UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Property Maintenance Group
Plaintiff

vs

Case No. C-1-08-265
(Hogan, M.J.)

The Connor Group, A Real Estate Investment Firm, LLC, et. al.,
Defendants

ORDER

The parties consented to final disposition of this action by the undersigned United States Magistrate Judge. (Doc. 72). The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and 28 U.S.C. § 1367. On November 9, 2009, this matter came before the Court for a jury trial on Plaintiff's claims against Defendant for, *inter alia*, breach of contract. On November 15, 2009, at the close of Plaintiff's case, Defendants moved this Court for a partial judgment as a matter of law with respect to Plaintiff's breach of contract claims regarding two properties, namely, the Arbors of Montgomery and the Orchards of Landen. On November, 17, 2009, at the close of Defendants' case, Defendants renewed said motion. Plaintiff, not surprisingly, opposes Defendants' motion. The Court heard arguments on Defendants' motion. For the reasons set forth more fully below, and in accordance with this Court's ruling from the bench, Defendants' motion is DENIED.

Defendants assert a counterclaim for breach of contract, alleging that Plantiff failed to perform its work on each of the properties at issue in this case, in a first class manner and according to the highest industry standards.

The arguments of counsel are clearly set forth on the record in this case. Each party directed this Court's attention to the relevant portions of the testimony in support of their respective positions. Their arguments are summarized as follows. Specifically, Defendants allege that Plaintiff specifically contracted with its subcontractors to perform a lesser quantity of wood replacement on the projects than Plaintiff originally contracted with Defendants to perform. Defendants argue that, with reference to the Arbors of Montgomery, the contract between PMG and The Connor Group called for 32,363 linear feet of wood replacement. The subcontract between PMG and the subcontractor, LMC, called for 16,630 linear feet of wood replacement. This evidence was substantiated by three separate witnesses. The contract between PMG and The Connor Group, with respect to the Orchards of Landen, called for 37,892 linear feet of wood

replacement. In contrast, the contract between PMG and its subcontractor, LMC, called for 19,400 linear feet of wood replacement. Again, the evidence was substantiated through the testimony of three witnesses. Defendants further argue that the work at the Arbors of Montgomery and the Orchards of Landen did not comply with accepted industry standards as evidenced by the rotten wood remaining on the buildings which was painted over by LMC Painting. Finally, Defendants contend that neither the project at the Arbors of Montgomery or the Orchards of Landen were finished.

Plaintiff argues that the question of whether or not the work was performed in a "first class manner" is a factual question for the jury to resolve in this case. Plaintiff contends that testimony elicited from Mr. McCann establishes that this was the type of wood replacement for which The Connor Group specifically contracted. Mr. McCann's testimony indicates that representatives of The Connor Group specifically requested that only the most visibly damaged wood be replaced. Testimony from the subcontractor likewise, indicates that no visibly rotten wood remained on the building prior to requests from Defendant for extra work. Plaintiff contends that the question of whether this complied with the terms of the contract is a factual issue for the jury to resolve. Plaintiff further argues that the two properties were not completed because Defendant pulled the subcontractor off the projects and sent its workers to other properties. Finally, Plaintiff argues that testimony indicates that Defendant never indicated in 2007, that the work was not being performed in a first class manner.

DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW WILL BE DENIED

Fed. R. Civ. P. 50 provides in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). In order to survive Defendant's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), Plaintiff must present sufficient evidence to establish that a controverted issue of fact exists upon which reasonable persons could differ. *Zamlen v. City of Cleveland, Ohio* 906 F.2d 209, 214 (6th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991); *Hersch v. United States*, 719 F.2d 873, 876-77 (6th Cir. 1983). On a motion for judgment as a matter of law, the Court must construe the evidence in the light most favorable to the non-moving party and consider the motion without weighing the credibility of witnesses or judging the weight of the evidence. *Zamlen*, 906 F.2d at 214; *Hill v. McIntyre*, 884 F.2d 271, 274 (6th Cir. 1989). The motion may be granted only if it is clear from the evidence that reasonable minds could come to but one conclusion. *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d 570, 579 (6th Cir. 1979).

Thus, the Court may grant a Rule 50 Motion for Judgment as a matter of law if a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.

The issues involved in these claims are factual and concern questions regarding the performance of Plaintiff and its subcontractor with respect to the wood replacement and painting projects at the Arbors of Montgomery and the Orchards of Landen. The Court finds that the conduct on both sides of the aisle is rife with mistakes. While the contract calls for work to be performed in a "first class manner," no definition of such exists within the four walls of the contract. Written change orders, specifically provided for in the contract, were ignored by all. Testimony from witnesses differs with respect to the quality of work expected, whether it was just enough to ready the properties for sale, or more. We find that different inferences are possible from the same facts. This Court has a history of trusting the jury with such calls. For this reason, Defendants' motion under Rule 50 is denied.

IT IS THEREFORE ORDERED THAT:

1) Defendants' Partial Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50(b) is DENIED.

SO ORDERED.

Date 11/17/09

Timothy S. Hogan
United States Magistrate Judge

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