

IN THE COURT OF COMMON PLEAS IN THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

POOLS AND SPAS UNLIMITED)
OF MILFORD, INC., and)
HENDERSON SERVICES, INC.,)
) C.A. No. 04-01-0074
Plaintiffs,)
)
vs.)
)
NATWARIAL V. RAMANI,)
)
Defendant.)

Submitted: October 31, 2005
Decided: January 6, 2006

Glynis A. Gibson, Esq.
Gibson & Nowak
1126 South State Street
Dover, DE 19901
Attorney for the Plaintiffs

Timothy A. Reisinger, Esq.
19 South State Street, Suite 103
Dover, DE 19901
Attorney for the Defendant

DECISION AFTER TRIAL

Plaintiffs Pools and Spas Unlimited of Milford, Inc. (“Pools and Spas”), and Henderson Services, Inc. (“Henderson Services”), have filed this debt action to recover money that they contend they are entitled to as a result of extra services they performed pursuant to a contract to build a swimming pool for Defendant Natwarial V. Ramani (“Ramani”). Ramani contends that the Plaintiffs breached the with him by not building the pool in compliance with generally accepted standards. Additionally, he has filed a counterclaim against the Plaintiffs seeking recovery for damage to his property and for

items that he contends were not completed on the pool. I find for Henderson Services and against Ramani and award damages in the amount of \$1,858.00, plus interest at the legal rate from October 17, 2002, and court costs. I also award reasonable attorneys fees to Henderson Services and against Ramani in the amount of \$371.60.

FACTS

Henderson Services entered a contract (“Contract”) with Ramani in early June 2002 whereby it was to construct a kidney-shaped vinyl liner swimming pool in the back yard of Ramani’s residence. The Contract, dated June 9, 2002, which was signed by Henderson Services and Ramani, listed specific information as to the pool that would be built and what would be included with it.¹ The total price for the construction of the pool listed on the Contract was \$24,915.00. While negotiating the purchase of the pool, the salesperson for Henderson Services also made certain representations giving more detail as to the terms of the Contract. However, he did not make any representations that were contrary to the actual written terms included in the agreement.²

Once construction of the pool started, the relationship between Ramani and Henderson Services quickly became contentious. Through conversations with

¹ Although it was established at trial that Pools and Spas is the parent company for Henderson Services, it is not mentioned anywhere in the Contract. The fact that it is the parent company of Henderson Services in and of itself does not give it standing to bring an action against Ramani and does not provide Ramani with the right to bring an action against it on the Contract. Therefore, Pools and Spas is hereby dismissed as a party to this action.

² There was some discussion about the thickness of the vermiculite to be used on the floor of the pool. Vermiculite is a substance that resembles potting soil. Once the hole where the swimming pool is being placed has been dug, vermiculite is spread. Vermiculite (also known as “vermic”) is spread along the bottom of the hole to provide the base on which the pool’s vinyl liner will rest. Normally, a two inch base of vermiculite is spread at the bottom of the pool pursuant to generally accepted standards for a residential pool. However, Ramani had requested that a four inch base be placed for his pool. The placement of the additional vermiculite was agreed to by Henderson Services’ salesperson without any additional charge.

acquaintances who had previously built commercial pools, Ramani expected the pool to be constructed in compliance with commercial standards. However, Henderson Services was building the pool according to residential standards. That difference in expectations led to a number of disputes between the parties and is the ultimate reason for this lawsuit. I am convinced that Henderson Services has satisfactorily constructed Ramani's pool in compliance with generally accepted standards for a pool at a residence. If Ramani wanted a commercial grade pool, he should have specified that prior to signing the Contract with Henderson Services. However, he did not. Instead, Ramani made additional demands concerning the construction of the swimming pool while it was being constructed. As a result, Henderson Services attempted to comply with Ramani's wishes by doing extra work according to Ramani's specifications, with the understanding between the parties that Ramani would need to pay extra for the extra work. Ultimately, however, Henderson Services was fired from the project by Ramani just prior to the completion of the job.

While Henderson Services had a list of extra items that it completed for which it was seeking reimbursement, which totaled over \$3,500.00, I find that only the following items and amounts due have been proven by a preponderance of the evidence:

- \$ 915.00 as the balance due on the original contract amount to build the pool;
- \$ 640.00 to re-tape walls and reseal the vinyl liner;
- \$1,260.00 for extra preparation of the site for concrete work;
- \$ 420.00 for installation of a water fill system;
- \$1,899.00 for installation of a pool heater; and
- \$ 312.00 for steel mesh, rebar and a deco drain.

From that amount, Ramani has proven by a preponderance of the evidence that he is due the following amounts for the reimbursement of items not delivered or completed under the Contract³:

\$ 2,400.00 for concrete for which he paid under the contract, but, was not poured;

\$ 650.00 for a diving board not delivered; and

\$ 538.00 to finish electrical work not completed.

Additionally, Henderson Services is seeking the reimbursement of reasonable attorney's fees and liquidated damages pursuant to specific provisions of the Contract.

DISCUSSION

It is clear from the record that Henderson Services did not breach the Contract and even provided extra services to Ramani pursuant to Ramani's request, with the understanding that it would get paid for the extra work. Therefore, Henderson Services is entitled to reimbursement for the services that it provided to Ramani under the Contract, and in addition to the Contract, in the total amount of \$5,446.00. Ramani, on the other hand, is entitled to a credit for the reimbursement of items that were not delivered or completed by Henderson Services under the Contract in the total amount of \$3,588.00. Thus, Henderson Services is entitled to the recovery of \$1,850.00 for net actual damages.

Henderson Services also contends that it is entitled to liquidated damages under the Contract in addition to the net actual damages to which it is entitled to recover. There are two provisions in the Contract that discuss liquidated damages.

³Ramani also counterclaimed against Henderson Services for additional expenses and damages he contends he incurred as a result of Henderson Services' alleged inferior workmanship and breach of the Contract. I find Ramani did not meet his burden of proof by preponderance of the evidence for these additional items.

Paragraph “(c)” of the “Buyer Default” section of the Contract discusses liquidated damages when the buyer repudiates the Contract prior to commencement of installation of the pool. That provision obviously does not pertain to the instant case since installation of the pool was almost complete when Henderson Services was removed from the job.

The other section dealing with liquidated damages is the one that would pertain to this action. It reads as follows:

Liquidated Damages: In the event the owner or owners, or co-signers, or both of them fail to comply with the terms of this agreement, Henderson Services Inc/Henderson Pools Inc may at its option enforce the following LIQUIDATED DAMAGES CLAUSE: In the event that owner or owners fail to comply with the terms of this contract, Henderson Services Inc/Henderson Pools Inc may, at its option receive and collect and recover the sum of twenty-five (25%) percent plus reasonable legal fees of twenty (20%) percent of the contract price for liquidated damages. In the event that any part of this contract is required to be turned over to Henderson Services Inc/Henderson Pools Inc attorney for the collection thereof, it is agreed that the remaining balance plus reasonable attorney’s fees of twenty (20%) percent, shall be the measure of damages.

A valid liquidated damages clause is a contract provision that is designed to determine in advance the measure of damages recoverable by a non-breaching party from a breaching party. “It is, in effect, the parties’ best guess of the amount of injury that would be sustained in a contractual breach, a way of rendering certain indefinite damages which would otherwise be uncertain or not easily susceptible of proof.” *S.H. Deliveries v. Tri-State Courier & Carriage*, 1997 WL 817883, at *2 (Del. Super. May 21, 1997) (citing 22 Am.Jur. 2d *Damages* §683). In contrast, a liquidated damages clause that results in a “penalty” is not enforceable. A “penalty” is an amount inserted into a contract that serves to punish the breaching party “irrespective of the damages sustained”.

Id. (citing 22 Am.Jur. 2d *Damages* §684). Such a clause is void as against public policy, whereas a valid liquidated damages clause is to be enforced according to its terms. *Id.*

In Delaware, there is a presumption in favor of the validity of a liquidated damages clause. *Id.* at *3 (citing 22 Am.Jur. 2d *Damages* §§686, 691). The question of whether a liquidated damages clause is a valid clause or an invalid penalty is a question of law. *Id.* (citing 22 Am.Jur. 2d *Damages* §692). There is a two-part test for determining whether a stipulated sum represents liquidated damages or serves as a penalty:

[A] stipulated sum is for liquidated damages when (1) the damages for which the parties might reasonably anticipate are difficult to ascertain (at the time of contracting) because of their indefiniteness or uncertainty, and (2) the amount stipulated is either a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to damages which have actually been caused by the breach.

Id. at *2 (citing 22 Am.Jur. 2d *Damages* §690).

In applying this test, the language of the liquidated damages clause for the Contract must be read carefully. It first provides a damage calculation which it “may, at its option” enforce which is twenty-five percent plus reasonable legal fees of twenty percent of the contract price. However, the very next sentence indicates that “[i]n the event that any part of this contract is required to be turned over to Henderson Services Inc./Henderson Pools Inc attorney for the collection thereof, it is agreed that the remaining balance plus reasonable attorney’s fees of twenty (20%) percent, shall be the measure of damages”.

Henderson Services contends that it is entitled to its actual damages plus liquidated damages of twenty-five percent and reasonable legal fees of twenty percent of

the contract price pursuant to the liquidated damages clause. However, such an interpretation of the liquidated damages clause in the Contract would obviously be a penalty and be void since the amount to be recovered by Henderson Services would not be a reasonable estimate of the damages which is caused by a breach or reasonably proportionate to damages that have actually been caused by a breach. The total sum recovered would be the actual damages caused by the breach plus liquidated damages. Henderson Services' interpretation of the liquidated damages clause would also be in conflict with the last sentence of the clause which states that when a matter is turned over to Henderson Services' attorney for collection, the remaining balance plus reasonable attorney's fees of twenty percent are the measure of damages.

I find that the last sentence of the liquidated damages clause in the Contract controls in the instant case. Henderson Services has turned the matter over to its attorney for collection and a specific sum of damages has been ascertained in the amount of \$1,858.00. Therefore, that amount is the actual measure of damages to which Henderson Services is entitled, plus reasonable attorney's fees of twenty percent of that amount.⁴

CONCLUSION

As a result of the Court's finding of fact, which is based on the entire record, including all direct and circumstantial evidence, and the references therefrom, and the Court's above-referenced conclusions of law, the Court awards judgment for Plaintiff Henderson Services, Inc., against Defendant Natwarial V. Ramani as follows:

- (a) Damages in the amount of \$1,858.00;
- (b) Reasonable attorney's fees in the amount of \$371.60;

⁴ Twenty percent of \$1,858.00 equates to \$371.60.

- (c) Pre and post judgment interest at the legal rate from October 17, 2002; and
- (d) Court costs.

IT IS SO ORDERED THIS 6th DAY OF JANUARY, 2006.

CHARLES W. WELCH
JUDGE