STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.		**SUPERIOR COURT**
DANIEL LEE	:	
	:	
VS.	:	**C.A. No. WC 2017-141**
	:	
LISA A. BEAUDOIN and TOM BEAUDOIN	:	
	:	
VS.	:	
	:	
CAMBRIANE GROUP, LLC, d/b/a ARCHADECK OF WEST RI	:	

DECISION

LANPHEAR, J. This matter was tried before the Court, jury-waived, on November 7 and 8, 2017. Each of the parties testified, as well as James Beane, a contractor from South Windsor, Connecticut. Mr. Beane had installed vinyl siding for thirty-eight years, and was qualified as an expert to testify.

FINDINGS OF FACT

Lisa and Tom Beaudoin own a single family home on Benson Avenue in Westerly, Rhode Island. They hired Mr. Lee to complete several home improvement projects on the property. In January 2015, they contracted with Daniel Lee to replace the existing vinyl siding on the home with Novik vinyl cedar shingles. The project would also include some insulation, gutters, and other work. The parties stipulated that Joint Exhibit 1 represents the existing contract between the parties.[1] Novik is a brand name of Cedar Shake vinyl siding. Novik provides a lifetime limited warranty on its projects

[1] The parties agree on Joint Exhibit 1, but agreed that the original document was dated on or about January 9, 2015. Mr. Lee operated under the names of Archadeck and Cambriane Group.

"provided that they are installed in accordance with the rules of art and instructions provided by Novik." Ex. D at 1. The warranty specifically excludes "damage arising from improper, defective or non-adherence to the rules of art or to the prevailing and building and construction codes or Novik instructions . . ." Ex. D at 3. Specific instructions on installation are included on each package of Novik shingles.

Work was commenced and delayed because of the installation of windows and other work on the house. Most of the work was completed by June 26, 2015, but each of the parties wanted an opportunity to have independent inspectors review the work. On September 11, 2015, final payment was requested by Mr. Lee to the Beaudoins. The parties had agreed that Mr. Beaudoin would pay a lumber yard directly. In any event, Mr. Lee claimed the balance due under the contract to be $7191. The parties further stipulated that the final payment was not made.

Although Mr. Lee had negotiated the contract, all of the work was done by a subcontractor for him and the subcontractor's son. Mr. Lee went to the property and reviewed the work being done almost every day, but the subcontractor spent the majority of the time at the property.

Mr. Lee acknowledged that it is a goal, in installing vinyl siding, to make the installation sufficiently tight so water does not penetrate it. Mr. Lee also acknowledged that he did not install all of the soffits at the roofline, as the contract indicated, but believed that some portions of it would be replaced in a separate project. He claimed he provided a $400 credit for the soffits which were never replaced.

In installing the siding, ladders were used. Mr. Beane established that ladders are not to be used as they may damage the finish of the siding, though no such damage was

demonstrated on the Beaudoin house. Mr. Beane established that although some starter strips were used at the bottom or base of the shingles, they were not Novik starter strips and the shingles were not clicked into the bottom of the shingles. Accordingly, the bottom shingles (the first layer installed) wobble when they are pulled, causing the shingles above them to wobble. This is inconsistent with the installation instructions from Novik. To repair the bottom shingles all of the interlocking shingles above them need to be removed.

Mr. Beane testified that it appears the shingling project was not thought out. As houses are not perfectly square, the deviations can be hidden by planning the entire layout of the shingles in advance. As that was not done here, the defects are more evident.[2] Mr. Beane established that there is one sheet of shingles falling off the house (Ex. U), even though the work was completed just two years ago.

Mr. Beane noted that the shingle strips or sheets should be applied uniformly, nailing the shingle in the center first, and then leveling it and nailing the sides in the provided holes. He demonstrated that not all shingles on the project were applied parallel to one another or with the lines of the house, and he reasoned that the subcontractor did not follow the instructions. (Exs. E, G, J, L, GG).

Mr. Beane noted large, inconsistent gaps between the strips of the siding. While most shingle squares appear uniform because they come from a large sheet of vinyl, there are larger, noticeable gaps throughout siding (Exs. F, G, N, O, V, Z, CC, GG). He concluded that this resulted from the application of the shingles in different temperatures, and not providing for the expansion of the shingles in different temperatures. He noted

[2] To support much of his testimony, Mr. Beane presented a variety of photographs of the house, which are exhibits.

that Novik includes a temperature gage in each box of shingle sheets, so the distance between the sheets can be set according to the temperature with the gage. Not using this gage was a deviation from the instructions and constituted improper workmanship.

Mr. Beane, through the use of photographic evidence, established that the corner pieces were not tucked into the "J strips" provided by the manufacturer, so the shingles are not watertight. (Exs. E, J, S, Y, AA). There are similar noticeable gaps beneath the windows, around the gutters, around doors, and at other corners of the house. (Exs. K, N, Y, Z, CC, DD) Some of the J strips are uneven.

Mr. Beane explained that when shingling a house, holes are cut by the installer into the shingling to provide for lights, spigots, showerheads, hoses and other conduits from the house. Through the photographs he showed a number of cuts which were not sealed and left exposed to the weather. (Exs. P, R, T, Y, Z, AA, BB, EE, FF). While Mr. Lee later referred to this as a "small fix," and in his Post-Trial Brief as "secondary issues" (Post-Trial Brief 1), it is noteworthy that the property has been left with those openings for an entire winter.

Mr. Beane described how there were a number of soffits or corner pieces that were not capped, not sealed, cut off at awkward heights, and not flashed properly. (*e.g.*, Exs. H, I, L, Q, R, W, DD). While some of these may be purely aesthetic, others may lead to water seepage, mold, a lack of insulation, and harm to the house. They constitute poor workmanship. He noted the mold already on the house (Ex. T). Some of the lack of capping was done at a very low point of the house where snow would be likely to invade the siding.

He concluded that to fix the errors, all of the vinyl should be removed. The starter strips are applied to the first row of shingles, and all others are clicked in afterward. As it would be difficult to determine which shingles were still useable, and all of the shingles for a single house should come from the same manufacturers' lot to ensure uniformity, he reasoned that they should all be replaced. He would charge $28,400 to do such a project, which he testified was a fair and reasonable price.

Presentation of the Witnesses

Credibility of witnesses is always a concern for a finder-of-fact. However, in this action, there were few, if any, disagreements of fact. The parties agreed that there was no formal written contract between them, but also acknowledged that Joint Exhibit 1 fairly documented the agreement between them.

Mr. Lee represented himself at trial, and the Court allowed him to testify in the narrative. Mr. Lee was articulate and well-prepared. While not always knowledgeable in courtroom rules or procedure, he was cooperative and thoughtful. The presentation became tenser when the Defendants' case against Mr. Lee was presented, as he did not appear to have initiated any discovery over the past two years. Still, he remained courteous. His testimony was consistent, not only with itself, but in large part it was consistent with the testimony of the Beaudoins. The Court found Mr. Lee to be credible.

The Court also found Mr. and Mrs. Beaudoin to be credible. They did not dispute that they were upset with the delay, and Mrs. Beaudoin even acknowledged that she raised her voice and needed to apologize to Mr. Lee. They acknowledge that they did not always talk with Mr. Lee in person as they were often in Connecticut. They did not dispute that they were concerned at the conclusion of the project and that they suddenly

stopped communicating with Mr. Lee, when they had previously told them they were trying to get an inspection. Ms. Beaudoin was called to the stand on three occasions by Mr. Lee, and while not necessarily pleased by this, she was cooperative, frank, respectful, consistent and responsive to all of his questions. Mr. Beaudoin testified briefly, but he was also consistent and cooperative. Mr. and Mrs. Beaudoin were both credible.

Mr. Beane was an expert witness from Connecticut. While prepared, he was highly familiar with the process of installing shingles, including this type of vinyl shingles. He limited his testimony, concluding that some items were poor workmanship but would not limit the application of the warranty. He did, however, note that other defects could limit the application of the warranty. He was critical of the use of the ladder on the project, but acknowledged that he saw no resultant harm from its use. Even Mr. Lee acknowledged Mr. Beane's expertise in his field. Mr. Beane was experienced in his trade, well spoken, responsive, deliberative, and on point. He was firm and consistent in his findings, and able to explain each conclusion. He was cooperative with all parties. He was highly credible.

ANALYSIS

Issues Raised Post-Trial

In his Post-Trial Brief of November 14, 2017, Mr. Lee raises a number of new arguments. He was given an opportunity to provide a written final argument at the close of the case. Even though Mr. and Mrs. Beaudoin had rested and counsel delivered a final argument, the Court then provided Mr. Lee with more of an opportunity to gather his thoughts in writing. The Court granted this opportunity as Mr. Lee represented himself. Instead of summarizing his case, he attempts to raise a series of new issues.

First, he claims that he should have been given an opportunity to depose the Defendants' attorney to determine what evidence he would present. Mr. Lee scheduled this deposition after he pressed for a trial and the case had been scheduled for a trial date certain. It is unclear when or where the deposition was to be as he submitted no Notice of Deposition and never moved to compel. Apparently, Mr. Lee had done no discovery in the prior twenty months that the case had been pending. No prejudice was shown.

Second, Mr. Lee tried to file more evidence post-trial. As Plaintiff, Mr. Lee had rested his case on November 7, 2017 at about 2:00 p.m. He was allowed to present a rebuttal case and rested again on November 8 at about 4:00 p.m. To attempt to file invoices, a technical manager's review, and emails after the trial is not only prohibited by the rules, it is patently unfair.[3] The evidence is closed and no new evidence will be considered.[4]

Third, Mr. Lee offers a neutral inspector and suggests that he be allowed to make some corrections now to the house. This Court will not mandate mediation at the close of the trial, prior to a Decision. Attempts to resolve the case prior to trial and during trial (on the record) were fruitless.

Finally, Mr. Lee suggests that he was prejudiced by the absence of Mr. Beaudoin during the first day of trial. Mr. Lee presented his case without objection, and never called Mr. or Mrs. Beaudoin in his case in chief before resting. In fact, it was the Court, *sua sponte*, who raised the issue of Mr. Beaudoin's absence and insisted that he present

[3] It appears that all of these documents were available to Mr. Lee prior to the trial, but for Exhibit E to the Post-Trial Brief.

[4] Even after his post-trial brief and the deadline for briefing passed, Mr. Lee has filed photographs, then a "Post-Trial Addendum." He is attempting to insert hearsay statements from a third party after the trial, and he does not include certifications to adverse counsel on his new filings. The Court will not consider these documents.

himself the next day. On the second day of trial, Mr. Lee called Mr. Beaudoin and Ms. Beaudoin to the stand, and examined each of them as rebuttal witnesses. He never objected to the trial procedure. To default a defendant now, after the Defendant has appeared and testified, and post-trial, is unfair. Mr. Lee's request for a default is denied.

Performance of the Agreement

Mr. Beane's testimony was largely uncontroverted. He revealed numerous incidents of improper workmanship. On many occasions, he revealed that the resultant defect would "void the warranty" or make recovery under the warranty unlikely.

Clearly some of the defects would be easier to fix than others, such as the caulking and capping. While it stands to reason that this work may have been done promptly if it were brought to Mr. Lee's attention during or promptly after the installation, other problems were much larger and troubling. Still, many of the issues should have been evident to Mr. Lee on his routine visits to the home, and his inspection upon completion. Holes in the shingles were not caulked, J strips and flashing was left loose, shingles were not evenly spaced—surely this was noticeable to someone with decades of experience in shingling.

The failure to use the starter strips along the base of the siding resulted in shingles being loose or flexible on the bottom. As the shingling is started at the base and the shingle sheets click into each other as they move up the house, the entire panel was left loose.

Leaving noticeable gaps in the shingle sheets as they were attached next to one another is just as concerning. There is a temperature scale in the packaging, so this problem is avoidable. These are problems which can only be remedied by removing an

entire series of shingles, if not the entire side. Not even Mr. Lee suggested that the shingle sheets, once removed, could be rehung. If the shingles were not nailed, cut or worn improperly, surely some of them would need to be replaced. To do so, a new lot of shingles would need to be ordered. There are problems at different points all over the house, and a goal of acquiring these shingles is to obtain a lifetime guarantee. Accordingly, it is far more appropriate, at this point, to replace all of the shingles.

The Contract Claim

Mr. Lee successfully established a contract claim. He demonstrated that there was an offer, and an acceptance of the offer, evidenced by Joint Exhibit 1. He established that each of the parties gave consideration (Mr. and Mrs. Beaudoin made the initial payments to Mr. Lee, and Mr. Lee enlisted a subcontractor who began to install the siding). Each of the parties had a mutual understanding of the terms of the contract, and assented to those terms. *See R.I. Five v. Med. Assocs. of Bristol County, Inc.*, 668 A.2d 1250, 1253 (R.I. 1996). Although the contract was not signed, it is still valid. *Bailey v. West*, 105 R.I. 61, 249 A.2d 414 (1969) approving of a contract implied in fact. No party disputed the existence of a binding contract.

As a contractual relationship existed, the next step is to determine which party, if any, breached the agreement. In this action, each party contends that the adverse party breached the agreement.

Pursuant to the terms of Joint Exhibit 1, the payments from the Beaudoins to Mr. Lee are frontloaded, that is, he was to receive the initial two payments before any shingles were attached to the house. Thirty percent was to be paid at signing, and another forty percent was to be paid "when shingles on site." There is no dispute that the

Beaudoins made these payments or paid the cost of the shingles directly. Hence, they were not in breach before the final payment was due and they appear to have been performing their side of the contract in good faith.

Though the cause is not clear to the Court, the relationship between the parties grew more fractured as the shingles were going up. Mr. Lee expressed concern about the Beaudoins not being on site regularly, but it was clear that they resided in Connecticut and this home was used more frequently in the summer. They regularly corresponded by emails, which seemed to be acceptable. The Beaudoins were not on site regularly to see that the shingles were being installed incorrectly. Still, this did not affect Mr. Lee's duty to perform the contract. Mr. Lee was on site regularly, saw how the shingles were being installed and should have seen many of the errors, particularly before pressing for the final payment. It is Mr. Lee who breached the contract with the Beaudoins by failing to install the shingles with proper workmanship. He also failed to install the shingles pursuant to the manufacturer's instructions; the shingles are installed inadequately. By a preponderance of evidence the Court infers that the shingles are unlikely to be protected by the manufacturer's lifetime warranty. Mr. Lee breached the contract.

Damages

Our Supreme Court has held:

> We adhere to the rule enunciated in *DiMario v Heeks*, 116 R.I. 44, 46, 351 A.2d 837, 838 (R.I. 1976) that a "contractor cannot recover on a building contract unless he has substantially performed and that any lesser degree of performance will not suffice." . . . Whether there has been substantial performance is a question of fact for the jury to resolve relying on all the relevant evidence. *Nat'l Chain Co. v. John J. Campbell*, 487 A.2d 132, 135 (R.I. 1985).

If there is a lack of substantial performance, the other party may recover the contract price, less the cost needed to remedy the defect. *Ferris v. Mann*, 99 R.I. 630, 210 A.2d 121 (1965). However, this formula should not be used if the contract work is worthless.[5] *National Chain* also set forth the general rule for damages for a breach of contract:

> The underlying rationale in breach-of-contract actions is to place the innocent party in the position in which he would have been if the contract had been fully performed. *George v. George F. Berkander, Inc.*, 92 R.I. 426, 430, 169 A.2d 370, 372 (1961).

The innocent parties here are Mr. and Mrs. Beaudoin, who relied on the independent contractor to install the siding correctly, and to be able to obtain a lifetime warranty at the end.

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[5] The doctrine of substantial performance recognizes that it would be unreasonable to condition recovery upon strict performance where minor defects or omissions could be remedied by repair. This formula is inappropriate, however, in situations in which the contractor's performance is worthless and the work has to be redone completely. In these situations, the contractor is liable for the cost to the owner of having the job redone. *Nat'l Chain Co.*, 487 A.2d at 135.

CONCLUSION

Judgment shall enter for Mr. and Mrs. Beaudoin for the contract count in Plaintiff's complaint, and the breach of contract count in the Defendants-Counterclaimants' counterclaim. The Beaudoins are awarded damages of $28,400 plus interest and costs.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Daniel Lee v. Lisa A. Beaudoin and Tom Beaudoin v. Cambriane Group, LLC, d/b/a Archadeck of West RI
CASE NO:	WC 2017-141
COURT:	Washington County Superior Court
DATE DECISION FILED:	November 21, 2017
JUSTICE/MAGISTRATE:	Lanphear, J.

ATTORNEYS:

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For Defendant:	Michael P. Lynch, Esq.