IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

GEORGE WALKER	:	
	:	C.A. #04-08-045
Plaintiff,	:	
	:	
v.	:	
	:	
CONCRETE CREATIONS	:	
	:	**Submitted: August 10, 2005**
Defendant.	:	**Decided: August 31, 2005**

Garven F. McDaniel, Esquire, attorney for Plaintiff, George Walker
Tasha Marie Stevens, Esquire, attorney for Defendant, Concrete Creations

DECISION AFTER TRIAL

In this action the Court is called upon to determine whether either party breached a contract for the installation of a concrete patio. Plaintiff claims that Defendant breached the contract be failing to complete the work within a reasonable period of time. Plaintiffs seek damages in the amount of $4100.00 which represents payment made on the contract. Defendant claims that performance would have been completed in a reasonable time but for the Plaintiffs unilateral repudiation of the contract. Defendant seeks damages in the amount of $6,166.00 which represents the amount due on the contract. The Court conducted a trial and took testimony and evidence on August 10, 2005. 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 March 13, 2004. (Ex. E.) The Defendant agreed to install a stamped concrete patio on the Plaintiff's property. In consideration thereof, the Plaintiff agreed to pay the Defendant a flat rate of $8,100. The Plaintiff was to pay $4,050 upon signing the contract, $3,750 upon completion of the installation and $300 upon completion of the sealer application.

The contract initially provided that the Defendant would begin construction of the patio on March 29, 2004 and complete the project by April 4, 2004. Fran Knox, an agent of the Defendant, scratched out those dates when the Plaintiff did not pay the initial deposit upon signing the contract on March 13, 2004. The contract includes notations which extended the payment of the initial deposit to March 17, 2004 and that a new start date would be provided. The Plaintiff did not pay the initial deposit until March 27, 2004. Instead of paying $4,050, the Plaintiff paid a total deposit of $4,100. On March 27, 2004, pursuant to a written addendum between them, the parties modified the original contract to expand the size of the patio for an additional $2,166. (Ex. F.) Thus, all work under the contract was to be performed for a total of $10,266.

Thereafter, the Defendant began to construct the patio for the Defendant by excavating certain areas in the Plaintiff's back yard. There is some dispute between the parties as to when the Defendant began work on the Plaintiff's project. The Plaintiff alleges that the Defendant began work on May 4. Thereafter, the Defendant worked on the patio for approximately two to three days. On May 13, 2005, the Plaintiff terminated the contract

with a letter that he placed in a wheel burrow that the Defendant left on his property and/or that he faxed to the Defendant. The letter purported to cancel the contract because of the Defendant's "failure to perform." (Ex. I.) Thereafter, the Plaintiff commenced this suit against the Defendant.

DISCUSSION

There is no dispute among the parties that a written contract existed between them. This Court must decide if either party breached the contract and if so, whether the non-breaching party is entitled to damages.

Time Was Not of the Essence

The first issue before this Court is whether "time was of the essence" for performance under the contract. When the Plaintiff cancelled the contract at issue, he stated that the reason for the cancellation was due to the Defendant's failure to perform, "both as written in the contract and verbally in the time since." Thus, the gravamen of the Plaintiff's claim seems to be that the Defendant did not comply with an alleged agreement that the Defendant was to perform the work by a certain date.

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

The original contract initially provided that the Defendant would begin the project on March 29, 2004 and complete the project nine days later, on April 7, 2004. However, according to the testimony of several of the witnesses who testified before the Court, the parties agreed to modify these dates as a result of the Plaintiff's inability to provide the Defendant

with a deposit upon signing the contract and because the Plaintiff sought to expand the project. A handwritten note on the contract effectively states that the Defendant would call the Plaintiff and notify him of a new start date.

The parties agreed to modify certain terms of the contract. The contract was effectively modified as is evident from the notations on the original contract, the addendum and the testimony of several of the witnesses. Had the dates on the original contract remained the same, the Plaintiff may have had a stronger argument that time was of the essence. However, the modification, which occurred as a result of the Plaintiff's late payment of the deposit and the Plaintiff's request to expand the project, renders the dates inapplicable. Accordingly, the contract itself does not provide that time was of the essence.

The Court now turns its attention to the parties' course of dealing. Joseph Lippold jointly owns the property at issue with the Plaintiff. Although the Plaintiff was a party to the contract, Mr. Lippold coordinated the project on the Plaintiff's behalf. He testified that the Defendant's office manager, Trish Knox, communicated a new start date to him after the Plaintiff paid the deposit and the Defendant ordered the necessary materials. The Defendant agreed to commence performance on May 5, 2004. Although the parties disagree as to when the Defendant actually began working on the project, the Court finds Mr. Lippold's testimony credible in light of the fact that he kept detailed records of the project. Thus, the Court finds that the Defendant commenced performance one day earlier than scheduled, on May 4, 2004. Mr. Lippold stated that he continued to converse with Ms. Knox from the start date on May 4, 2004 until the Plaintiff terminated the contract on May 13, 2004. Although this Court finds that the parties discussed a tentative plan for performance of the project, this

Court heard no evidence whatsoever, that the parties reached an agreement as to when the work was to be completed or that such a term would be essential to the contract. Consequently, this Court finds that the course of dealing between the parties does not indicate that time was of the essence.

Because neither the written contract itself, nor the course of dealing between the parties stated or implied that time was of the essence, this Court finds that time was not of the essence.

The Plaintiff 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 Defendant commenced performance on May 4, 2004. The Plaintiff attempted to cancel the contract nine days later, on May 13, 2004. Thus, this Court must decide whether the time between May 4, 2004 and May 13, 2004 was a reasonable time for the Plaintiff to demand performance.

The parties have provided this Court with significant evidence that will aid it in determining whether the Defendant timely performed. Prior to the modification, the parties agreed that the work would be completed nine days after commencement of the work. Thus, the Court loosely considers that approximately nine days would be sufficient to complete the original work. However, two factors would contribute to a variance in the calculation of a reasonable time for performance. First, the start date was postponed as a result of the Plaintiff's failure to pay the deposit upon signing the contract. Additionally, upon the Plaintiff's request, the parties expanded the project.

The Court finds that based on the testimony and evidence presented that the length of time that it would take for the Defendant to complete the project may have been altered by the fact that the project had to be rescheduled due to the Plaintiff's postponed payment of the deposit. Likewise, the Plaintiff's request to expand the project by 174 square feet would undoubtedly extend the amount of time in which the Defendant could have reasonably completed performance. Finally, the delay in the start of the project placed this project in competition for time with other jobs the Defendant scheduled prior to the delay caused by Plaintiff's late payment of the initial installment. Fran Knox, who oversaw the performance of the project, testified that he intended to complete the project within two to three days of the date that the Plaintiff terminated the contract. The Court finds his testimony credible in light of his experience. Additionally, the Court finds that performance under the timeline provided by Mr. Knox would be reasonable considering the modification to the contract.

Despite the modifications to the terms of the contract, which were requested and compounded by the Plaintiff himself, the Plaintiff unilaterally terminated the contract just nine days after the Defendant actually commenced work on the project. In light of the initial terms of the original contract, the Plaintiff's delay in paying the deposit and the modifications sought by the Plaintiff pursuant to the addendum, this Court finds that the Plaintiff did not provide a reasonable amount of time for the Defendant to complete performance prior to his unilateral termination. Therefore, the Defendant did not breach the contract when it failed to complete performance by May 13, 2004.

Plaintiff's Unilateral Termination

The Court now considers whether the Plaintiff properly terminated the contract at issue, or alternatively, whether the Plaintiff's unilateral termination constituted a breach of the contract.

A unilateral attempt to terminate a contract is considered repudiation under the law. *Rochdale Village, Inc. v. Public Service Employee's Union*, 605 F.2d 1290, 1297 (2 nd Cir. 1979); *See also Lopresti v. Merson*, 2001 WL 1132051, *6 (S.D.N.Y.). If a contract provides that a party may unilaterally terminate the agreement, repudiation effectively cancels the contract. *Id*. However, if the contract does not provide a right to unilaterally terminate the contract, then the repudiation does not cancel the contract, rather it breaches the contract. *Id*.

The Court has reviewed the contract at issue and all of its modifications. The contract did not provide the Plaintiff a right to unilaterally terminate the contract. Accordingly, the Plaintiff's repudiation effectively breached the contract.

Damages

To recover damages, Defendant 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). As was discussed above, the Defendant substantially complied with the terms of the contract. The Court finds that the Defendant began performance of the contract and intended to complete the project shortly after the Plaintiff repudiated the contract. But for the Plaintiff's repudiation, this Court does

not doubt that the Defendant would have timely performed. Accordingly, the Defendant is entitled to damages.

The parties presented significant evidence with respect to the costs of labor and materials on the project. However, upon review of the contract, the Court finds that the contract at issue was a flat rate contract, meaning that the contract provided a total price, which included all costs of labor and materials. Accordingly, itemization is unnecessary.

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*. The original contract required the Plaintiff to pay the Defendant $8,100. The modification called for the Plaintiff to pay an additional $2,166. Thus, the Plaintiff was required to pay a total of $10,266 under the terms of the entire contract. The Plaintiff paid an initial deposit of $4,100. Accordingly, a balance of $6,166 remains due pursuant to the contract and represents the Defendant's expectation damages. The contract itself also states that the Defendant is entitled to recover for reasonable attorney expenses, court costs and interest in the event that the Plaintiff breached the contract.

CONCLUSION

For the foregoing reasons, the Court finds that the Plaintiff breached the contract when it wrongfully repudiated the contract on May 13, 2004. Consequently, the Defendant is entitled to damages in the amount of $6,166. Additionally, the Defendant is entitled to reasonable attorney's fees, court costs and interest. Counsel for Defendant will submit an affidavit supporting

fees to the Court by September 13, 2005. Therefore, Judgment is rendered in favor of the Defendant.

IT IS SO ORDERED this _____day of August, 2005.

_____
Judge Rosemary Betts Beauregard