

Lalji v Pintado

2019 NY Slip Op 30332(U)

February 11, 2019

City Court of Peekskill, Westchester County

Docket Number: SC-408-18

Judge: Reginald J. Johnson

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SC-408-18

PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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BONNIE LALJI and CHANDRATT LALJI,

DECISION & ORDER

Plaintiffs,

--against--

Index No. SC-408-18

LUIS R YUNGA PINTADO d/b/a LUIS,
GENERAL CONTRACTING,

Small Claims Part

Defendant.

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Appearances:

Bonnie Lalji and Chandradatt Lalji, pro se
Luis R. Yunga Pintado d/b/a Luis General
Contracting by Frank A. Catalina, Esq. by
by Andrea Catalina, Esq. for Defendant

Hon. Reginald J. Johnson

This is a small claims action commenced pursuant to Uniform City Court Act (UCCA), Article 18-A. The Plaintiffs appeared pro se and the defendant appeared by Frank A. Catalina, Esq., by Andrea Catalina, Esq. After unsuccessful settlement negotiations, this matter proceeded to a bench trial. The defendant testified but called no witnesses on his behalf.¹

¹ After the adjournment of the trial on December 5, 2018, the parties consented to resume the trial on January 30, 2019 with the defendant subject to re-direct examination and to call his two witnesses . On January 30, 2019, the defendant and his witnesses failed to appear, request a further adjournment, or contact his attorney even after his attorney called and emailed him the day of the trial.

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Marta Fagundo, a court employed Spanish interpreter, assisted the defendant throughout the course of the trial.

In deciding this matter, the Court considered the testimony of the parties and the following exhibits: Contract (Plt's "1"), copy of \$6,000 check deposit (Plt's "2"), copy of returned check (Plt's "3"), copy of Nelson's Hardwood Floor invoice and copy cleared check for \$2000.00 (Plt's "4"), and copy of nine (9) photos (Plt's "5").

Procedural History

On July 25, 2018, the Plaintiffs commenced this Small Claim action against the defendant for breach of contract.² On October 10, 2018, the parties were scheduled to appear in court, but the case was adjourned to October 31, 2018. At the October 31st court conference, after the parties were unable to settle this case, the court scheduled this matter for a bench trial on December 5, 2018. On December 5, 2018, this matter proceeded to trial but was adjourned to January 30, 2019 for further proceedings where after both parties fully presented their cases and rested.

Facts

I. Testimony of Bonnie Lalji

The Plaintiff testified that she and the defendant entered into a written contract on or about April 7, 2018 wherein the defendant would renovate a one family home located at 7301 Briar Road, Philadelphia,

² On The Application To File Small Claims, the Plaintiffs noted that their claim was based on a dishonored check. However, in their brief statement of their claim, the Plaintiffs stated that the "contractor failed to perform as per

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Pennsylvania (“the home”) for \$12,000.00 ([“Contract”] Plt’s “1”). Plaintiff stated that she gave the defendant a \$6,000.00 deposit at the time she and the defendant signed the Contract (Plt’s “2”). The Contract further provided that the work would commence on April 9, 2018 and be completed on April 22, 2018. In addition, the Contract set forth in detail the work to be performed on the first and second floors of the home. Plaintiff testified that she called the defendant for a status update several times, but after she did not hear from him for five to six days, she and her husband decided to travel to Pennsylvania to personally speak with him and inspect the home. On or about April 14, 2018, the defendant informed the Plaintiffs that he wanted an additional \$3,000.00 in order to complete the job.

On or about April 21, 2018, the Plaintiffs traveled to the home and found three men who were painting and who appeared to be living there. The Plaintiff testified that she and her husband inspected the home and determined that roughly 25% of the work had been completed—specifically, three bedrooms were painted; the living room was painted; and the dining room was painted. However, Plaintiff stated that the kitchen upgrade was not completed; the popcorn ceilings were not removed; new sheetrock was not installed; the flooring was not sanded and varnished, new kitchen tiles were not installed, and new paneling,

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light fixtures and a faucet were not installed. Plaintiff asked one of the workers if he could contact the defendant by phone and he did so.

During the telephone conversation, Plaintiff complained to the defendant about the items of work that were incomplete and about her belief that the workers were living in the home during the renovation. Plaintiff testified that the defendant told her not to worry, that he would tell the workers to leave, and that he would refund her money. The workers packed up and immediately left the home. Thereafter, the defendant mailed the Plaintiffs a refund check dated May 10, 2018 which was returned by the bank for insufficient funds on May 11, 2018 (Plt's "3"). Plaintiff testified that she confronted the defendant about the returned check and he promised to pay her \$6,000.00 in cash. According to Plaintiff, the defendant arranged to meet their daughter in a Rockland County parking lot to pay her the \$6,000.00 deposit in cash, but he never appeared and continued to make excuses about when he intended to refund the \$6,000.00. In or about May 29, 2018, the Plaintiff re-deposited the refund check, but she was informed by the bank that the defendant had placed a stop payment on the check.

Plaintiff testified that she contracted the services of Nelson's Hardwood Floors for \$2000.00³ to complete the work that defendant left unfinished (Plt's "4"). Plaintiff also testified that she contracted the

³ Nelson's Harwood Floors Estimate Invoice indicated a total sum due of \$2100.00, but an attached copy of the check used to pay for the services was in the sum of \$2000.00.

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services of Perfect Painting Design Corp. to complete work on the first and second floors, but that she said never gave Perfect Painting the required deposit pursuant to the terms of the contract (Def's "A").

On cross examination, Plaintiff testified that she had become acquainted with the defendant through her husband, and that the defendant and her husband met each other through their employment. On April 7, 2018, Plaintiff testified that she met the defendant and discussed the work that was to be done at the home. She stated that her husband discussed most of the work details with the defendant and that her only conversation with him regarding the work details occurred on April 7. Plaintiff testified that although she drafted the terms of the contract, her husband discussed the details of the contract with the defendant. Plaintiff stated that the estimated start and completion dates were April 9, 2018 through April 22, 2018. She stated that if the work did not get completed for a few days after the completion date, she would accept that. She sent text messages to the defendant on April 13 and 18 and he failed to respond.

Plaintiff further testified that after defendant failed to respond to her text messages, she traveled to the home on April 22, 2018 and arrived there at approximately 11:00 a.m. She stated that she asked one of the workers at the home how much longer it would take to complete the work and the worker stated that he did not know. Plaintiff asked one of the workers to contact the defendant by phone and he did and handed the

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phone to the Plaintiff. Plaintiff said that the defendant started yelling at her and told her that he would not complete the job. Plaintiff said that she did not threaten to call the police on the defendant. Plaintiff said she owns five houses and that the subject property is about a half hour drive from another property that she owns.

Plaintiff submitted a contract from Perfect Painting Design Corp.⁴ and stated that she did not personally prepare this contract.

II. Testimony of Chandradatt Lalji

Plaintiff testified that the defendant sent him a video of the interior of the home prior to April 22, 2018, the completion date. But he and his wife decided to go to Pennsylvania to personally inspect the home. Plaintiff testified that he first met the defendant in 2007 at a job site. Defendant showed the Plaintiff photos of exterior renovations he had done, which Plaintiff thought were professionally done, but defendant never showed the Plaintiff any photos of any interior renovations he had done, although represented to the Plaintiff that he could also do interior renovations—paintings, upgrades, etc., as well. The defendant traveled to Pennsylvania and inspected the home so that he could quote the Plaintiffs a price. The defendant's initial quote was \$18,000.00 but he later reduced it to \$12,000.00. Plaintiff said that he and the defendant neither discussed the cost of transportation from New York to Pennsylvania for his

⁴ Perfect Painting Design Corp. contract was marked for identification as Defendant's Exh. "A" for id.

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workers, nor did they discuss the cost of a hotel stay for the defendants' workers. Further, the Plaintiff and defendant did not discuss whether the home would have hot water or electricity, although the house did have electricity.

Plaintiff testified that he is employed as a Facility Operations Manager and as such he works with contractors on a regular basis. He said that if the work was not completed by April 22, 2018, he would allow for a few more days beyond that date for the work to be completed. Plaintiff also testified that he asked the defendant if the work would be completed by April 22 and the defendant said "no." Plaintiff further stated that he did not hear any threats from his wife to call the police on the defendant. Plaintiff stated that he and his wife arrived at the home between 11:00 a.m. -12:00 noon and the workers left 2 to 3 hours later.

III. Direct testimony of Luis Yunga Pintado

Defendant testified that he is the owner of Luis General Contracting located at 1340 Main Street, Peekskill, New York 10566. As a contractor, he works on sidewalks, sheet rock, rock walls, floor and cabinets, molding and painting, and other general contracting work. Defendant testified that he met Mr. Lalji on a job site in Mount Kisco; he stated that Mr. Lalji would provide him with job assignments, and he would pay Mr. Lalji a referral fee. Defendant further stated that after Mr. Lalji would supervise and approve his work, after which the main office would pay him. Defendant stated that Mr. Lalji asked him to work on the home in

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Pennsylvania as a favor. Defendant said he thought Mr. Lalji was a good man but the problems that arose between them and which led to the instant lawsuit were instigated by Ms. Lalji.

Defendant testified that he agreed to do the following work at the home in Pennsylvania: paint the rooms in the home; paint and fix the railing; paint the kitchen and dining room; replace the cabinets and caulk portions of the home; varnish the floor upstairs and downstairs.

Defendant stated that Mr. Lalji asked him to travel to the home and inspect it and give him a quote, which he did. Defendant said his initial quote was \$18,000.00 but he lowered the quote to \$12,000.00 because Mr. Lalji gives him work assignments. Defendant stated that he included the costs of tolls, hotel and travel in his quote; he said he assigned 3 workers to work at the home. Defendant testified that he told Mr. Lalji that the job would take approximately 2 to 3 weeks to complete but that he did not give Mr. Lalji a specific completion date.

Defendant testified that he used compound on and sanded the upstairs walls; he said his workers started their work upstairs and worked their way down stairs. He stated that the cabinets were finished and that the floors would be addressed last. On the second floor, the Defendant testified that he sanded and painted the walls; he also painted the ceiling white and the walls taupe. Defendant stated that he removed the popcorn ceilings on the second floor, except one for area. Defendant also stated that he did not remove all the floor molding, and he did not stain and

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varnish the floors, which he wanted to address last. Defendant claimed he purchased all the materials.

Defendant testified that on April 22, 2018 he received a call from one of his workers who informed him that he was scared because Ms. Lalji was threatening to call the police on them. Defendant said he spoke with Ms. Lalji and she was very angry and threatened to call the police on him and his workers. Defendant was concerned because he did not have a license to work in Pennsylvania. Defendant said that he was forced to leave the job by Ms. Lalji; he said he wanted to complete the job because there wasn't very much work left to do.

On cross examination, Defendant testified that understands English but not very well. Defendant said that he did understand enough English to discuss the terms of the contract with Mr. Lalji. Defendant stated that he has been living in the United States for 12 years. Defendant testified that he performed work under many contracts during his 12-year residency in the United States, but none of those contracts was like the contract in this matter. Defendant stated that he assigned 3 workers to complete the work in the home. He said that his professional practice involves painting, sanding, and varnishing the floors, among other general contracting work. Defendant stated that he would have completed the job in 6 days. He said he inspected the job thoroughly before he quoted the Plaintiffs a price. When asked if it was his common practice to include hotel and transportation costs in his quotes, Defendant said he

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considers all his expenses when figuring a quote. Defendant said that he was doing the Plaintiffs a favor by agreeing to do the work at the home, given the fact that he was not licensed in Pennsylvania. Further, Defendant testified that he agreed to do the work at the home because he and Mr. Lalji had a good relationship. Defendant also said he did the Plaintiffs a favor by charging them only \$12,000.00 for the work. Defendant conceded that he agreed to remove his workers from the home and refund the Plaintiffs their \$6,000.00. However, Defendant stated that he wrote a refund check to the Plaintiffs but after he considered his costs, he could not refund their \$6,000.00.

IV. Closing Arguments

a. Defendant's closing argument

Defendant's counsel argued several points to the Court. First, the contract contained an estimated date for completion of the work at the home and that but for Plaintiffs' cursing at defendant's workers and threatening to call the police on them, defendant would have completed the project within a week or so after the contract completion date of April 22, 2018. Second, the defendant argues that the photographic evidence depicted the interior of a home that could have been the interior of one of the other homes the Plaintiffs own, and not the interior of the subject property. In other words, the photographs lacked corroboration and therefore, cannot be trusted. Third, defendant argues that since the Plaintiffs only presented one estimate marked paid from Nelson Hardwood Floors (Plt's "4"), their

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damages should only be limited to this one estimate. Fourth, defendant argues that the Plaintiffs' lack credibility because they deny that they prepared both the Contract (Plt's "1") and estimate that purportedly came from a contractor Perfect Painting Design Corp.,⁵ even though the style and format looked identical. Fifth, that the defendant's bounced refund check may have been the result of his last-minute realization that due to the expenses he incurred, he could not refund the Plaintiffs' money, and that the bounced check is not central to the dispute in this matter. Lastly, the testimony from the defendant that he called the Plaintiffs to inquire about the lack of hot water and heat was some proof that the parties agreed that the defendant's workers could reside at the house in Pennsylvania while working on the house.

b. Plaintiffs' closing argument

The Plaintiffs argued that this case is simply about a signed contract between the parties, a down payment made by the Plaintiffs to the defendant, and defendant's breach of the contract. Plaintiffs also argued that the defendant's workers were living in the house without their permission and that approximately 10% of the work had been completed at that time. Plaintiff argued that no materials were ordered, and the kitchen, the cabinets, the tiles and the lights were not replaced. Plaintiffs argued that since the workers informed them that the defendant instructed

⁵ The estimate provided by Perfect Painting Design Corp. was only marked for identification at this trial. Nevertheless, I will consider it assessing defendant's argument that the Plaintiffs lacked credibility in initially

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them only to paint and not do any other work,⁶ this was proof that the defendant had no intention of fulfilling his contractual obligations.

Plaintiffs argued that they threatened to call the police on the defendant after the check bounced in or about May 2018, contrary to defendant's claim that Ms. Lalji cursed at the workers and threatened to call the police on them on April 22, 2018. Plaintiffs further argued that the defendant breached the contract by instructing his workers to leave the house without any fault of or actions by the Plaintiffs. Lastly, Plaintiffs argued that they provided a contractor with a marked-up copy of the parties Contract in the interest of time and that explains the similarity of the style and fonts between the contractor's contract and the parties Contract.

Discussion

“A small claims court is generally ‘not bound by statutory provisions or rules of practice, procedure, pleading or evidence,’ and all that is required is that proceedings be conducted ‘in such manner as to do substantial justice between the parties according to the rules of substantive law’ (CCA 1804)” (*Buvis v. Buvis*, 38 Misc.3d 133[A] [App Term, 2d 11th & 13th Jud Dists 2013]); see also, *Williams v. Roper*, 269 A.D.2d 125, 126 [1st Dept. 2000]). Further, the determination of a trier of fact as to issues of credibility is given substantial deference, as a trial

denying that they prepared this estimate for the contractor Perfect Painting Design Corp.

⁶ The Plaintiffs claimed that the workers painted over the popcorn ceilings instead of removing them pursuant to the

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court's opportunity to observe and evaluate the testimony and demeanor of the witnesses affords it a better perspective from which to evaluate their credibility (see, *Vizzari v State of New York*, 184 A.D.2d 564 [2d Dept. 1992]; *Kincade v. Kincade*, 178 A.D.2d 510, 511 [2d Dept. 1991]). Unless the fact-finding trial court's conclusions could not be reached under any fair interpretation of the evidence, its determinations are usually left undisturbed by an appellate court (see, *Claridge Gardens v Menotti*, 160 A.D.2d 544 [1st Dept. 1990]). Even if an appellate court differs with a small claims court on an arguable point of fact or law, the appellate court may not reverse, absent a showing that there is not support in the record for the trial court's conclusions or that they are otherwise so clearly erroneous as to deny substantial justice (see *Payne v. Biglin*, 2 Misc.3d 127[A] [App Term, 9th & 10th Jud Dists 2003]). This standard applies with greater force to judgments rendered in the Small Claims Part of the court (*Williams v. Roper*, 269 A.D.2d at 126).

Pursuant to UCCA §1804, absent expert testimony, the submission of an itemized bill or invoice, receipted or marked paid, or two itemized estimates, is prima facie evidence of the reasonable value and necessity of the work performed (see, *McFaddin v. C.A. Putnam Constr.*, 23 Misc.3d 133 [App Term, 2d Dept. 2009]). In a breach of contract action, the Plaintiffs have the burden of establishing “(1) the formation of a

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contract between the plaintiff and the defendant, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damages" (*Brualdi v. IBERIA, Lineas Aereas de Espana, S.A.*, 79 A.D.3d 959, 960 [2d Dept. 2010]). Here, it is undisputed that the parties entered into a Contract for remodeling/construction work to be performed by the defendant at a home owned by the Plaintiffs in the State of Pennsylvania (Plt's "1"). It is further undisputed that Plaintiffs paid the defendant a deposit of \$6,000.00⁷ pursuant to the terms of the Contract (Plt's "2"). Did the Plaintiffs perform their obligations under the Contract? The defendant argues that the Plaintiffs breached their obligations under the Contract by ordering defendant's workers to leave the house before the completion of the job and by threatening to call the police on defendant's workers. The Plaintiffs deny those allegations and argue that the workers left voluntarily and that they did not threaten to call the police on them.

It is well settled that a covenant of good faith and fair dealing in the course of performance is implied in every contract (see, *511 W. 232nd Owners Copr. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002)). "This covenant embraces a pledge that neither party shall do anything which will have the effects of destroying or injuring the right of the other party to receive the fruits of the contract" (Id., quoting, *Dalton v. Educational*

⁷ Since the monetary jurisdictional amount of the Small Claims Part is \$5000.00 (UCCA §1801), Plaintiffs' claim was limited to \$5,000.00.

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Testing Serv., 87 N.Y.2d 384, 389 [1995]). The duty of good faith and fair dealing may be breached “when a party to a contract acts in a manner that, **although not expressly forbidden by any contractual provision**, would deprive the other party of the right to receive the benefits under their agreement,” (*Jaffe v. Paramount Communications, Inc.*, 222 A.D.2d 17, 22-23 (emphasis added)). However, “[a] claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim” (*Skillgames, LLC v. Brody*, 1 A.D.3d 247, 252 (1st Dept. 2003)). Here, Court finds that the Plaintiffs performed their obligations under the Contract—that is, they paid the contractual deposit and they made the premises available to defendant’s workers. The Court further finds that, based on the testimony and credible proof presented at trial, the Plaintiffs neither ordered the defendant’s workers to leave the house before the work was completed, nor did they threaten to call the police on defendant’s workers if they did not leave the house. In this Court’s view, the defendant voluntarily withdrew his workers from the house prior to the completion of the project over a disagreement with Mrs. Lalji regarding the progress of the work.

The Court finds that the Plaintiffs acted in good faith and dealt fairly with the defendant, but that the defendant did not reciprocate. The trial testimony and evidence proved that the defendant ordered his workers to leave the house before the work was completed (photos of

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incomplete work are depicted in Plt's "5-A" through "5-I") and that he informed the Plaintiffs he would refund the Contract deposit in full. The undisputed trial evidence shows that the defendant tendered a refund check in the sum of \$6,000.00 to the Plaintiffs that was returned by the bank for insufficient funds (Plt's "3"). Thereafter, the defendant placed a stop payment on the refund check. That defendant would offer to refund 100% of the Contract deposit to the Plaintiffs is, in this Court's view, inconsistent with his claim that the Plaintiffs ordered his workers to leave the house prior to the completion of the work under threat that the police would be called on them if they did not. Hence, the Court finds that the defendant breached the Contract by essentially abandoning the house before the work was completed.

The Court now turns to the issue of damages. Even in the Small Claims Part of the Court, proof of damages is an essential element of a prima facie case (See, *Estevez v. Skorishchenko*, 33 Misc.3d 138 [A] [App Term, 2d, 11th & 13th Jud Dists 2011]). Further, the Court cannot base its damages award on an invoice which was not "receipted or marked paid" (see *Santoro v. Rizzo*, 24 Misc.3d 127 [A] [App Term, 2d Dept. 2009]; UCCA §1804). Pursuant to UCCA §1804, absent expert testimony, the submission of an itemized bill or invoice, receipted or marked paid, or two itemized estimates, is prima facie evidence of the reasonable value and necessity of the work. Here, the Plaintiffs presented one invoice [Nelson's Hardwood Floors] receipted paid with a copy of

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the cashed check attached in the sum of \$2,000.00 (Plt's "4"). The Plaintiffs testified that they paid the contractor \$100.00 in cash as a deposit. The Court notes that the invoice total is \$2100.00. The Court credits the Plaintiffs' testimony that they paid the contractor a \$100.00 deposit. Since the Plaintiffs presented proof of damages in the sum of \$2100.00, the Court awards Plaintiffs the sum of \$2100.00 plus costs in the sum of \$20.00.

Based on the aforesaid, it is

Ordered that the Plaintiffs be awarded a judgment in the sum of \$2100.00 plus \$20.00 cost for a total judgment award of \$2120.00.

This constitutes the decision and order of the Court.

Hon. Reginald J. Johnson
Peekskill City Court Judge

DATED: Peekskill, New York
February 11, 2019

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