IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

A&A Air Services, Inc.	:	
	:	C.A.#04-08-033
Plaintiff below/Appellant,	:	
	:	
v.	:	
	:	
JANE RICHARDSON	:	
	:	
Defendant below/Appellee.	:	

Joseph C. Raskauskas, Esquire, attorney for Plaintiff below/Appellant
James F. Waehler, Esquire, attorney for Defendant below/Appellee

Submitted: June 14, 2006
Decided: August 17, 2006

DECISION AFTER TRIAL

In this action the Court is called upon to determine whether the Defendant, Ms. Jane Richardson ("Defendant"), breached her contract with the Plaintiff, A&A Air Services, Inc. ("Plaintiff"), when the contract was terminated on or about July 11, 2002 and the Defendant failed to tender the final payment due upon completion of the installation of a geothermal heating and cooling system. Alternatively, the Court is asked to decide whether the Plaintiff failed to properly install the system, thus breaching the contract and causing the Defendant damages. The Court is also being asked to calculate appropriate damages. The Court conducted a trial and took testimony and evidence on June 14, 2006. This is the Court's decision.

FACTS

The Court makes the following findings of fact after reviewing the testimony and exhibits submitted. The parties entered into a written contract on or about December 10, 2001 whereby the Plaintiff agreed to install a geothermal heat pump system in the Defendant's residence in Fenwick Island, Delaware for a total price of fourteen thousand eight hundred seventy five dollars. The residence at issue contains a ground floor, a first floor and a second floor. Carl Madden, an employee of the Plaintiff, initially consulted with Stanford Moore, who lives with the Defendant, and provided an estimate based upon the blue prints and the specifications submitted by Moore. Each of the witnesses who worked on the project testified that they frequently dealt directly with Mr. Moore throughout the course of performance. Specifically, Mike Hall stated that when he initially met with the Defendant, Mr. Moore and Mr. Gregory Allen on January 8, 2002, the Defendant told him that Mr. Moore would be "taking care of things from now on."

The contract provides that the Plaintiff was to install a Water Furnace Geothermal Heat Pump System on the first and second floors. Specifically, the Plaintiff was to install a Premier 2 Water Furnace pump on each floor as well as the necessary pipe loops, thermostats, air cleaners, returns, registers and duct work. The contract price included the cost of installing bore holes, so that water could be pumped to generate the system. The Defendant agreed to pay the contract price in installments. $3,718.75 was due upon acceptance of the contract, completion of the loop installation, completion of rough in, and completion of the installation. The Defendant tendered full payment for each of the first three installations, but did not make the final payment. (Pl. Ex. 2.)

Although the written contract itself does not state the number of wells that would be necessary, the parties concur that the Plaintiff originally informed the Defendant that the system would require four ¾-inch wells with an approximate depth of 180 feet. Mike Hall, co-owner of Somerset Well Drilling, Inc., which was hired to drill the wells for the project, testified that upon inspection of the underlying utilities, he found that he could not install the originally planned four wells because one of the wells would lie too close to the Defendant's septic system. To resolve the situation, he drilled three 1-inch wells with an approximate depth of 240 feet. (Pl. Ex. 9.) The cost of drilling the three 1-inch wells at 240 feet exceeded the cost of drilling four ¾-inch wells at 180 feet by approximately $720. The Plaintiff agreed to absorb the additional cost in order to preserve the relationship with the Defendant.

The Court heard testimony from David Hoffman, who has significant experience as a Mechanical Design Engineer with respect to geothermal and HVAC systems. Hoffman testified that the Plaintiff failed to install the same Water Furnace pumps that were promised pursuant to the terms of the contract. The contract provided that on the first floor, the Plaintiff agreed to include a Premier 2 Water Furnace pump, model number P022T111NAD. On the second floor, the Plaintiff agreed to install a Premier 2 Water Furnace pump, model number P019S101NAD. (Pl. Ex. 2.) According to Hoffman's report, the Plaintiff actually installed a Premier Water Furnace pump, model number P022TR111NADSSA on the first floor and Premier Water Furnace pump, model number P019D10NSSA on the second floor. (Def. Ex. 1.)

Tom Atkinson also testified before the Court. He is employed by Water Furnace International as a Manufacturing Representative and he examined the system at the Defendant's residence. After reviewing

Hoffman's report and the contract at issue, Atkinson testified that the pumps installed in the Defendant's home were the same as the pumps proposed in the contract. He indicated that the name of the product had changed from "Premier 2 Water Furnace Pump" to "Premier Water Furnace Pump" to reflect an upgraded model. Furthermore, the model numbers were different partly due to an apparent typo in the report, and to indicate whether the equipment was top-loaded, right-handed or left-handed. Atkinson also stated that there was no difference in capacity or substance between the equipment specified in the contract and that which was installed in the Defendant's residence.

Mr. Chris Allen and Mr. Corey Milligan were both employed by the Plaintiff and worked on the system installed at the Defendant's residence. Each testified that Mr. Moore continually observed them as they installed the system. Additionally, they testified that when Mr. Moore was dissatisfied with a certain portion of the installation, they would alter their work to accommodate his requests. Gregory Allen, the owner of the Plaintiff-company, also testified that upon Mr. Moore's request, the Plaintiff installed a split system because Mr. Moore did not want the pump installed in a particular closet in the residence. The Plaintiff installed an American Standard air handler, which, according to Mr. Atkinson, is recommended by Water Furnace International because Water Furnace does not manufacture air handler equipment.

In early July 2002, the Plaintiff had completed most of the installation. Chris Allen testified that the work left to be completed consisted of installing registers and grills, which balance the system. He also stated that construction was ongoing in the residence, as the Defendant's home was in the midst of being remodeled. It is unclear

whether the Defendant or Moore requested that the system to be turned on; however, the system was activated. The contract provides that "[t]his unit may not be used for heating or cooling until job is completed." On or about July 11, 2002, the Plaintiff received a service call from Moore, wherein he complained that the system was not properly cooling the residence. Chris Allen reported to the residence in response to the call. He testified that the home was cold when he entered it and despite hot July outdoor temperatures, the temperature in the home registered at 67 degrees. Although the thermostat was set at 54 degrees, Allen determined that the system was operating properly because the capacity of geothermal systems are affected by external temperatures. Upon further inspection of the unit, he determined that the air filters were clogged with construction residue, and that the system had been tampered with.

Soon after Chris Allen inspected the system, Gregory Allen and Atkinson went to the Defendant's residence and met with Moore to further inspect the system. At this meeting, an altercation ensued. Moore became physically abusive toward Atkinson and dismissed the two men from the residence. After this dispute, the Plaintiff sent the Defendant a final bill for the work completed, subtracting $500 for work that remained to be finished. The Defendant refused to pay this final bill.

The Defendant testified that she did not believe the system was adequate because when the system ran, the temperature was inconsistent throughout different rooms in the home. She also presented documentation and other witnesses to support her position that the system was not functioning properly.

DISCUSSION

To establish a prima facie case of breach of contract, the Plaintiff must prove three things. First, it must show that a contract existed. Second, it must establish that the Defendant breached an obligation imposed by the contract. Finally, it must prove that it suffered damages as a result of the Defendant's breach. *VLIW Technology, LLC v. Hewlett-Packard Company*, 840 A.2d 606, *612 (Del. 2003).

There is no dispute that the parties entered into a binding contract for the installation of a geothermal heating and cooling system. (Pl. Ex. 2.) Thus, the remaining issues before the Court are whether the Defendant committed a breach of the contract and, if so, to what extent the Plaintiff is entitled to damages. Likewise, the Court must determine whether the Defendant has met her burden of establishing the same elements of her breach of contract counterclaim.

I. The Plaintiff's Claim

The Plaintiff claims that the Defendant breached the contract when she failed to pay the final installation pursuant to the contract. The Plaintiff concedes that some items remained to be completed on the system when it sent the final bill to the Defendant. Such items related to the installation of grills and registers, which would balance the system. Gregory Allen explained that the items were not finished because after the altercation in July 2002 he did not want his employees to go back to the residence. To compensate the Defendant for the unfinished work, the Plaintiff decreased the final bill by $500. (Pl. Ex. 3.)

Mr. Moore was the Defendant's Agent

Some dispute remains as to whether Moore acted as an agent of the Defendant for purposes of this breach of contract dispute. After considering

all of the evidence submitted, I find that Moore was an agent of the Defendant and that he had apparent authority to act on her behalf with respect to the contract with the Plaintiff.

To establish liability on a theory of apparent authority, the claimant must establish that it relied on an indicia of authority that was originated by the alleged principal, and that such reliance was reasonable. *Billops v. Magness Const. Co.*, 391 A.2d 196, (Del. 1978). Hall testified that at his initial meeting with the Defendant, she openly stated to him and to Gregory Allen that Moore would be "taking care of things from now on." I find that this statement created an indicia of authority, which originated from the Defendant.

Additionally, Moore was actively involved throughout the term of the relationship between the Plaintiff and the Defendant. He initiated the relationship between the parties by calling the Plaintiff's estimator, Madden, to provide an estimate for the system. Additionally, employees of the Plaintiff testified that Moore would not let them work in the residence unless he was home to observe their work, and that he requested and consented to changes and alterations as the installation project continued. Moore himself testified that he was the "point person" on the project, as he was overseeing the total remodel of the home. Taking all of the foregoing into account, the Court finds that the Defendant held Moore out as her agent and that the Plaintiff reasonably relied on his authority to act as the Defendant's agent.

The Defendant Breached Implied Covenant of Good Faith and Fair Dealing

Gregory Allen and Atkinson testified that they went to the Defendant's residence to meet with Moore in July 2002 to further investigate his claim that the system was not properly functioning. During the course of that meeting Moore became physically abusive toward Atkinson. The

Defendant intervened at some point. Moore then dismissed the men from the residence. Moore admitted that the incident occurred and that he was later criminally charged for the altercation. Gregory Allen testified that after the incident occurred, he would not permit his employees to return to the residence to finish installing the system for fear of placing them at risk for physical injury. The question arises whether Moore's conduct, acting as the Defendant's agent, breached the contract at issue.

Delaware contract law imposes an implied covenant of good faith and fair dealing in every contract. *PAMI-LEMB II Inc, et al. v. EMB-NHC, LLC*, 857 A.2d 998, 1016 (Del. Ch. 2004). This implied covenant 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract.' *Id*. quoting *Wilmington Leasing, Inc. v. Parrish Leasing Co., LP*, 1996 WL 560190, *2 (Del. Ch. 1996). The general principal under Delaware contract law is that the agreement between the parties controls, and that courts should refrain from rewriting or supplementing the agreement. *Cincinnati SMA L.P. v. Cincinnati Bell Cellular Sys.*, 708 A.2d 989 (Del 1998). Thus, the application of the implied covenant of good faith and fair dealing is a judicial endeavor that is typically approached with caution. *Id*. The Delaware Supreme Court has provided that cases governed by the principles of good faith and fair dealing should be rare and implied only where it is necessary to honor the reasonable expectations of the parties. *Id*. After careful consideration of the facts, I find that the contract at issue includes no express term that can be directly applied to the physical altercation that occurred, and that implication of the covenant is indeed necessary to protect the parties' reasonable expectations.

The purpose of the implied covenant is to protect the spirit of the agreement between the parties when one party uses underhanded or oppressive tactics to deny the other party the benefit of its bargain. *Id*. Thus, it requires the Court to examine the express terms of the contract and infer the spirit of the agreement. *Chamison v. Healthtrust, Inc.*, 735 A.2d 912 (Del. Ch. 1999), *aff'd* 748 A.2d 407 (Del. 2000). Based upon that inference, the Court then determines what the parties would have bargained for to control the dispute between them, had the dispute been foreseeable at the time the contract was created. *Id*. The Court then implies that covenant into the express agreement and treats the breach of the implied covenant as a breach of the contract. *Id*.

The contract now before the Court expressly required the Plaintiff to install a geothermal system in the Defendant's residence. Had the parties foreseen that the Plaintiff's employees might be threatened with physical harm, they would have included a provision that required the Defendant to keep the residence in a reasonably safe condition so as to protect those employees from that type of danger. The Court finds that the Defendant failed to maintain the residence in a reasonably safe condition and acted unreasonably when her agent, Mr. Moore became physically aggressive. For these reasons, the Court finds that the Defendant breached its implied covenant of good faith and fair dealing, and materially breached her contract with the Plaintiff.

<u>The Plaintiff Substantially Complied with the Contract</u>

To recover damages for breach of contract the Plaintiff must establish that it substantially complied with the provisions of the contract. *Emmett Hickman Co. v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571 (Del. Super. 1969). The Defendant contends that the wells were not properly installed,

the equipment installed was different than that specified in the contract, and the system installed did not function properly. In support of her allegations, the Defendant presented evidence in the form of documentation and expert testimony. Additionally, the Plaintiff concedes that approximately $500 worth of finishing work remained to be completed at the time of the Defendant's breach.

The Defendant presented two witnesses who testified as to the adequacy of the wells both in number and in depth to support the system. Ron Witke, President and owner of RW Heating and Air, testified that he examined the Defendant's property and the geothermal system on or about August 13, 2003. At that time he concluded that in addition to the three wells already installed, two additional closed-loop wells would have to be installed in order to make the system function properly. (Def. Ex. 3.) According to Witke those wells were indeed installed at the Defendant's residence. Hoffman also assessed the geothermal system. On the stand, he concluded that in addition to the three original wells, and the two wells drilled in accordance with Witke proposal, two more wells at a depth of 250 feet would be necessary for the system to run adequately. Thus, the Defendant's witnesses provided inconsistent testimony with respect to how many wells would be adequate to support the system. Additionally, Hoffman admitted that he relied on generalized numbers and knowledge of the eastern shore of Maryland and Delaware to determine the capacity of the system overall and the wells individually.

Hall installed the original three wells at the Defendant's residence. He testified that he is familiar with the local conditions of Fenwick Island that contribute to the capacity of wells when installed as part of a geothermal system. He reviewed Hoffman's report on the stand and explained that the

numbers used in the report were not precisely accurate, which would greatly alter the overall conclusions. Specifically, the report indicates that the three wells installed were only 180 feet deep. This does not take into account that the actual depth was 240 feet. (Pl. Ex. 9.) Hall also testified that the boar diameter actually installed was wider than the number relied on by Hoffman. A wider diameter would give each well more cooling capability. Additionally, Hall testified that special clay is required in Delaware, which further insulates the piping and contributes to the cooling capacity. The report does not rely on the use of clay. The report also factors the ground temperature as 62 degrees. On rebuttal Hoffman admitted that he has never tested the ground temperature in Fenwick Island. Hall testified that the actual ground temperature in Fenwick Island is 58 degrees. Lastly, the report relied on a thermal conductivity of 1.00 Btu/hr.-ft.-degrees F; the actual thermal conductivity measurement for Fenwick Island is 1.35 Btu/hr.-ft.-degrees F. After reviewing the evidence, the Court finds Hall's testimony as to the adequacy of the wells to be persuasive. The Court finds by a preponderance of the evidence that the three wells drilled at 240 feet were sufficient to support the system in the area where it was located.

The Defendant also claims that the equipment actually installed in her home deviated from that which was proposed in the contract. She again relied on Hoffman to support her position, who testified that the model numbers of the equipment installed was different than the model numbers proposed and accepted in the contract. The Court notes Hoffman's observation, but it relies heavily on the testimony of the Manufacturer Representative, Atkinson, for purposes of determining whether there was a substantive difference between the proposed and installed equipment. After reviewing the different equipment and the relevant model numbers,

Atkinson stated that the "Premier Water Furnace Pump" was the updated version of the "Premier 2 Water Furnace Pump." Furthermore, he testified that there was no difference with respect to capacity and substance between the equipment provided for in the contract and the equipment installed. Additionally, Atkinson testified that Water Furnace International does not manufacture air handler units, but does recommend the use of American Standard air handler units in conjunction with its equipment. After reviewing the evidence, the Court is satisfied by a preponderance that the equipment provided for in the contract was the same as that which was installed.

The Defendant testified before the Court at trial. She stated that she believed the system did not function properly because the temperature was inconsistent from room to room in the residence. Chris Allen testified that the work which remained to be completed at the time of the Defendant's breach included the installation of grills and registers. He further provided that this part of the installation would balance the system, or help maintain consistent temperatures throughout the house. After hearing the Defendant's complaints about the system, I find that had it not been for the Defendant's breach, the Plaintiff could have re-entered the residence to balance the system. Furthermore, evidence that the Defendant operated the system while construction was ongoing, despite the plain language of the contract, likely contributed to the problems that she experienced.

In her closing argument, the Defendant also provides that the duct work installed by the Plaintiff was insufficient to support the system. (Def. Ex. 1.) The report indicates that duct work was run to the ground floor entry way or foyer for cooling purposes. Significant evidence was submitted regarding whether the area in the ground floor foyer was meant to be

included in the space heated and cooled by the geothermal system. The contract itself does not mention the ground floor. Additionally, the blue prints submitted into evidence provide that the area is storage space, and not a foyer. Gregory Allen testified that he did not believe that the foyer was included, or that employees of the Plaintiff ran necessary duct work to that area. On the other hand, the Defendant claimed that the foyer had always been there and that the Plaintiff installed the system to include that space. However, she became elusive upon further questioning by the Plaintiff's attorney. After weighing the evidence, I find that the contract did not provide for the foyer to be conditioned by the geothermal system. There is no dispute that duct work currently runs to the foyer area on the ground floor, however, I find that this duct work was added subsequent to the Plaintiff's performance. Accordingly, I find that the duct work installed by the Plaintiff was adequate to support the system.

For the foregoing reasons, I find that the Plaintiff substantially complied with the provisions of the contract. Therefore, it is entitled to recover damages.

Amount of Damages

Having determined that the Plaintiff is entitled to recover damages, the Court must next decide how to calculate those damages. The standard remedy for breach of contract is based upon the reasonable expectations of the parties. *Duncan v. Thera Tx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001); see also *Gebecor Int'l., Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000). Expectation damages are measured by the amount of money that would put the non-breaching party in the same position as if the breaching party had performed the contract. *Id.* Had the Defendant not breached the contract, the Plaintiff would have received compensation in the amount of the total

contract price. Only one installment remained due and owing under the contract at the breach. The Plaintiff requests $3,218.75 in damages and I find that this amount would give the Plaintiff the benefit of its bargain.

II. The Defendant's Counterclaim

The party who first commits a material breach of the contract may not proceed against the other party if it subsequently refuses to perform. *Hudson v. D&V Mason Contractors, Inc.*, 252 A.2d 166, 170 (Del. 1969). The Defendant committed a material breach when she breached the implied duty of good faith and fair dealing. The Plaintiff substantially complied with the terms of the contract and, as discussed *supra*, the system functioned properly at the time of the Defendant's breach. For the foregoing reasons, I find that the Defendant failed to establish her counterclaim by a preponderance of the evidence and it is hereby denied.

CONCLUSION

The Defendant materially breached her contract with the Plaintiff when she breached the implied covenant of good faith and fair dealing. Because the Plaintiff substantially complied with the terms of the contract, I find that he is entitled to expectation damages. The Defendant did not establish her counterclaim and I hereby deny it. Accordingly, judgment is entered in favor of the Plaintiff, A&A Air Services, Inc., and against the Defendant, Jane Richardson, in the amount of $3,218.75 plus interest.

IT IS SO ORDERED this ________day of August 2006.

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Judge Rosemary Betts Beauregard