

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ATD, INC. and EDWARD GRIM :
 : C.A.#02-03-005
 Plaintiffs below/Appellants, :
 :
 v. : *Trial Date: December 28, 2004*
 : *Date Decided: January 21, 2005*

 SANDRA LONG :
 :
 Defendant below/Appellant. :

Dean A. Campbell, Esquire, attorney for ATD, Inc. and Edward Grim
Kevin M. Howard, Esquire, attorney for Sandra Long

DECISION AFTER TRIAL

In this action the Court is called upon to make the determination whether the Plaintiffs breached a contract with the Defendant when they did not complete the contracted work before the Defendant fired the Plaintiff. Alternatively, the Court is asked to determine whether the Defendant breached the contract when she unilaterally terminated the contract. The parties also ask this Court to determine appropriate damages. The Court conducted a trial and took testimony and evidence on December 28, 2004. This is the Court's decision.

FACTS

The Court makes the following findings of fact after reviewing the testimony and exhibits submitted. The Plaintiffs and the Defendant entered into a contract on or around May 2, 2001. According to the contract, the

Plaintiffs were to clear the Defendant's residential lot of land in Lewes, Delaware in preparation for placement of a modular home. The Defendant requested a quote for work to be completed on the lot and the Plaintiff provided such quote. Pls. Ex. 1. However, the parties never engaged in a written contract. Therefore, the agreement between the parties was an oral contract. The Defendant contends that the parties agreed that the work would be finished by May 31, 2001. The Plaintiffs assert that the parties never determined a date on which they were required to complete the work.

The Plaintiffs made special scheduling arrangements with Swain Excavation and began clearing the Defendant's lot on May 16, 2001. Pls. Ex. 3. On several occasions, Plaintiff could not complete a full day's work on the lot because his employee was sick, and he could not clear the lot alone. Additionally, the Plaintiffs were prevented from entering the development where the Defendant's lot was located or required to leave by the developer himself due to Swain Excavation's endeavor to complete the roads in the development. The Plaintiff's work was also halted on several days due to rain and muddy conditions. By June 18, 2001, the Plaintiff had not finished clearing the Defendant's lot.

On June 19, 2001, the Defendant fired the Plaintiffs because she felt that they did not timely complete the work. When the Defendant fired the Plaintiffs, the Plaintiffs removed their equipment from the land and billed the Defendant for the work. The Defendant refused to pay the bill. Subsequently, the Plaintiffs filed this lawsuit against the Defendant. The Defendant filed counterclaims against the Plaintiff. The Defendant hired

Swain Excavation to complete the work on her lot. It took Swain Excavation two days to finish clearing the lot.

DISCUSSION

There is no dispute among the parties that an oral contract existed between them. Both parties claim that the other breached the contract and request this Court to award damages. The Defendant asserts that time was of the essence and that the Plaintiffs' failure to perform in the necessary time breached the contract. Contradictorily, the Plaintiffs contend that time was not of the essence and that the Defendant breached the contract when she unilaterally terminated the contract on June 19, 2001.

Time Was Not of the Essence

The first issue before this Court is whether "time was of the essence" for performance under the contract. The Defendant testified that she and the Plaintiffs agreed that the lot would be cleared before Memorial Day of 2001. Mr. Grim conceded that the Defendant explained that she wanted the lot cleared as soon as possible. However, Mr. Grim denied that the parties specified a day on which the work was to be completed.

This Court should look at two things when determining whether time is of the essence in a contract. Either the contract provided specific language that "time was of the essence," or the course of dealing between the parties implied that time was of the essence. *Silver Properties, LLC v. Ernest E. Megee, L.P.*, 2000 WL 567870, *2 (Del. Ch. 2000).

There is no written document for the Court to reference in determining the language of the contract. Therefore, the Court relies on the parties' testimony. The Defendant testified that the parties agreed time was of the essence. Mr. Grim testified that they did not agree on such a term.

Weighing the credibility of both witnesses, the Court finds that while there was some discussion of the Defendant's desire to have the work completed as quickly as possible, the parties did not specify a date of completion when they entered the contract. Without a deadline it would be nearly impossible to find that the parties intended for time to be of the essence. Thus, this Court finds that the language of the contract did not set forth that time was of the essence.

Next, the Court will examine the course of dealing between the parties to determine whether their conduct implied that time was of the essence. Mr. Grim testified that after the Defendant contacted him to accept his offer to complete the work for a certain price, he rearranged his schedule so that he could accommodate her request to begin as early as possible. Although this conduct shows some intent by the parties to complete the work quickly, it is insufficient to show that the parties intended for time to be of the essence. The Court was not provided any other information to support an implied intent.

Neither the contract itself, nor the conduct of the parties stated or implied that time was of the essence. Therefore, this Court finds that time was not of the essence.

The Defendant Did Not Allow Reasonable Time for Performance

If time is not of the essence in a contract, the Court will imply a reasonable time for performance. *Martin v. Star Publishing Co.*, 126 A.2d 238, 244 (Del. 1956), *See also, Bryan v. Moore*, 2004 WL 2271614, *2 (Del. Ch. 2004). The Plaintiffs began the contract work on May 16, 2001. The Defendant fired the Plaintiffs on June 19, 2001. Thus, this Court must decide whether the time between May 16, 2001 and June 19, 2001 was a reasonable time for the Defendant to demand performance.

The implication of reasonable time requires the Court to consider the type of contract at issue and any circumstances that may delay performance. The contract was one for the physical clearing and removal of trees from a residential lot. The type of work involved was laborious in nature and required the operation of heavy machinery. Logically, all of the work under the contract was to be performed outdoors, without any protection from the elements. Further, the lot was located in a newly created residential development where special permission had to be obtained by the Plaintiff to enter the job site as the roads had not yet been installed.

The Plaintiffs assert that they had not completed the work by June 18, 2001 because several factors prevented them from engaging in full days of work. First, Mr. Grim testified that his employee was sick on several days and unable to assist him in clearing the Defendant's lot. The nature of the work required use of heavy machinery that Mr. Grim could not safely operate alone. Thus, he stated that he was unable to clear the Defendant's lot on those days. Second, Mr. Grim stated that rainy weather conditions also prevented him from engaging in work on the lot. Finally, Mr. Grim testified that the developer demanded that the Plaintiffs leave the development on several occasions. He also stated that the developer kept the development blocked off on other days and the Plaintiffs could not enter.

Although the Defendant may have desired the Plaintiffs to finish clearing the lot in a speedier manner, that is not the issue before this Court. The question is whether the time allotted was reasonable. Considering the nature of the contract itself and the circumstances surrounding the work the Court finds that the Defendant failed to allow a reasonable time for performance when she unilaterally terminated the contract on June 19, 2001.

This conclusion is further supported by the testimony of Mr. Grim and Mr. Cheney. Mr. Cheney is the owner of Swain Excavation. He testified that Swain Excavation finished clearing the lot in two days. Mr. Grim testified that he too could have completed the work in two days. Thus, the Defendant should have allowed the Plaintiff the additional time required in order to provide a reasonable time for performance.

Defendant's Unilateral Termination

On June 19, 2001, the Defendant unilaterally terminated the contract. The Plaintiffs contend that her unilateral termination constituted a breach of the contract.

A unilateral attempt to terminate a contract is a repudiation. *Rochdale Village, Inc. v. Public Service Employees Union*, 605 F.2d 1290, 1297 (2nd Cir. 1979). If the contract does not provide a right to unilaterally terminate the contract then the repudiation does not terminate the contract, it breaches the contract. *Id.* The agreement at issue did not provide any right for either party to unilaterally terminate the contract. Therefore, the Defendant's repudiation on June 19, 2001 constituted a breach of the contract.

Damages

Because the Defendant breached the contract, the next step is to determine whether the Plaintiffs are entitled to receive damages for the Defendant's breach and the amount of damages appropriate to compensate the Plaintiffs.

To recover damages, the Plaintiffs must show that they substantially performed under the terms of the contract. *Emmett Hickman Co. v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571 (Del. Super. 1969). After the

Defendant fired the Plaintiffs, she hired Swain Excavation to complete the work on her lot. Mr. Cheney stated that the Plaintiffs completed a substantial amount of the clearing before Swain Excavation was hired. The Court finds Mr. Cheney to be a credible witness and accepts his testimony that the Plaintiffs substantially performed the task of clearing the Defendant's lot. Thus, this Court finds that the Plaintiffs substantially performed under the contract. Therefore, they are entitled to damages as a result of the Defendant's breach.

Normally, the remedy for a breach of contract is based upon the reasonable expectations of the parties. *Duncan v. TheraTx., Inc.*, 775 A.2d 1019, 1022 (Del. 2001). Expectation damages are measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract. *Id.*

If the Defendant had not breached the contract by unilaterally terminating it, the Plaintiffs could have completed the remaining work and collected the agreed price of \$3,500. Thus, the Plaintiffs should be awarded expectation damages in that amount.

The Plaintiffs request this Court to award consequential damages in an amount exceeding \$600. The Plaintiffs normally take lumber that they clear from lots and convert it to wood chips, which they then sell for a profit. The Plaintiffs assert that they are entitled to the amount of profit they would have made from the wood chips if the Defendant had not breached the contract.

Under Delaware contract law, a party may recover damages for those consequences, which might have been foreseen or anticipated to flow from the breach. *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889,

90 (Del. Super. 1942). Damages are limited to those that may fairly and reasonably be said to arise naturally from the breach, or that may reasonably be said to have been foreseeable by both parties at the time they entered into the contract. *Id.*

This Court can find neither that the Plaintiffs' inability to make the wood chips arose naturally from the Defendant's breach, nor that such loss was foreseeable by both parties at the time that the contract was created. Mr. Grim conceded that he never informed the Defendant of his intentions to convert the lumber into wood chips. Nor, would a reasonable person necessarily assume the Plaintiffs' intention. Thus, his lost potential profits were not foreseeable. Therefore, the Court finds that the Plaintiffs are not entitled to consequential damages for that lost opportunity.

CONCLUSION

Time was not of the essence under the terms of the contract or the conduct of the parties. The Defendant did not allow a reasonable time for the Plaintiff's to perform. Thus, the Defendant breached the contract when she unilaterally terminated the contract on June 19, 2001. Therefore, Judgment is rendered in favor of the Plaintiffs in the amount of \$3,500 together with interest at the legal rate from June 19, 2001 and costs.

IT IS SO ORDERED this _____ day of January, 2005.

Judge Rosemary Betts Beauregard

