

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CLARENCE ENGLISH and)	
VICTORIA ENGLISH,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. 2007-03-177
)	
COLONIAL CONSTRUCTION, INC.)	
A Delaware corporation)	
)	
Defendant.)	

Submitted: July 18, 2008
Decided: January 2, 2009

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DECISION AFTER TRIAL

Clarence English and Victoria English, plaintiffs (hereinafter “English”) bring this action for breach of contract against Colonial Construction, Inc. (hereinafter “Colonial”) alleging failure to repair her house as specified and for lost and damaged personal items. Trial was conducted on July 8, 2008; the parties thereafter were provided leave to submit written closing arguments on July 18, 2008. This is the Court’s final decision.

Facts

The English are the owners of real property situated at 105 Beach Lane, Wilmington, Delaware. On November 14, 2003, Victoria English testified she was notified at work that a tree fell on her house causing significant damage. The photographs introduced as Plaintiff's Exhibit 2 indicate a large tree fell on the property causing damage to the roof and extensive damage to other parts of the structure. Victoria English testified when she arrived home on November 14, 2003, she found a 200 foot tree in the center of her house. She thereafter testified and introduced photographs showing the condition of her house prior to the damage. (Plaintiff's Exhibit No. 1 and 2). She testified that as a result of the damage, the entire upstairs of the house had to be taken down. When she called the insurance carrier, they gave her a case number, and referred her to Colonial Construction, Inc. to repair the damages.

English testified she thereafter spoke with April Waters, who was the initial contact person for Colonial Construction, Inc. She signed an agreement which was drafted and prepared, if not by Colonial at their direction. The contract was entered into on January 15, 2004, between English and Colonial to repair the damage. The contract provided English would pay Colonial \$106,075.47 to repair the damaged property. The payment terms provided Colonial would submit invoices to the property owner for draws against the insurance company of one-third upon signing of the contract, one-third upon delivery of the drywall, and the final one-third upon

completion and obtaining a certificate of occupancy from New Castle County government. She testified she believed Colonial would put everything back together. She further testified that she believed that she would get the same quality of material which was in the house prior to the damage. Repairs began three months after she signed the contract. The work was scheduled to take eight (8) months; but she was not permitted to occupy her residence for eleven (11) months.

English introduced as Plaintiff's Exhibit No. 4 a cost breakdown of the construction contract which indicated all of the work outlined in the agreement was not completed. She testified that in the kitchen, there were no electrical sockets; the spice rack was reinstalled; cabinets installed, were not like material, they were of a lesser quality than her original cabinets. Additionally, the cabinets were not installed properly leaving gaps with the wall, and the crown molding was not installed. She pointed these issues out to Colonial and after attempted efforts, their repairmen left without completing the job.

English introduced Plaintiff's Exhibit No. 5, which consisted of 16 pages, and a photograph which she maintains shows the work failed to comply with workman like standards. She states the area near the front door did not have siding installed; the stucco around the door was too thick causing problems with opening and closing the door; the brick over the door was not replaced; the window on the front was not properly installed, and the stucco was partially white with cracks. She further testified the breakfast nook chandelier was not replaced, the dish rack was not reinstalled, and the dining chandelier was cracked and not re-hung when it was returned.

8Upstairs she testified the tops of the doors were not leveled nor repaired; the middle door to the small bathroom had a large gap at the bottom; hollow doors were used to replace solid doors; and the window in the bathroom was too large. Additionally, in the bathroom, the medicine cabinet was not replaced; the bath tub was not level; the floor was not level; and the tiles were cracked. English testified she informed Colonial of these problems, but they failed to make repairs.

English testified the existing windows were leaking, and the storm windows and screens were not returned. Because of the leak in the dining room, the hardwood floor under the carpet was warped, which required that they take up the floor and replace it with plywood. She testified the middle bedroom window frame reaches the top of the ceiling, and there are no steps to reach the crawl space in the attic.

English testified the small bedroom floor was not level. She stated the floor angle is such that when a ball is placed on the floor, it rolls to one side without force. She informed Colonial and they failed to correct the problem. The middle bedroom, she testified that the floor got wet which caused it to buckle. They sanded it, but did not replace it; therefore, the floor is not level. The floor is also spongy. She testified the master bedroom floor sags in the middle. After notice, Colonial came out and installed a four-by-four joist, but this did not correct the problem.

English testified and introduced as Plaintiff Exhibit No. 6 the items which were damaged when they were in storage with Colonial. She testified that when the pool table was returned, it was wet, the panels broken off, the return pockets were broken, and the table was beyond repair. English claims \$895.00 for the pool table

because it was approximately one year old. She testified that a plate holder was not returned and seeks \$29.89. She testified the two speakers which were in the middle bedroom were not returned. She testified the items were five years old and seeks a replacement value of \$399.00 each, for a total of \$798.00. She testified a book shelf and JVC speakers were not returned and she seeks \$449.99. In addition, there were two speakers in the basement that were not returned and she seeks \$49.99.

English testified the furniture in the living room was damaged. She testified the chandelier in the breakfast nook was not returned, she seeks \$269.00, and the one the dining room was broken, she seeks \$199.00. Further, her planter in the basement was not returned, she seeks \$69.95; and two Hurricane glasses were not returned, she seeks \$26.50. Finally, she testified the baker's rack was not returned and she seeks \$579.00. The total amount she seeks for lost or damaged items is \$8,233.33.

During cross examination, English testified she moved back to the residence on October 31, 2004. The dining room set was replaced by State Farm. She introduced Plaintiff's Exhibit No. 5 to show the cabinets over the refrigerator are not level and the quality was less than those before the damage. She introduced Plaintiff's Exhibit No. 4 which indicates credits were given to her for the kitchen socket. She testified State Farm made a payment of \$2,890.00 for the spice rack and for the cabinets. She further testified she was reimbursed for her middle bedroom in the amount of \$4,864.00. She testified that prior to the accident, there was tile on the wall behind the stove and the sink. She further testified that State Farm paid for the tile behind the stove but there is still a claim for the tile behind the sink.

English testified she hired Woodland Cleaning and Restoration Company to inspect the work and prepare an estimate to correct the problems. The inspection was done by Stephen Castiglione, Sr. on March 10, 2006 and a report submitted on March 14, 2006. (Plaintiff's Ex. No. 7).

Stephen Castiglione testified he has been employed with Woodland Restoration for seventeen (17) years and is presently its President. He testified he is a journeyman carpenter by training and experience. He testified the cabinets appeared to be on a slant, that the floor joist below the kitchen, in the basement was cracked, which could cause the unlevelled condition. He indicated the floor sub-joist crack was evident. He further testified that the dining room floor was not level, and that the dining room doors needed to be re-hung and re-jointed. On the second floor, he testified the floor was not level and this unlevelled condition was a result of cracks in the floor joist. He testified he cut a hole in the dining room ceiling to inspect the floor above. This inspection revealed the floor joist above was cracked, which is depicted in Plaintiff's Exh. No. 3. He testified that the estimate cost of repair for the floor would be approximately \$29,000.00 to level out the two floors.

During cross examination, Castiglione testified he had no structural engineering experience, having received his carpentry training at a trade school. He testified that he cut a hole under the master bedroom to determine why the floor was not level, and found it was due to the cracked joist. He further testified he used a leveler to determine the floor problem, but did not inspect the blueprints for the cabinets.

Scott Berry testified for Colonial Construction, Inc., indicated he had eleven (11) years with the company and supervised the framing work. He testified that he did no work on the first floor. The second floor joists were broken and they had to be replaced. The drawings were done by Blackstone Group on January 20, 2004. He testified joists in the middle bedroom and in the bathroom area were replaced. In the back bedroom, no joist was replaced. He indicated the joists were replaced by putting them back into the joist pocket where the broken ones were removed. He testified no joist was replaced in the master bedroom nor in the bathroom adjoining this bedroom. He testified that after the work was completed, the County inspected the joists that were replaced.

During cross examination he testified that he did some of the work on the second floor. He upgraded the bathroom, but the kitchen on the first floor was not damaged by the tree. He did not use a leveler on the floor to ensure it was level, but probably knew that the floor was not level, but was only replacing the joist. He further testified the primary work was done upstairs, in the bathroom, and the rear bedroom.

Frederick Roland a second witness called by the defendant, testified he is a licensed engineer, as of 1978. He works as a structural engineer and evaluated the house at the request of State Farm, made an assessment of the damage, and prepared an engineering report, dated November 19, 2003. He further testified he approved the plan for reconstruction of the house. He met with Mrs. Weeks and a second representative from State Farm at the house. Based on his inspection and assessment

of the damage, he found no structural damage in the basement nor any structural damage on the first floor. The major damage was on the second floor. During his initial visit, he indicated which joist needed to be replaced. He inspected the ceiling of the basement but found no damage, further there was no damage to the foundation walls in the basement.

His inspection also revealed the joists were pocketed into the exterior wall. He also found there was a “dish affect” in the center beam, which is a sag in the middle of the beam. He testified that the sag in the floor occurs over a period of time due to age. He testified that the space from the wall to the center door is between twelve (12), and twelve (12) and one-half inches. He went on to testify that he used a laser level to measure deflection in the floor and to inspect the second floor. His inspection of the bathroom in the master bedroom indicates some deflection, but within tolerance of the twelve (12) inches or 5/8 inches of a slope towards the center. The slope in the rear bedroom was in excess of the tolerance level. He further testified he could not conclude the flooring was not done in a workmanlike manner.

During cross examination, he testified that a floor does sag over time due to wood sagging. He testified he marked eight broken joists. He further testified he found the foundation structurally sound when he inspected the entire house. He prepared a second engineering report on October 26, 2006 (Defense Ex. No. 3) and indicated in the report that the bathroom floor is one-half inch out of level. The master bedroom floor is one-half inch out of level. The bathroom floor deflection is

going side-to-side. He did not check the first floor for level. He inspected the ceiling in the living and dining room and found a broken joist above these rooms. He concluded in the second report that the original report called for these joists to be replaced. He further testified he was not surprised that the contractor did not use a device to ensure the floor was level.

He testified on re-direct he made a second inspection and that the damage in the basement did not occur from the tree striking the house. Further, that all the slopes in the upper levels are within tolerance.

Discussion

To prevail on a claim for breach of contract, the moving party must establish three things. First, there must be established the existence of a contract. Second, there must be credible evidence to establish the defendant breached an obligation imposed by the contract. Third, the plaintiff must prove she suffered damages as a result of the defendant's breach. *A&A Air Services, Inc. v. Richardson*, 2006 WL 2382433 (Del. CCP).

In this case, Plaintiff introduced Exhibit No. 3 which indicates the parties entered into a contract on January 15, 2004 for the repair of her house which was damaged as a result of a large tree falling on the roof. The house sustained significant damage. The contract refers to "specifications" for the work to be performed (Plaintiff's Ex. No. 4).

The contract provides the property owner (English) reserves the right to specify appliances, kitchen cabinets, carpets, paint and paint color, all based on existing products and installations. It also provides all materials used in reconstruction to be of like-kind and quality of existing finishes. It further provides that the contract specifications and sum shall be changed only by “change order/supplement.” The terms also include contractor (Colonial) will guarantee its workmanship for a period of one (1) year from the date of the Certificate of Occupancy.

The contract is silent on the issue of personal property damage, but the parties do not dispute that the damage to the residence was so extensive that removal of English’s personal property was required so that the repairs could be undertaken. Therefore, it is fair to conclude that removal of the property was necessary for completion of the work required under the contract. Once Colonial undertook to remove and store English’s personal property, it had a duty of care to protect it from reasonable damage.

English claimed many of her personal property items were returned damaged and seeks \$5,580.00. Additionally, English seeks for items not returned \$1,653.32. Colonial concedes that certain property was not returned in the value of \$2,693.00 and damages to the dining room chandelier and the breakfast nook chandelier in the amounts of \$269.00 and \$188.10, respectively. Totally, Colonial concedes items were not returned in the value amount of \$2,693.20. The amount English claimed for

unreturned items is \$2,653.33. The parties are very close in the value of these claims; therefore, I award the sum of \$2,653.33.

English claims \$5,340.00 for damages to personal property. Colonial concedes damages to the chandelier in the amount of \$457.10, but disputes damages to the pool table and the living room furniture in the amount of \$5,112.00. Colonial argues this claim should fail because English did not provide proof that the pool table is beyond repair or could be repaired at a cost lower than which she paid for the pool table. Colonial relies upon *Atwell v. RHIS, Inc., et al.*, 2007 WL625277 (Del. Super.) for the position that, while an owner of property may testify regarding its value, it may not be speculative and there has to be some reasonable basis in fact to support the claim. Here, English testified that when the pool table was returned, it as wet, the panels broken off beyond repair and the return pockets were broken off. Thus, it appears from the testimony, the table was in very poor condition and its future use in serious question.

The testimony of English included reference to documents which gave the value of a used pool table in 2008. English testified she purchased the table in 2002 for \$899.00 and is seeking \$895.00 as replacement value. While English is not entitled to the value of a new pool table, she is entitled to the value based upon the evidence in the record. There is no evidence that the pool table was not useable before it as placed in storage and the evidence here is that it is clearly unusable at this time. Therefore, I award a reasonable sum of \$400.00, as reasonable value at the time of the damage.

Colonial also disputes English's claim for damages to the living room furniture. English claims \$4,217.00 in replacement value for this item, notwithstanding she testified that she has been using the furniture since its return and continues to use the furniture. English's claim is based upon the fact there are several stains which cannot be removed. However, English's continued use of the furniture provides weight to the position that the furniture is useable even if somewhat unsightly. The fact that there are stains, without evidence that it renders the items unusable, does not provide a basis to award damages for the entire value of the living room furniture. In fact, the evidence fails to establish any amount for which damages can be awarded, accordingly, this claim is denied.

English also asserts a claim alleging the work was performed negligently and not in a workman like manner. English testified the kitchen cabinets were installed at an angle to the wall for which there are gaps. The kitchen floor tiles were cracking and breaking away, and the second floor was unlevelled to a point that a golf ball could easily roll from a standing position to a corner. English testified the floor is so unlevelled that the furniture cannot be placed properly. The testimony in the record indicates State Farm paid for the cabinets and the spice racks; thus, I find no merit to these claims.

Stephen Castiglione of Woodland Cleaning and Restoration, with 17 years of experience in restoring storm damage testified he inspected the upstairs and the downstairs of English's property. He testified his inspection discovered the floor joist in the basement cracked which could cause the unlevelled condition in the

kitchen and that the cracks were very evident. He found the second floor unlevelled and believed there were cracks which caused the unlevelled condition. He cut a hole in the dining room ceiling and, upon inspection, found the joist supporting the second level floor cracked. On cross-examination, he testified he used a leveler and found the floor unlevelled.

Castiglione prepared a report introduced as Plaintiff's Exhibit No 7, which outlined the conditions he found and estimated the repair cost of \$29,795.59 to correct the problems. This estimate includes items other than the floor problem.

Scott Berry testified for Colonial Construction and indicated several second floor joists was broken and replaced during construction. He further testified that the construction was done according to the blue print prepared by the architect. When the joist was replaced, they moved those damaged, and replaced them in the same joist pocket. However, during cross-examination, he testified that they did not use an instrument to check to determine if the joist were level. Further, they did not replace floor joist in the master bedroom and did no floor work in the bathroom.

Frederick Roland, a structural engineer, prepared a second report following completion of the work and concluded that the master bedroom was one-half inch out of level. He also concluded the upstairs bathroom was not level and the left front bedroom was one-half inch out of level. While he concluded the deflection was within tolerance, the floor was not level. His report of October 26, 2005 indicated that the broken joist above the living room and dining room in the original report called for their replacement, (Defense Ex. No. 3), but was not replaced.

The terms of the contract provide Colonial will guarantee its workmanship for a period of one (1) year from the date of Certificate of Occupancy and the property owner shall notify contractor of any correction necessary due to workmanship. English testified she moved back into the house on October 31, 2004, noticed items were missing, items were damaged, and the floor was not level. She immediately notified Colonial of these issues.

The testimony in the record and supporting documents establish that the floor in the master bedroom and a bathroom is not level and additionally, it is established that this condition is due to a cracked joist which was to be replaced, but was not done. A reasonable person contracting to repair one's house following substantial damage would reasonably expect the floors to be level. I cannot imagine a condition more disconcerting than having a residence where the floor is so unlevelled that it causes the furniture to shift. Therefore, I find the unlevelled floor in the master bedroom a material breach of the contract. The testimony established that the problem with the first level floors was not the result of the tree damage. To correct the floor problem on the second floor, Woodland testified and documents submitted indicated it would cost \$15,128.61. I find that this is established by the preponderance of evidence.

English alleges damages for several other items, but I do not find these to be a material breach under the contract or was compensated by State Farm Insurance. Accordingly, judgment is entered for English as follows:

Damage or lost items	\$ 2,653.33
Damage to pool table	400.00
Damage to living room furniture	- 0 -
Negligent installation of the floors	<u>15,128.61</u>
Total Award	<u>\$18,181.94</u>

SO ORDERED this 2nd day of January 2009

Alex J. Smalls
Chief Judge