IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ADIRONDACK GROUP, INC.,	)	
A Pennsylvania corporation, t/a	)	C. A. No. 03A-08-010 PLA
THE FENCE AUTHORITY,	)	
	)	Court Below:
Plaintiff/Defendant	)	Court of Common Pleas of the
Below-Appellant,	)	State of Delaware, New Castle
	)	County
v.	)	C. A. No. 2001-12-198
	)	
KATHLEEN M. BRAXTON,	)	
	)	
Defendant/Plaintiff	)	
Below-Appellee.	)	

Date Submitted: February 19, 2004
Date Decided: May 19, 2004

UPON APPEAL FROM A DECISION
OF THE COURT OF COMMON PLEAS
AFFIRMED.

OPINION AND ORDER

Louis J. Rizzo, Jr., Esquire, Reger & Rizzo, LLP, Wilmington, Delaware, Attorney for the Plaintiff/Defendant Below-Appellant.

Leonard L. Williams, Esquire, Williams & Crosse, Wilmington, Delaware, Attorney for the Defendant/Plaintiff Below-Appellee.

ABLEMAN, J.

This is an appeal from the judgment issued by the New Castle County Court of Common Pleas in a breach of contract dispute over the delivery and installation of fencing around a swimming pool at a private residence. After hearing all the evidence, testimony, and motions presented at a one-day bench trial on August 8, 2003, the Court reserved judgment. On August 11, 2003, the Court of Common Pleas issued its decision in a letter opinion, entering judgment in the amount of $4,000.00 in favor of the plaintiff, Kathleen M. Braxton ("Appellee"), plus pre-imposed judgment interest at the legal rate pursuant to 6 *Del.C.* § 2301, *et seq*. Adirondack Group, Inc., a Pennsylvania corporation, t/a The Fence Authority ("Appellant"), filed the instant appeal on August 22, 2003, on the grounds that the Court of Common Pleas committed errors of fact and law, and that its decision was contrary to the evidence presented. For the reasons set forth hereafter, this Court affirms the judgment of the Court of Common Pleas.

Statement of Facts

Appellee resides at 301 Rolling Green Avenue, New Castle, Delaware. In June 2001, Appellee was in the process of completing major renovations and improvements to the property located around her newly constructed residence. In addition to having an in-ground swimming pool built in her back yard, Appellee had engaged various contractors to provide paving, landscaping, installation of a

concrete driveway and patio, and improvements in the form of a gazebo, cabana, and a storage shed to her property.[1]

In the midst of the ongoing improvements and construction, and upon completion of the swimming pool, Appellee contacted the Appellant to install a fence around the perimeter of the pool. On June 6, 2001, Appellant and Appellee entered into a written contract for the delivery and installation of a custom designed fence to be constructed and installed around her swimming pool pursuant to specifications selected by the Appellee. The contract was written and drafted by the Appellant, the express terms including Appellant's performance "to install fifty feet of six almond Hollingsworth PVC, including two (2) four (4) foot wide gates, 216 of five feet almond Lakeland PVC, and other materials" at a total cost of $12,000.00. Appellee paid a $4,000.00 deposit at the time of signing, with the full balance of $8,000.00 due at the date of completion.

The contract provided for the delivery and installation of the fence within four to six weeks from the date the parties entered into the contract. It appears, from the record, that both parties orally agreed to this provision and stipulated to it as a term and condition of the contract. It is this salient provision of the contract that is the focus of the claim of a material breach.

[1] Transcript of Trial, dated August 8, 2003, at 14 (hereinafter "Tr. of Trial at __.").

According to Appellee's testimony, as her house was located in a new residential development community, her yard and pool were completely exposed without any protective fencing, except for a piece of chicken wire, and there "was not anything substantial to keep children or anyone from falling into the pool."[2] In addition to the potential liability issue, Appellee explained that she emphasized to the Appellant that she needed the fence installed within four to six weeks. At the time she entered into the contract, the pool was near completion, and Appellee could only arrange for the requisite inspections to be performed, and the necessary certificate of occupancy to be issued, once the fence had been installed pursuant to county requirements. Moreover, Appellant testified that many of the remaining planned construction projects had to be put on hold at this time because the contractors could not gain access to the other areas of her back yard, or could not proceed further with their own projects, until the fence was installed.[3]

Other relevant provisions of the contract also engendered controversy between the parties and are additional components of Appellant's alleged claim of a material breach committed by the Appellee. Under the heading of the provision entitled "What You Must Know," subparagraph "A" obligated Appellee to read the terms and conditions of the contract. By signing her initials, she certified to the fact that she had read the terms and conditions. The purpose of this provision was

[2] Tr. of Trial at 31.
[3] Tr. of Trial at 20.

to avoid any misunderstandings by the Appellee as the Appellant progressed with its fence project. Under the heading entitled "What We Will Do," subparagraph "A" provided that, "[i]t is important to understand the schedule could change due to inclement weather, illness to the scheduled installer or material availability." Furthermore, under the heading entitled "Terms and Conditions," subparagraph "G" maintained that, "[t]here will be absolutely no deposit refund for material that has been expressly produced for a specific order. Ornamental Aluminum, PVC or Custom Wood Fence Deposits will only be returned if ordered materials have not been manufactured by or received by The Fence Authority."

Appellant testified that the fence materials were ordered on June 11, 2001, three days immediately following the expiration of the statutory three-day consumer protection grace period.[4] Appellant also testified that it would require approximately ten days to two weeks after the receipt of the fence, for Appellant to install the fence at Appellee's residence.[5] Appellee contacted Appellant's office several times over the period of approximately three weeks. She was advised on each occasion that the fence had not yet been received by the Appellant from the manufacturer. On June 27, 2001, exactly three weeks after the contract had been signed, Appellee again called the Appellant's office inquiring as to the status of her fence order, but was unable to obtain confirmation from the Appellant that the

[4] Tr. of Trial at 82.
[5] Tr. of Trial at 72-74.

fence would be delivered and installed as promised within the stipulated four to six week period. Appellee testified at trial that, in each instance when she contacted the Appellant's office and asked for a status update on delivery and installation of her fence, the Appellant "[n]ever gave me a definitive date. They [representatives of Appellant at its place of business] kept saying it's in the depot or it's on the way."[6] After one such particular inquiring phone call placed by Appellee, Appellant replied, "don't call us, we'll call you."

On July 17, 2001, after not hearing from Appellant for some time, Appellee contacted Appellant by telephone, once more requesting information on the status of the projected delivery and installation of the fence. As of that date, she was advised by Appellant's representative that the fence had not been received from the manufacturer. On that same day, in response to this information, Appellee notified the Appellant in a letter, via facsimile, that she was canceling the contract, effective July 17, 2001.[7] Pursuant to the record, the pertinent content of Appellee's letter reads as follows:

> [P]lease return my deposit less the $100.00 fee for cancellation as outlined in your contract (letter) R. The week of the 4th of July 2001, you said materials were at depot. The reason for cancellation is due to the fact that the requested materials have not been delivered, no new delivery date has been given, and you, the Fence Authority [,] have not received said materials despite repeated promised. Additionally, the

[6] Tr. of Trial at 28.
[7] Tr. of Trial at 20-27.

> treatment by your representatives have [sic] left much to be desired, especially to a cash [-] paying customer.[8]

Sometime on either July 17 or July 18, 2001, Appellant's representative visited with Appellee at her home and requested that she reconsider her cancellation and accept the fence.[9] According to Appellant's representative, at this meeting he informed the Appellee that the fence had been shipped from the manufacturer and was en route. Appellant's representative followed up with a letter to the Appellee, dated July 18, 2001, in which Appellant explained that, according to the terms and conditions of the contract, the last date she could have exercised her cancellation option was June 9, 2001, and that "a refund of your deposit money is not required under the contract and a refund will not be sent."[10] Furthermore, Appellant reminded Appellee in the letter that she had been advised at the inception of the contract that there was a possibility of a delay due to the unique nature of the fence.

On July 31, 2001, a representative of Appellant visited Appellee at her home and, once more, asked her to reconsider her cancellation of the contract. He informed her that the fence had arrived at Appellant's place of business on July 20, 2001.[11] Appellee testified that she informed Appellant's representative that she

[8] Plaintiff's Exhibit 1.
[9] Tr. of Trial at 65.
[10] Plaintiff's Exhibit 4.
[11] Tr. of Trial at 46-47.

had already purchased a fence from another vendor and had it installed. After waiting eight weeks for delivery and installation, she testified that she no longer wished to do business with the Appellant and was not interested in reconsidering her cancellation of the contract. Appellant's representative informed Appellee that, if she had a family member to buy the fence materials, she could get her $4,000 deposit refunded.[12]

At trial, two of Appellant's representatives testified that the fence materials had not been received in the four to six week stipulated period. They substantiated the fact that receipt of delivery was effectuated at Appellant's place of business on July 20, 2001. They also concurred that, as of July 17, 2001, the date that the Appellee cancelled the contract, the fence materials had not been delivered to Appellant. Finally, Appellant's representatives admitted under oath that Appellant did not notify Appellee of the arrival of the fence materials on July 20, 2001 until July 31, 2001, eleven days after receipt of the fence materials. As well, Appellant's president represented under cross examination that Appellant waited eleven days after receipt of the material to notify the Appellee and request the contract be re-executed, despite the fact that Appellee had informed Appellant on July 18, 2001 that she had already purchased another fence.

[12] Tr. of Trial at 29-30.

Appellant also testified that it cost $5,089.71 to purchase the custom fence materials from the manufacturer and that it had made good faith efforts to attempt to sell the custom fencing materials, but had been unsuccessful because of the unique nature of the materials.[13] In light of these facts, Appellant filed a counterclaim in the lower court action requesting judgment in the amount of $1,089.71, representing consequential and incidental damages expended by Appellant, over and above the $4,000.00 deposit paid by Appellee.

Parties' Contentions

In its brief, Appellant asserts that the Court of Common Pleas committed an error of law by ruling in favor of Appellee, and that the Court's verdict was unsupported by the evidence. The trial Court found that Appellant's failure to reasonably perform the terms and conditions of the contract, by delivering and installing the fence within the four to six week stipulated period, as promised at the original contract signing on June 6, 2001, constituted a material breach of the contract. Appellant contends the opposite, and submitted that Appellee's wrongful cancellation of the contract on July 17, 2001, one day prior to the expiration of the six week period on July 18, 2001, constituted a material breach of the contract.

Second, Appellant asserts that the trial court incorrectly calculated the contract dates. Although the contract was executed by the parties on June 6, 2001,

[13] Tr. of Trial at 89-93.

Appellant contends that the contract did not commence until June 11, 2001. This was the date Appellant placed the order for the custom fence materials from the manufacturer, as it was the "first date after the expiration of the consumer protection contract-cancellation." Following this line of reasoning, Appellant proposes that the six week period identified in the contract would not expire until July 23, 2001, six days after Appellee cancelled the contract. However, Appellant concedes, '[w]hether the six week period identified in the contract expired on July 18th or July 23rd, it is undisputed that Plaintiff cancelled the contract prior to either date."

On the contrary, Appellee argues that the trial Court properly found that Appellant breached the contract for having failed to "reasonably perform" by delivering and installing the fence within four to six weeks. Consequently, Appellee was exonerated in her action of discharging her duties under the contract and in terminating the contract on July 17, 2001. Appellee submits that the trial Court employed an orderly and deductive reasoning process, in concluding that there was a meeting of the minds between the parties at the time they entered into the contract that performance by Appellant was to be effectuated within four to six weeks. In Appellee's legal evaluation, Appellant did not "reasonably perform." Therefore, Appellant breached the contract. Because the Appellant failed to perform timely and committed a material breach of the contract, Appellee also

argues that Appellant was not entitled to its counterclaim, as it failed to present proof by a preponderance of the evidence.

Standard and Scope of Review

In *Levitt v. Bouvier*, the Delaware Supreme Court set forth the proper scope of review of an appeal in a non-jury Superior Court case to the Supreme Court.[14] In *State v. Cagle*, the Court extended the same procedural standard and scope of review set forth in *Levitt* to an appeal on the record from the Court of Common Pleas to this Court.[15] In essence, when reviewing appeals from the Court of Common Pleas, the Superior Court sits as an intermediate appellate court, and as such, its function is the same as that of the Supreme Court.[16]

[14] *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972).

[15] "An appeal from a decision of the Court of Common Pleas for New Castle County, sitting without a jury, is upon both the law and the facts. In such appeal, the Superior Court has the authority to review the entire record and to make its own findings of fact in a proper case. However, in exercising that power of review, the Superior Court may not ignore the findings made by the Trial Judge. The Superior Court has the duty to review the sufficiency of the evidence and to test the propriety of the findings below. If such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process, the Superior Court must accept them, even though independently it might have reached opposite conclusions. The Superior Court is only free to make findings of fact that contradict those of the Trial Judge when the record reveals that the findings below are clearly wrong and the Appellate Judge is convinced that a mistake has been made which, in justice, must be corrected. Findings of fact will be approved upon review when such findings are based on the exercise of the Trial Judge's judicial discretion in accepting or rejecting 'live' testimony. *See Barks v. Herzberg*, 206 A.2d 507(Del. 1965). If there is sufficient evidence to support the findings of the Trial Judge, the Superior Court sitting in its appellate capacity must affirm, unless the findings are clearly wrong." *State v. Cagle*, 332 A.2d 140, 142 (Del. 1974) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

[16] *See generally Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. Ct.); *State v. Huss*, 1993 WL 603365, at *1 (Del. Super. Ct.).

Therefore, the applicable standard of review for appeals from the Court of Common Pleas to the Superior Court is *de novo* for legal determinations and "clearly erroneous" for findings of fact.[17] While errors of law are reviewed *de novo*,[18] findings of fact are reviewed only to confirm and verify that they are supported by substantial evidence.[19] Therefore, the Court's role is to correct errors of law, and to review the factual findings of the court below simply to determine if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process."[20] If so, they must be accepted notwithstanding the fact that the Superior Court may have reached opposite conclusions.[21]

The Law

In those instances where a contract involves a mixture of goods and services, the applicability of the Uniform Commercial Code ("U.C.C.") may depend upon the significance of each to the total contract. It is necessary for the Court to "review the circumstances surrounding the factual circumstances surrounding the negotiation, formation and contemplated performance of the contract to determine whether the contract is predominately[,] or primarily[,] a contract for the sale of

[17] *See Cagle*, 332 A.2d at 142; *Levitt*, 287 A.2d at 673; *accord State v. Roberts*, 2001 WL 34083579, at *1 (Del. Super. Ct.); *State v. High*, 1995 WL 314494, at *2 (Del. Super. Ct.).
[18] *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990).
[19] *Shahan v. Landing*, 643 A.2d 1357, 1359 (Del. 1994).
[20] *See also Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001); *accord Downs*, 570 A.2d at 1144; *Baker*, 488 A.2d at 1309; *Levitt*, 287 A.2d at 673; *Richards*, 1998 WL 732960, at *1.
[21] *Levitt*, 287 A.2d at 673; *Roberts*, 2001 WL 34083579, at *1; *High*, 1995 WL 314494, at *2.

goods or for services."[22] Further, "[i]f the cause of action centers exclusively on the materials portion or the services portion of the contract, the determination may rest upon that fact."[23]

When the Court is considering the terms and conditions incorporated into a written contract, the plain language of the contract will be given its plain meaning.[24] If there is an ambiguity, however, the contract language is "construed most strongly against the party that drafted the contract."[25] "The party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform."[26] "Mere inconvenience or substantial increase in the cost of compliance will not excuse a promisor from the duty to perform his contractual obligations."[27] "In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract."[28] It is well-settled law in Delaware that damages for breach of contract will be in an amount sufficient to return the injured party to the position that party would have been in had the breach not occurred.[29] The measure of damages is the loss actually sustained as a result of the breach of the contract.[30]

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[22] *Glover Sch. & Office Equip. Co., Inc. v. Hall*, 372 A.2d 221, 223 (Del. Super. Ct. 1977).
[23] *Id*. (citations omitted).
[24] *Phillips Home Builders, Inc. v. The Travelers Ins. Co*., 700 A.2d 127, 129 (Del. 1997).
[25] *Id*. (quoting *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co*., 616 A.2d 1192, 1196 (Del. 1992)); *see also E.I. duPont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108 (Del. 1985).
[26] *Hudson v. D & V Mason Contractors, Inc*., 252 A.2d 166, 170 (Del. Super. Ct. 1969).
[27] *Ridley Inv. Co. v. Croll*, 192 A.2d 925, 926 (Del. 1963).
[28] *Emmett S. Hickman Co. v. Emilio Capaldi Developer, Inc*., 251 A.2d 571, 573 (Del. Super. Ct. 1969).
[29] *Del. Limousine Serv., Inc. v. Royal Limousine Serv., Inc*., 1991 WL 53449, at *3 (Del. Super. Ct.).
[30] *Id*.

In the same respect, once a material breach of a contract occurs, a party has a duty to mitigate.[31] The determination of whether the breach is of sufficient importance to excuse non-performance by the non-breaching party is one of degree and is determined by weighing the consequences in light of the contract, compared with the actual custom of performance of similarly situated contracts.[32] Notwithstanding a material failure to perform, the complaining party may, nevertheless, recover the value of the benefit conferred upon the other party.[33]

Discussion

Applying these principles to the record in this proceeding, the Court finds and concludes the following dispositive issues. First, in recognition of the applicable U.C.C. standards, and in light of the fact that the disputed contract was a mixed contract, related to both goods and services, the trial Court properly considered this action as a contract for services and not for the sale of goods. The Court does not find sufficient evidence in the record to support a finding contrary to the fact that this was predominately, and primarily, a service contract for the installation of a custom fence. Therefore, the U.C.C. does not apply.

Second, the record reflects that both parties were in agreement over the unambiguous language concerning the four to six week period of performance.

[31] *Lowe v. Bennett*, 1994 WL 750378, at *4 (Del. Super. Ct.).
[32] *E. Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610, at *4 (Del. Super. Ct.), *aff'd*, 540 A.2d 1088 (Del. 1988).
[33] *See Heitz v. Sayers*, 121 A. 225 (Del. Super. Ct. 1923).

There also existed a meeting of the minds within the four corners of the contract, concerning the stipulated time frame of four to six weeks for delivery and installation of the fence. Appellee proved by a preponderance of the evidence that there was a definitive meeting of the minds between the two parties as to this express condition. The trial Court found that Appellee's testimony was credible, in particular, as to a meting of the minds over this time-line requirement. This Court will not disturb the testimonial findings of a lower court that has been afforded the opportunity, and the advantage, to view, and listen to, a witness first-hand.

Third, the trial Court also found that Appellee met her burden of establishing by a preponderance of the evidence that the Appellant breached its duty to "act reasonably and to perform pursuant to the terms and conditions of the contract" by neglecting to deliver and install the fence in the allotted time, as promised when the parties entered into the contract on June 6, 2001. The Court detects no error of law or finding of fact to contradict the trial Court's finding that, even though the Appellee gave notice to cancel the contract one day short of the six week deadline, Appellant's non-performance up to, and including, that point in time, constituted a failure to perform in a timely manner under the terms of the contract, thereby inducing a breach. Under the circumstances, Appellee could discharge her duties under the contract. Not only had the Appellant failed to receive the fence materials on the date the Appellee cancelled the contract, but it could not even provide the

Appellee with a definitive date of delivery to set her mind at ease. The trial Court appropriately took note of the language in the contract that allowed some "leeway in the delivery." This does not belie the fact that, at trial, Appellant failed to offer any evidence in support of its own contract provision, which provided for potential changes or modifications in the delivery schedule due to inclement weather, illness of the scheduled installer, or material availability.

Hence, after reviewing the entire record, including, but not limited to, the trial transcript, the evidence presented, and the testimony of the parties, this Court finds that Appellant was responsible for a material breach, and thus, cannot complain that the Appellee failed to perform. Appellee sustained more than a "mere inconvenience" which validated her excusal from a duty to perform. As the injured party, Appellee was entitled to damages that would return her to the position she would have been in had the breach not occurred. Thus, the measure of her damages equates to the loss actually sustained, which in this instance amounts to her $4,000.00 deposit that the Appellant refused to return. This Court affirms the trial Court's decision based on the well established principle of law that, since Appellee was entitled to discharge and rescind her duties as defined in the contract, she may also recover the value of the benefit conferred upon the other party.

Concerning the Appellant's counterclaim, once the Appellant committed a material breach, it had a requisite duty to mitigate. Despite Appellant's claim that

it actively pursued fulfillment of this duty by attempting to sell the fence materials to no avail, had the Appellant been timelier, more diligent, and definitive concerning the nature and content of its notice to the Appellee as to delivery and installation, a material breach on its part could have been avoided. Appellant's attempts to rectify the situation through negotiation, conciliation, and/or mitigation with the Appellee or others, amounted to nothing more than untimely, disingenuous, afterthoughts. Therefore, Appellant failed to prove its counterclaim by a preponderance of the evidence.

Accordingly, upon review of the lower Court's decision, this Court concludes that there were no errors of law and that the factual findings of the Court below were sufficiently supported by the record and are the product of an orderly and logical deductive process. For all the foregoing reasons, the judgment of the Court of Common Pleas is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Louis J. Rizzo, Jr., Esquire
Leonard L. Williams, Esquire
Prothonotary