Roofing was required to "[p]rovide protection from adverse weather conditions for portions that might be exposed during cutting and patching operations." Section 02070, paragraph 1.1(D) of the contract obligated New Castle Roofing to "[p]rotect from damage existing finish work that is to remain in place and becomes exposed during demolition operations" and to "[p]rovide temporary weather protection during interval between demolition and removal of existing construction on exterior surfaces and installation of new construction to ensure that no water leakage or damage occurs to structure or interior areas of existing building." Section 02070, paragraph 1.1(A)(2) of the contract also obligated New Castle Roofing to

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[6] ***Rollins v. Thomas*, Del. Super., C.A. No. 98C-07-012, Graves, J. (Mar. 29, 2000), Mem. Op. at 5.**

"[r]emove existing roof drain assemblies . . . inspect drain line for debris and clean as required to assure proper rainwater flow." Robert Dancy, New Castle Roofing's principal, admitted at his deposition that it was New Castle Roofing's responsibility to ensure that the roof drains were clear and that the building remained waterproof throughout the roof replacement project. The damage to the gymnasium occurred when the clogged drains caused water to pour into the gymnasium's interior.[7] Therefore, the Court finds that New Castle Roofing's failure to comply with the terms of the contract caused the water damage to the Caesar Rodney gymnasium. Plaintiff's motion for partial summary judgment on the issue of liability is GRANTED.

II. New Castle Roofing's Motion for Summary Judgment on the Issue of Damages.

The heart of the dispute in this matter lies in determining the measure of damages. New Castle Roofing argues that the proper measure of damages under Delaware law is the difference between the value of the floor prior to August 10, 1998, and the value of the floor after August 10, 1998. Defendants argue that Plaintiff has only presented evidence of the replacement cost of the floor and bleachers, which they claim is not the appropriate measure of damages, therefore their motion for

[7] **The night of the storm, the School Board's staff was able to stop further leaking by unclogging the drains, allowing the water to drain properly.**

summary judgment should be granted. The School Board argues that it is entitled to recover the replacement cost of the gymnasium floor and bleachers, and even if the Court should determine that the proper measure is the fair market value, the replacement cost represents an appropriate means of determining that reduction since the Caesar Rodney School District is a non-profit property.

The different theories of damages are representative of the opposite legal perspectives from which the parties view this case. Plaintiff's argument rests largely on viewing the case as a breach of contract while the Defendant's argument relies on considering the event a tort. Based on the previous ruling on liability, the Court agrees that New Castle Roofing's actions were negligent and this negligence was a breach of the express terms of the contract. To determine the proper measure of damages, the Court will evaluate the measure of damages under both tort and contract theories.

Defendant argues that they should be awarded summary judgment because the proper measure of damages is the before and after value of the property and Plaintiff does not have evidence to prove these values. Based on *Klair v. Day*,[8] Defendant claims that the measure of damages in a property damage case is "the difference between the fair market value of the property before the imposition of the damaging

[8] ***Klair v. Day*, Del. Super., C.A. No. 81C-AP-79, Bifferato, J. (Jan. 12, 1988) ORDER.**

element and the fair market value of the property after the damage has occurred."[9] Under Delaware law, the before and after value for damages has been applied to a number of contexts.[10] Defendant also points to *Storey v. Castner* and claims that the before and after value figures must be produced directly by expert witnesses, which Plaintiff has not done.[11] Defendant then proceeds to cite to cases that rejected the replacement cost as the appropriate measure of damages.[12] Because Plaintiff does not have expert testimony to establish the before and after value of the floor, Defendant claims that Plaintiff cannot establish a proper case for damages under Delaware law and the case should be dismissed.

On the other hand, Plaintiff argues that under Delaware law, where the contractor in a construction contract case "fails to perform its obligations under the contract, the aggrieved party is entitled to damages measured by the amount required to remedy the defective performance unless it is not reasonable or practical to do

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[9] ***Klair*** **at 1.**

[10] ***Storey v. Castner*****, Del. Supr., 314 A.2d 187, 191 (1973) (citing** ***Alber v. Wise*****, Del. Supr. 166 A.2d 141, 143 (1960) and** ***Teitsworth v. Kempski*****, Del. Supr., 127 A.2d 237, 238 (1956) (cases involving damage to vehicles);** ***Brandywine 100 Corp. v. New Castle County*****, Del. Supr., 527 A.2d 1241 (1987) (case alleging damage to land after building demolition);** ***Jordan v. Delaware and A. Telegraph and Telephone Co.*****, Del. Super., 75 A. 1014 (1909),** ***aff.*** **78 A.401 (1910) (case alleging damage to trees);** ***Zaleski v. Mart Assoc.*****, Del. Super., C.A. No. 82C-NO-11, Poppiti, J. (July 25, 1988) ORDER (case calculating damages from the complete destruction of a retail business).**

[11] ***Storey*** **at 192.**

[12] ***Brandywine 100 Corp.*** **at 1;** ***Nardo v. Jim Baxter's Delaware Tire Center*****, Del. Super., C.A. No. 90C-10-34, Steele, J. (Nov. 18, 1991), Mem. Op.**

so."[13] Plaintiff agrees that New Castle Roofing did provide the roof it contracted to provide; however, New Castle Roofing did not fulfill other crucial requirements under the contract, specifically, protecting the gymnasium's interior from damage. Plaintiff analogizes Defendant's argument that the proper measure of damages is the before and after value to those raised by the Defendant and rejected by this Court in *Farny*.[14] Therefore, Plaintiff argues that *Farny* establishes that diminution in market value may be considered "as an alternative and supplement" to the primary measure of damages, which is the cost of remedying the defective performance.

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[13] *Farny v. Bestfield Builders, Inc.*, Del. Super., 391 A.2d 212, 214 (1978) (citing to Restatement, "Contracts," § 346 (1932).

[14] *Farny* at 213-214 (rejecting lower court's use of before and after value because it resulted in a judgement disproportionate to the reasonable damages suffered due to the breach of contract).

Alternatively and if the Court employs the before and after value to measure damages, Plaintiff argues that they should be considered a "non-profit service property" and the replacement cost is therefore still appropriate. To support this contention, Plaintiff points to the *Klair* case which stated that the replacement cost approach is appropriate for "non-profit service properties that seldom come on the market, like churches, schools, and cemeteries" because there is a ready market by which to assess fair market value.[15] Plaintiff distinguishes their situation from those of *Klair* and *Brandywine 100* as those were tort actions with no privity of contract, whereas the *Farny* case is a closer analogy because it involved a construction contract. Because there is no ready market for the property (their gymnasium floor) and the value of the floor cannot be appraised by other methods such as comparable sales or capitalization of earnings, Plaintiff claims that the replacement cost is the correct measure of damages.

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[15] ***Klair* at 1.**

In response to Plaintiff's non-profit service property argument, Defendant argues that this case is distinguishable from the cases sited by Plaintiff. Defendant distinguishes the alleged damage because the floor is an item **in** a non-profit service property, whereas in the other cases the damage occurred to the non-profit service properties in and of themselves. In addition, Defendant alternatively argues that if the Court determines the appropriate measure of damages to be replacement cost, the damages should be replacement cost less diminution in value. Defendant claims that the ordinary life of the floor is 30-35 years;[16] therefore, it would be absurd to give the school the full replacement cost for the floor. William Miller of Miller Flooring, the company that installed the new Scissor-Loc flooring system, stated in his deposition that a wooden floor like the school's original floor has an unlimited life span and that with proper care such floors have been know to last 100 years or the life of the building. Defendant argues that even accepting Miller's testimony, they would be entitled to a one-third credit against the replacement cost of the floor as the floor was 30 years old (1/3 of 100 years) when replaced.

In *Klair v. Day*, this Court examined Delaware case law for the measure of damages in an action seeking recovery for damages to real and personal property in

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[16] **William Miller testified at deposition that "wood floors can last hundreds of years if they're never exposed to moisture. There are channel lock floors that are 50 years old -- 50 years old that are still in place. An average life expectancy is around 30 years due to moisture. So if -- if floors never got exposed to moisture, that average could be 100. But it's about 30, 35 years."**

tort.[17] In that case the parties conceded that the correct measure of damages was the difference between the fair market value of the property before and after the damage occurred. The *Klair* court went on to note that three methods exist for determining fair market value: (1) the capitalization of income approach; (2) the comparative sales approach; and (3) the replacement cost approach. The Court recalled that the replacement cost approach is

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[17] ***Klair*** **at 1 (tortious conduct was setting fire to Plaintiff's barn).**

> generally used for non-profit service properties that seldom come on the market, like churches, schools and cemeteries. The nature of such properties prevent the appraisal by the other methods . . . While the method is most often used with properties owned by non-profit entities, the replacement cost approach is justified whenever evidence of comparable sales or income capitalization is unavailable.[18]

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[18] ***Id.***

The Court finds that the "basic measure of damages for a breach of contract involving improvements to real property is the amount required to remedy the defect by replacement or repair unless that amount is disproportionate to the probable loss in value or it constitutes economic waste."[19] However, there is no strict application of a damage formula as the underlying goal is to achieve a just and reasonable result.[20] In the case *sub judice*, the parties contracted for a new roof to be installed and for this to be accomplished by using procedures that would ensure that the gymnasium's interior was not damaged. New Castle Roofing breached this contractual obligation; therefore, the remedy is replacement or repair unless these figures are disproportionate to the probable loss in value. While the Court can decide what the appropriate

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[19] ***Shipman v. Hudson*, Del. Super., C.A. No. 88C-JN32, Lee, J. (Feb. 17, 1995), Mem. Op. at 5.**

[20] ***Shipman* at 5; *Farny* at 14.**

measure of damages is, the Court cannot decide the actual amount as a material issue of fact exists as to whether it was necessary to replace the floor or repairs would have been sufficient to remedy the defect.[21]

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[21] In Footnote 1 of their Reply Brief in support of the Motion for Summary Judgment, New Castle Roofing states that "Of course, NCR denies that either the floor or the bleachers needed to be replaced.

The Court finds that it is fair and reasonable in light of the contractual obligations of the parties to require the Defendant to pay the cost of replacement or repair for the damage to the gymnasium floor. Another reason the replacement cost is a just result in this matter is that even under the diminution in value tort cases like *Klair*, the Plaintiff would be entitled to present the replacement cost to the fact finder. In *Klair*, the Court noted that in cases involving damage to real and personal property, "the correct measure of damages is the difference between the fair market value of the property before the imposition of the damaging element and the fair market value after the damage has occurred."[22] Under this standard, the key is determining the appropriate appraisal method of fair market value. Of the three choices available: capitalization of income, comparative sales and the replacement cost approach, the replacement cost approach is applicable because evidence of comparable sales or income capitalization is unavailable.[23] Defendant's argument that the replacement cost approach would not apply because the gymnasium floor is not a "non-profit service property" fails because it ignores the underlying purpose of the replacement cost approach. As *Klair* reminds us, the replacement cost approach is "justified whenever evidence of comparable sales or income capitalization is unavailable . . . [because] [t]he nature of such properties prevent the appraisal by other methods."[24]

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[22] ***Klair* at 1.**

[23] **The Court accepts this as fact because it is not controverted by the parties.**

[24] ***Klair* at 1.**

Neither party has produced evidence that a market exists for used high school gymnasium floors, which makes methods of fair market appraisal such as comparative sales, extremely difficult to apply. The fair market value of a high school gymnasium floor is also difficult to determine because it serves a predominantly utilitarian function of serving the needs of the school's athletic program. For these reasons, even under the fair market diminution in value method the Defendant espouses, the Court favors the replacement cost appraisal method. Defendant's motion for summary judgment on the measure of damages is DENIED, and the Court finds that the proper measure of damages is the cost of replacement or repair of the floor, as the extent of damage to the floor appears to be controverted.[25]

III. Defendant's Motion for Summary Judgment on the Issue of Recovering the Cost of the Bleachers.

Defendant's summary judgment motion also claims that the proper measure of damages for the school's new bleachers is the before and after value, for which the Plaintiff has produced no evidence. In addition, the Defendant also joined the

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[25] **While it is highly unusual for the Court to offer advisory-type opinions, the parties indicated to the Court at oral argument that once the Court determines the appropriate measure of damages, the case will likely resolve itself.**

summary judgment motion of Plymouth Environmental, the third-party Defendant no longer in the case, which argued that Plaintiff is not entitled to any damages for the school's bleachers because they were not damaged by the storm and did not have to be replaced. In response, Plaintiff argues that one of the contract's requirements was the protection of the gymnasium's interior from damage, including the bleachers, therefore, the Defendant must pay the replacement cost of the bleachers. Plaintiff's additional arguments will be addressed below.

In a summary judgment motion, the moving party initially bears the burden of showing a genuine material issue of fact does not exist.[26] If a properly supported motion for summary judgment shows no genuine issue of material fact, the burden shifts to the nonmoving party to prove material issue of fact exist.[27] To carry its burden, the non-movant must produce specific facts which would sustain a verdict in its favor.[28] The non-movant cannot create a genuine issue for trial through bare

[26] ***Moore v. Sizemoore*, Del. Supr., 405 A.2d 679, 680 (1979).**

[27] ***Id.* at 681.**

[28] ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Hoffman v. Cohen*, Del. Supr., 538 A.2d 1096, 1097-98 (1988).**

assertions or conclusory allegations.[29]

[29] ***Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Martin v. Nealis Motors, Inc.*, Del. Supr., 247 A.2d 831, 833 (1968).**

Plaintiff's claim that the bleachers were damaged by the August 10th storm rings hollow. Earl Black, chief custodian of Caesar Rodney High School and Plaintiff's Superior Court Civil Rule 30(b)(6) witness, testified by deposition that after making a few minor repairs the bleachers were in the same or similar condition as they were prior to the storm on August 10, 1998. Pursuant to Plaintiff's own witness, the bleachers did not receive damage from the storm necessitating replacement or significant repair. Presumably to counter this weakness in their case, Plaintiff argues that the new floor required the installation of the new bleachers. Many factual disputes exist on this issue–whether the new floor required the installation of new bleachers.[30] As noted above, Plaintiff has produced no evidence that the bleachers

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[30] **During the School Board's search for a company to replace the gymnasium floor, the proposed contracts included removal and installation of the existing bleachers. The contract between the School Board and Miller Construction for the installation of the Scissor-Loc flooring system also initially called for the removal and installation of the old bleachers. According to the Plaintiff, the new bleachers had to be installed because the old bleachers**

were damaged by the August 10th storm to an extent that required significant repair or replacement. Therefore, to avoid summary judgment, Plaintiff must produce evidence establishing that any new floor or repaired floor would have required new

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would have gouged the floor and voided the new floor's warranty. Plaintiff claims that the wheels and angle brackets were not in danger of gouging any floor, new or old, prior to the storm damage; however, after the storm the bleacher's wheels and brackets were damaged by dragging the bleachers across the cupped and warped old floor. Whether or not new bleachers had to be installed to prevent damage to the new floor and voiding the floor's warranty is unclear from the record. The installers of the new floor give inconsistent testimony about the necessity of installing new bleachers and which warranty may have been voided by the old bleachers, the manufacturer's or the installer's. There are many factual disputes in the record concerning the actual replacement of the bleachers, but it is not necessary for the Court to decide them.

bleachers.

Miller Flooring, the new floor's installer, testified that **if** the wheels, brackets and angles were damaged by being dragged over the old warped floor, the bleachers would have to be replaced to prevent damage to the new floor. Based on this testimony the question is whether the bleachers' wheels, angles and brackets had such problems. The School Board has produced no such evidence. On the contrary, the school's chief custodian testified that after making a couple of minor repairs, the bleachers were in the same or similar condition as they were before the storm damaged the floor. The Court finds that there is no material issue of fact that the damage done to the bleachers was minimal and inexpensively repaired. Therefore, Defendant will not be held financially responsible for the replacement of the bleachers. Defendant's motion for summary judgment on the issue of damages for the bleachers is GRANTED.

IT IS SO ORDERED.

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J.

dmh
oc: Prothonotary
xc: Order Distribution