SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
judge

kent county courthouse
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Dover, Delaware 19901
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Submitted: April 2, 2003
Decided: September 17, 2003

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Re: ***Ken Owens d/b/a Ken Owens Project Management v. Dale H. and Nancy E. Bellinger, et al. Civil Action No. 01L-11-027***

Dear Counsel:

This court conducted a bench trial beginning on April 2nd and continuing until April 3, 2003. The Defendants, Dale H. and Nancy E. Bellinger as homeowners (Bellinger or Homeowners) engaged Ken Owens, d/b/a Ken Owens Project Management (Plaintiff or Owens) to provide construction services to renovate their home at 17 Cardiff Road, Rehoboth Beach, Delaware. The parties put together an agreement consisting of a one page "budgeting" or "pricing" document which briefly delineated the costs and the work to be performed. In addition, drawings were prepared by an architect and agreed upon. The parties dispute the nature of their relationship. The original plan was to have the project completed in six to eight weeks, but construction continued on for almost seven months, beginning in January 2001 and ending in August 2001.

Plaintiff presents a claim for mechanic's lien and breach of contract against the Homeowners and, in the alternative, a *quantum meruit* claim. Homeowners generally deny the claim and seek, by way of counterclaim, damages for sums paid in excess of the contract price for work to repair damages for defective and incomplete work.

The bottom line is that Plaintiff seeks $24,814.75[1] and the Homeowners have counterclaimed for $47,946.98.[2] During closing, both sides appeared ready to concede adjustments to these numbers.

What we have here is not just a failure to communicate but a misconception as to the nature of the relationship established by the parties. This construction case is unfortunately an all too frequent occurrence and could have been avoided. It is a messy situation created by the litigants, ably presented by counsel, and now dependent upon the Court to resolve.

I. Nature of the Relationship.

Both parties agree that there is an agreement. The extrinsic evidence presented and the testimony of the parties demonstrate this fact. The contract documents include the plans prepared by the architect and the pricing or budget document referred to in the trial exhibits under Tab A 1 as the contract specs. Plaintiff claims he was hired as a construction or project manager as opposed to a general contractor. The Court agrees that the label probably does not make much difference in this case. His job was to get the subcontractors, material men, supplies

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[1] The court has reduced the original claim amount of $35,160.26 by subtracting the double charge of $2,150.00 for drywall and $8,195.51 for the 10% labor & materials charge conceded by Plaintiff.

[2] See Plaintiffs' accounting analysis, Tab 3 of the Joint Trial Exhibit and Table, Remedial Repairs.

and labor at the best prices for a fee of $5,000.00.[3] The project manager also advises and provides oversight for the project. Owens would submit periodic bills without a planned schedule. It is apparent the labels of general contractor or project manager are just that, labels. The Court agrees that whether the Plaintiff acted as a general contractor or project manager is not case dispositive.

The Court finds that the agreement was to provide overall supervision and management to renovate the Bellingers' home within the budget for a $5000.00 management fee. Owens permitted and the Homeowners exercised the right to hire their own subcontractors and pay them directly. Examples of this are the HVAC and masonry contractors. On the work Mr. Owens was to directly manage and supervise[4], he would do some of the work himself or obtain the subcontractors and bill for the work.[5]

II. Plaintiff's Claims.

Plaintiff claims he has fulfilled his obligations under the agreement and directed the necessary subcontractors to complete or at least partially complete the work as outlined in the budget documents. This includes the changes to the plans demanded by the Homeowners. The Court is not going to go through all of the changes, but Owens does contend that the additional work was significant in terms of cost and delayed the project. In some cases, as with respect to the wet bar issue and the painting, the work had to be done over again. There was a total of $40,315.00 worth of changes (see trial trans. A-103). The Plaintiff, however, did

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[3] Initially there was a claim for 10% of the labor and material supplied but this was withdrawn at closing.

[4] Although in many cases Mrs. Bellinger would direct the work herself, thereby causing some confusion and necessitating changes.

[5] The architectural plans have notes which require the general contractor to furnish all labor, materials, equipment and services necessary for the completion of the project. It does appear that Owens took on most of the responsibilities of a general contractor.

not disclose the additional costs, at times neither saying "this is no big deal" nor submitting any changes to the agreement, so that all parties would know the obligations being incurred. The Bellingers never requested change orders, but the Plaintiff never submitted them either nor personally told the homeowners what the changes would cost. (See trial trans. A-53).

Plaintiff admits that there were errors in the billing with adjustments made to reduce the final claim. Plaintiff submits that the final accounting must include a reduction by 10%, presumably because he was to get the best prices and not charge a markup. Plaintiff further submits that the final accounting document[6] reflects the amount due. In the alternative, the Plaintiff seeks relief under the principle of *quantum meruit.*

III. Homeowners' Defenses and Counterclaim.

The Homeowners concede that there is an agreement with little documentation. The contract specifications and drawings were the basis of the parties' agreement. The Homeowners say that this represents the worst case scenario for the entire project. They believed that Owens was to charge $5000.00 for his profit, but that there was a markup for labor and material, which is in dispute. In any event, the Homeowners claim that they have paid more than the worst case and, looking at the best case for the Plaintiff, they would be owed $200.00. The Bellingers did engage other contractors, some of whom Owens knew about, others he did not. They did not know he was going to charge an hourly rate for his time and did not receive invoices - only statements for payment. The expert witness, Mr. Szypulski, testified that a number of items need to be completed or repaired representing the basis of the counterclaim. The Homeowners assert that Owens only consents to two items - the flooring and the steps. (See Items 7 & 8 of Table.)

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[6] Referred to as Plaintiff's Accounting Analysis contained in Joint Trial Exhibit 1 at Tab 3.

IV. Discussion

In reviewing the testimony in conjunction with the correspondence between the parties at the end of the construction, it seems clear that the parties allowed themselves to be painted into a corner. The Plaintiff was not willing to continue until agreement was reached as to his final bill. The Bellingers were upset about what they considered to be a cost overrun and would not agree to pay any more until the job was completed by a time certain. There was no apparent effort to resolve their differences short of a trial.

A contractor under whatever guise he wishes to characterize his relationship to the homeowners owes a duty to disclose the costs of any increased work and reach an agreement. The Homeowners are intelligent and were clear about what they wanted done, yet did not demand to know about the cost of changes until the end. The fault lies on both sides, with the Plaintiff failing to delineate his responsibility by failing to provide the Homeowners with a construction schedule, change orders, and cost information. In some respects the Homeowners did act on their own assuming responsibility in the areas of HVAC, the installation of the flooring, the electrical work, and painting.

The law is clear. Owens must show substantial performance of his contractual obligations with Mr. & Mrs. Bellinger to justify his claim.[7] If the builder does not perform in an adequate manner, the homeowner is entitled to damages measured by the amount required to remedy the defective performance unless it is not reasonable or practical to do so.[8]

Using this standard, the Court finds that a good faith effort was made to perform even though the construction of the home was not completed. This determination, however, does not relieve Owens from responsibility for problems with workmanship and failure to comply with contract requirements or agreed upon

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[7] See *Dashiell Builders v. Andrews*, 2002 Del. Super. LEXIS 504 (Del. Super. 2002).

[8] *Id.*

changes.

The Court finds the following facts from consideration of the evidence and the testimony as follows:

The basic agreement was for the Plaintiff to act as a project manager, who in reality acted as a general contractor/advisor to the Homeowners, perform work on the project, hire subcontractors, and oversee the contract. The dispute over whether the Plaintiff acted as a "partner" or as a general contractor makes little difference. There was an expectation that he would insure the work was done to the satisfaction of the Homeowners.

The proposed "worst case scenario" morphed to be $158,402.66[9] without adjustments and corrections as admitted by the parties. A summary of credits and payments are as follows:

Total project cost:	$158,402.66
Payments received:	$117,355.60
Minus direct payments:	$ 5,886.80
Minus duplicate drywall claim:	$ 2,150.00
Minus Plaintiff charge of 10% for material & subcontractors:	$ 8,195.51[10]

Wherefore, the Court finds that $24,814.75 is due to the Plaintiff.

In the course of the trial, there was testimony by Owens on cross-examination where he admits that other credits must be given to the Homeowners. They are as follows:

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[9] See Tab 3 of Plaintiff's accounting analysis.

[10] During closing Plaintiff agreed to forego 10% of the combined totals for materials and subcontractors. Looking at Tab 3, the Court calculates this to be $8,195.51.

Credit for Masonry:	$22,906.00
Credit for HVAC:	$ 1,100.00
Credit for Flooring:	$16,700.00
Credit for Columns:	$ 3,500.00
Credit for the Pergola:	$ 2,300.00
Total for all reductions:	$180,093.91

There is incomplete evidence submitted that these credits were not otherwise accounted for by the Plaintiff and in light of the burden imposed on the contractor to prove this, and given the admissions, the Court finds that they were not given. Therefore, $46,506.00 is due in credits; thus the balance of the credits would eliminate any balance due the Plaintiff ($46,506.00 - $24,814.75 = $21,691.25). Since Owens said that he had a 10% add on built in, the Court will reduce this balance by $2,169.00 leaving a net balance in favor of the Homeowners in the amount of $19,522.25.

The Plaintiff is not entitled to relief under the principle of *quantum meruit* as there was an agreement to pay on a labor and material basis with a credit due. If there is an enforceable contract between the parties, *quantum meruit* is inapplicable.[11]

With respect to the counterclaim, the Court considered the claim for repairs and completion as outlined in Tab 1 which would otherwise have been completed but for the impasse referred to earlier. This impasse occurred because the Bellingers paid all bills without apparent question and then stopped when they realized they were over budget and became concerned. The Court finds the Bellingers' expert, Mr. Szypulski, to be credible and convincing with respect to the repairs necessary as well as the labor and materials needed to complete the project with exceptions to Items 7, 21, and 18. The responsibility for completion and repair

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[11] *Stoltz Realty Co. v Paul*, Del. Super., C.A. No. 94C-02-208, Del Pesco, J. (Sept. 20, 1995) Mem. Op. at 20.

lies with the Homeowners. Therefore, the amount due is as follows:

Counterclaim:	$47,946.98
Deduct Item 7:	$ 1,154.25
Deduct Item 21:	$ 502.00
Deduct Item 18:	$28,027.00
Total due:	$18,263.73

V. Conclusion

Considering the foregoing, the Court finds for the Homeowners on the mechanic's lien and breach of contract claim. Mr. & Mrs. Bellinger are entitled to $18,263.73 on the counterclaim and $19,522.25 for the balance due on the contract.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File