SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

February 21, 2007

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RE: William Bell v. John Guiliano
C.A. No. 06A-06-003
Letter Opinion

Date Submitted: November 20, 2006

Dear Counsel:

This is my decision on William Bell's ("Bell") appeal of the decision by the Court of Common Pleas ("CCP") that Bell breached his contract with John Guiliano ("Guiliano") to properly install floor coverings at Guiliano's home. The CCP awarded Guiliano damages of $13,765.00, plus interest and costs.

BACKGROUND

Bell and Guiliano signed a written contract providing that Bell would install sub-flooring, padding, carpeting and vinyl in Guiliano's home for $8,500.00. Bell did the work and was paid in full. Guiliano then noticed problems with the carpet and vinyl. When Bell did not fix the problems to Guiliano's satisfaction, Guiliano filed suit against Bell in the Justice of the Peace Courts. Guiliano, after losing in the Justice of the Peace Courts, filed an appeal with the CCP.

The CCP held a trial on May 17, 2006. Bell, Guiliano, Jerome Selig ("Selig") and Kent Edel

("Edel") testified at the trial. Guiliano and Bell testified about the contract terms and the problems with the carpet and vinyl. Bell admitted that he made some installation errors. Selig and Edel are certified flooring inspectors who inspected the carpet and vinyl before the trial. Selig testified for Guiliano. Edel testified for Bell. Selig testified that there were many problems with Bell's installation of both the carpet and vinyl, including carpet that was delaminating, carpet seams that were in the wrong place and were separating, gaps between the edges of the vinyl flooring, vinyl flooring that was peeling up, and no sub-flooring. Selig further testified that it was the worst installation job that he had ever seen and that the vinyl and carpet would have to be totally replaced at a cost of $13,765.50. Edel testified that he saw similar problems, but that some of them were due to manufacturing defects and that the problems could be repaired for $1000.00 to $1500.00.

STANDARD OF REVIEW

Superior Court Civil Rule 72(g) describes the procedure by which the Superior Court is to review an appeal. It states, "[a]ppeals shall be heard and determined by the Superior Court from the record of the proceedings below, except as may be otherwise expressly provided by statute."[1] In reviewing the record, the Superior Court's job is to make sure the decision below was based upon substantial facts. When reviewing an appeal from the Court of Common Pleas, the Superior Court reviews the decision in the same manner as the Supreme Court would consider an appeal.[2] The function of the Superior Court is to "correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an

[1] Sup. Ct. Civ. R. 72(g).

[2] *Fiori v. State*, 2004 WL 1284205, at *1 (Del. Super. Ct.).

orderly and logical deductive process."[3] First, errors of law are reviewed de novo.[4] Second, "if substantial evidence exists for a finding of fact, the Superior Court must accept that ruling, as it must not make its own factual conclusions, weigh evidence, or make credibility determinations."[5] "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[6] Substantial evidence is more than a scintilla but less than a preponderance.[7]

DISCUSSION

Bell raises three arguments in his appeal. One, Bell argues that the CCP erred by not requiring Guiliano to mitigate his damages. Two, Bell argues that the CCP erred by not taking into account depreciation in its award. Three, Bell argues that the CCP's decision is not supported by substantial evidence in the record.

A. Mitigation of Damages

Bell argues that the CCP erred by not requiring Guiliano to mitigate his damages. This argument is based on the fact that Guiliano had two estimates to replace the carpet and vinyl. One estimate was for $10,500.00. This came out on the cross-examination of Guiliano. Guiliano also had Selig's estimate for $13,765.50. Bell argues that the CCP should have awarded the lower of the

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[3] *State v. Harris*, 1993 Del. Super. LEXIS 481, at *2 *citing Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

[4] *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990).

[5] *Fiori*, 2004 WL at *1 *citing Johnson v. Chrysler*, 213 A.2d 64 (Del. 1965).

[6] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[7] *Id*.

two estimates. He also argues that the higher estimate is not supported by the evidence.

Bell has misapplied the general rule as to the mitigation of damages. All that is required of the non-breaching party is that he act reasonably so as to not unduly enhance the damages caused by the breach.[8] Bell caused the problem by not properly installing the carpet and vinyl. Guiliano did not do anything to make the problem worse and Bell has not offered any authority for the proposition that the law requires the court to take the lowest estimate of damages merely because it is the lowest. The only persuasive estimate that was submitted to the CCP was Selig's estimate. There was no information at all about the lower estimate. It only came up briefly on cross-examination. The court can only make a decision based on the evidence it has before it. It is not the duty of the reviewing court to weigh the evidence, determine the questions of credibility, and make its own factual findings.[9] When the determination of facts rests on a question of credibility and acceptance or rejection by the trial judge of live testimony, the trial judge's findings will be approved on review.[10] The CCP heard the testimony of a certified flooring inspector who testified at trial. It was certainly not an error for the CCP to find this testimony more persuasive than hearsay testimony about an estimate from an unknown person elicited on cross-examination. Once the CCP concluded that the carpet and vinyl would have to be replaced, the only persuasive evidence on damages was Selig's estimate of $13,765.50.[11]

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[8] *Handelsgesellschaft Scharfe* MBH & Co. V. Krapf & Sons, Inc., 1985 WL 189275, at *5 (Del. Super.), *citing* 22 *Am.Jur.*2d, Damages §33.

[9] *Smith v. Thomas*, 2001 WL 1729143 at *2 (Del. Super.).

[10] *Id.*

[11] Bell also argues that the CCP stated in its written decision that Guiliano had a duty to mitigate his damages, but then did not require him to do so. This is not correct. Guiliano sought

B. Depreciation

Bell argues that the CCP erred by not deducting depreciation from its award. His argument is misplaced. Bell improperly installed the new carpet and vinyl. Thus, they were worthless to Guiliano from the beginning, leaving Guiliano with nothing of value to depreciate. The situation would be different if Bell had damaged something that Guiliano had previously used, but that is not the case here.[12]

C. Insufficient Evidence

Bell argues that the decision by the CCP is not supported by sufficient evidence in the record. All of the witnesses testified that there were problems with the installation of the carpet and vinyl. Indeed, Bell admitted that he made some installation errors. Selig testified in great detail about Bell's installation errors, describing it as the worst installation job that he had ever seen. The CCP found Selig to be the more persuasive expert. Given this, and Bell's own admissions about his installation errors, the decision of CCP is supported by substantial evidence in the record.

CONCLUSION

The decision of the Court of Common Pleas is affirmed.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

$13,765.60, plus ten percent (10%) to cover the rising cost of labor and materials. The CCP did not award Guiliano the extra 10% that he sought.

[12] See *Reams v. Del Campo*, 1991 WL 1078213 (Del. Com. P1.).