

February 7, 2011

Mr. Ronald W. Smith
2806 North Harrison Street
Wilmington, Delaware 19802
Pro-Se Defendant Below/Appellant

Mr. Kenneth M. Freemark
1607 Silverside Road
Wilmington, Delaware 19810
Pro-Se Plaintiff Below/Appellee

Mr. Kenneth M. Freemark
P.O. Box 3679
Wilmington, Delaware 19807
Pro-Se Plaintiff Below/Appellee

Re: *Ronald W. Smith v. Kenneth M. Freemark*
C.A. No.: CPU4-09-006608

Date Submitted: January 19, 2011
Date Decided: February 7, 2011

MEMORANDUM OPINION

Dear Mr. Smith and Mr. Freemark:

Trial in the above captioned matter took place on January 19, 2011 in the Court of Common Pleas, New Castle County, State of Delaware.

Following the receipt of documentary evidence¹ and sworn testimony, the Court reserved decision. This is the Court's Final Decision and Order.

¹ The Court received into evidence the following items: All of the following Exhibits are Plaintiffs' Exhibit # 1; however, they are further identified as 1-27: Plaintiff's 1 & 2 – Bill of Particulars prepared by Plaintiff; Plaintiff's 3 – Time Line of Project; Plaintiff's 4 – Signed contract between Plaintiff and Defendant dated 5-14-07; Plaintiff's 5 – Sketch of Project; Plaintiff's 6 – City of Wilmington Zoning Board of Adjustment Application for Variance; Plaintiff's 7 – City of Wilmington Notice for Application for Appeal for Variation of Provisions of the City of Wilmington Zoning Code; Plaintiff's 8 – Letter from Defendant to Neighboring Property Owners and City Council Members regarding application for a variance; Plaintiff's 9 - Instructions to Defendant regarding the process to be followed for re-application of a variance; Plaintiff's 10 – City of Wilmington Board of Adjustment Notice of Zoning Appeal scheduled for hearing on April 23, 2008; Plaintiff's 11 – City of Wilmington Board of Adjustment Zoning Appeal Decision denying variance request; Plaintiff's 12 – Sketch; Plaintiff's 13 – Sketch; Plaintiff's 14 – Sketch; Plaintiff's 15 – Sketch; Plaintiff's 16 – Sketch; Plaintiff's 17 – Sketch; Plaintiff's 18 – City of Wilmington Board of Adjustment Notice of Zoning Appeal scheduled for hearing on August 27, 2008; Plaintiff's 19 - City of Wilmington Board of Adjustment Zoning Appeal Decision denying variance request; Plaintiff's 20 – Letter dated Nov. 12, 2008

I. Procedural Posture

The matter is an appeal *de novo* brought to the Court of Common Pleas pursuant to 10 *Del. C.* § 9570 *et. seq.* from the Justice of the Peace Court. Appellant has timely perfected his appeal and has answered the Complaint.

The Complaint alleges that on May 14, 2007, the parties executed a design contract for a garage addition to Defendant's property in the amount of \$3,900.00.

Design work was performed over a period of time by the Plaintiff and expanded due to the City of Wilmington's requirements which were unknown to Plaintiff at the time that the contract was signed. Per the contract, Plaintiff billed the Defendant in the amount of \$1,500.00 and payment was due by January 26, 2009. Defendant responded by letter but no accompanying payment was received on February 3, 2009. Plaintiff sent another letter to Defendant with a second request on February 6, 2009 but received no response from Defendant. Plaintiff then sent a certified letter with a third request to Defendant on March 24, 2009 but received no response from Defendant. Plaintiff alleges that the work has been performed and payment is due per the contract. Defendant paid the required deposit in the amount of \$1,500.00 per the contract on

from Howard L. Robertson, Inc. describing the lines and grades of Defendant's properties; Plaintiff's 21 – Letter to Patrick Susi, Supervisor of Mapping Support, New Castle County from Defendant in reference to revision of the deed for Defendant's properties; Plaintiff's 22 – Letter to Plaintiff from Office of Administrative Services, GIS and Mapping Services in reference to combination of tax parcels; Plaintiff's 23 – Letter from Plaintiff to Defendant dated 1-26-09 stating that "sketches approved and working drawings ready for final approval. Fee due \$1500.00."; Plaintiff's 24 – Drawing of Proposed Garage for Defendant prepared by Plaintiff; Plaintiff's 25 – Letter from Plaintiff to Defendant dated 2-6-09 requesting payment for services rendered; Plaintiff's 26 – Letter from Defendant to Plaintiff dated 2-3-09 stating that the project has been put on hold until further notice; Plaintiff's 27 – Four (4) photographs of a residence; Defendant's Exhibit # 1 – Letter from Raymond P. Harwood, Assistant Plans Examiner/Engineer, Department of Licenses and Inspections stating that the plans submitted by Defendant were the only copies received, reviewed and approved by the Department of Licenses and Inspections as the working drawings used on the project; Letter "To Whom It May Concern" with no identified author stating, *inter alia*, that design drawings provided by Defendant differed from those created by Plaintiff and that Plaintiff's drawings were working sketches or design in progress as they were not complete for construction, bearing no seal nor approval stamp from the City of Wilmington Licenses and Inspections Department; Defendant's Exhibit # 2 - Letter from Defendant to Plaintiff dated 2-3-09 stating that the project has been put on hold until further notice; Defendant's Exhibit # 3 – Signed contract between Plaintiff and Defendant dated 5-14-07; Defendant's Exhibit # 4 - Letter from Plaintiff to Defendant dated 2-6-09 requesting payment for services rendered; Drawing of Defendant's property in reference to project.

May 29, 2007. Defendant provided to Plaintiff a site plan review which was not suitable for the revised project. Plaintiff prepared an Application for Variance to the Zoning Board of Adjustment and provided it to Defendant for his signature and payment of \$100.00 for the application.

Plaintiff delivered the Variance Application and accompanying payment provided by Defendant to the City of Wilmington. Plaintiff provided a draft for Defendant to follow and to send to all adjoining property owners per City requirements. Plaintiff provided Defendant a list of all properties to be notified as directed by the City of Wilmington Board of Adjustment. Plaintiff was notified by the City of Wilmington Board of Adjustment to appear on behalf of Defendant on April 23, 2008 to present information and variance request with Defendant's permission. Due to public objections, the matter was delayed/postponed to a later date in order to gain additional information.

The City of Wilmington Board of Adjustment required Defendant or his representative to meet with the community and to prepare sketches for owners' approval to be presented to the community for approval. Defendant approved a final sketch and preliminary sketches prepared by Plaintiff in order to submit to the community for approval.

The City of Wilmington Board of Adjustment scheduled a re-hearing for August 27, 2008. The City of Wilmington Board of Adjustment hearing on August 27, 2008 was attended by Plaintiff in order to provide testimony; however, Defendant was not present at such hearing. The Zoning Board approved the request with conditions to be satisfied prior to obtaining the building permits. Plaintiff then invoiced Defendant for the extra work performed that was not included per the contract. Defendant paid the invoice to Plaintiff on or about November 18, 2008. As requested by the City of Wilmington Board of Adjustment, Defendant approved and

provided payment for a new deed description to combine his two (2) properties into one (1) property. Plaintiff obtained the new deed description from Defendant's land surveyor on or about November 12, 2008 and delivered it to New Castle County to be recorded and approved by Defendant.

Plaintiff, acting on behalf of Defendant, received approval of the deed revision on or about December 9, 2008 and notified Defendant that the approval had been given to begin the working drawings. On or about January 26, 2009, Plaintiff invoiced Defendant as per the contract in the amount of \$1,500.00. Plaintiff sent additional notices for payment to the Defendant with no response received until February 3, 2009. On or about February 3, 2009, Plaintiff received a letter from Defendant stating that the project was on hold and no payment would be submitted by Defendant.

Plaintiff responded to Defendant by letter dated February 4, 2009 in which he explained the contract, work completed as per the contract and that payment was due and owing. After several requests for payment, Plaintiff received no response and no payment from Defendant. Plaintiff states that he has completed the work as per the contract and seeks the amount of \$1,500.00 for services rendered plus interest and court costs.

Defendant's Answer admits the execution of a contract between the parties; however, contends that Plaintiff's design work was never approved by the City of Wilmington's Licenses and Inspections Department. Further, Defendant disputes that payment was due and owing to Plaintiff, specifically Plaintiff changed his invoice to reflect that payment was due and owing after a property line reconfiguration was completed. Defendant states that the above was not per the contract. Defendant disputes the site plan provided to Plaintiff by stating that "if the site plan provided by the surveyor was not suitable, the Plaintiff cannot provide final working drawings

based on the said site plan.” Defendant admits that Plaintiff prepared the Application for Variance and assisted Defendant in the process of gaining the adjoining property owners’ approval of the project.

Defendant further admits that Plaintiff attended the variance hearings on his behalf. Defendant alleges that the working drawings must have been presented to the City and approved prior to obtaining building permits for the project. Defendant alleges that there was no attempt by Plaintiff to communicate with him via telephone regarding the dispute. Defendant denies that Plaintiff is entitled to payment because Plaintiff failed to perform his duties as an architect.

Defendant further denies that Plaintiff is entitled to court costs and interest. Defendant alleges that he is “very seriously considering [sic] bringing charges against the plaintiff for 3 counts of attempted extortion.”

The Court construes the instant action as a breach of contract claim. The Plaintiff claims that Defendant breached his contract to pay the balance due for architectural design services rendered.

Plaintiff requests that this Court award the amount of \$1,500.00, interest and court costs.

The sole issue pending before this Court is whether the Plaintiff has proved by a preponderance of the evidence that the architectural design services were rendered in full to Defendant and if so, whether he is entitled to payment for such services. For the reasons set forth below, the Court enters judgment in favor of the Plaintiff.

II. The Facts

The Court considers the following facts to be relevant in the instant matter. Kenneth M. Freemark (hereinafter “Freemark” or “Plaintiff”) and Ronald W. Smith (hereinafter “Smith” or “Defendant”) entered into a written contract on May 14, 2007. Plaintiff is a registered architect.

The contract provided that Plaintiff was to provide drawings to the Defendant for the Defendant's construction of a garage to Defendant's existing residence. Plaintiff testified that the contract provided that the owner of the property was responsible for providing the lines and grades as well as for obtaining the necessary building permits. The parties set forth a fee schedule for payments and the total contract price was in the amount of \$3,900.00.

According to Plaintiff, the existing lines and grades drawings were not prepared by him but rather prepared by Robinson Engineering. Plaintiff prepared the drawings for the variance hearing. At the variance hearing, Plaintiff testified and an objection was made to the plans prepared by Plaintiff. For that reason, Plaintiff would need to prepare sketches based upon discussions with neighbors. After that was complete, Defendant had to re-apply for the variance. Plaintiff testified that the project was placed on hold by the city. Plaintiff further testified that Defendant's two (2) properties held two (2) separate deeds and per the city, the garage had to be adjacent to the property or attached to the property.

Plaintiff sent an invoice to Defendant in the amount of \$1500.00 for his services rendered in preparing the drawings. Plaintiff conceded that the final drawings were not completed due to the project being placed on hold. Further, Plaintiff stated that the lines and grades drawings were incorrect and although not specified for in the contract between the parties, Plaintiff assisted Defendant with such task.

Defendant offered a different version than Plaintiff. Defendant contended that Plaintiff seeks payment in the amount of \$1500.00 for work performed that was actually never performed by Plaintiff. Defendant testified that on or about January 26, 2009, Plaintiff informed him that the sketches had been approved and the working drawings were ready. Defendant stated that Plaintiff did not submit these documents to the city and that he was in fact the only one who

submitted the drawings to the city. As a result of Plaintiff's failure to submit the final drawings to the city for approval, Defendant placed the project in hold until such time that the final working drawings were submitted to the city as the final working drawings require the approval of the City of Wilmington. Defendant testified that he did not fire the Plaintiff but rather "left the door open to proceed." Defendant received a letter from Plaintiff on or about February 6, 2009, which stated that the working drawings were 60% completed. Defendant further testified that he had received a previous letter from Plaintiff on or about January 26, 2009 that stated that the working drawings were completed. Further, Defendant testified that his two (2) properties were to be combined into one (1) parcel.

III. The Law

In a civil claim for breach of contract, the burden of proof is on the Plaintiff to prove his claim by a preponderance of the evidence.² The plaintiff in a civil suit is required to prove all the elements of his or her claim by a preponderance of the evidence.³ "Preponderance of the evidence" is defined as "the weight of evidence under all the facts and circumstances proved before you."⁴ Or, put somewhat differently, "[t]he side on which the preponderance of the evidence exists is the side on which the greater weight of the evidence is found."⁵

To recover on a claim for breach of contract, the plaintiff must establish three elements by a preponderance of the evidence: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by the contract; and (3) resultant damages to the plaintiff.⁶

² *Williams v. Vertical Blind Factory*, 2009 WL 5604428 at *3 (Del. Com. Pl. Nov. 17, 2009) citing *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. Ct. 2005).

³ *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009) citing *Neilson Business Equipment Center, Inc. v. Monteleone*, 524 A.2d 1172 (Del. Super. Ct. 1987).

⁴ *Id.* citing *Warwick v. Addicks*, 157 A. 205, 206 (Del. Super. Ct. 1931).

⁵ *Id.* citing *Reynolds v. Reynolds*, 237 A.2d 708 (Del. Super. Ct. 1967).

⁶ *Id.* citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

Stated differently, to state a claim for breach of contract, the Plaintiff must establish the following: (1) a contract existed; (2) the defendant breached the contractual obligations; and (3) the breach resulted in damage to the plaintiff.⁷ Further, “when there is a written contract, the plain language of a contract will be given its plain meaning.”⁸

If a contract is clear on its face, “extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.”⁹

In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract.¹⁰ Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred.¹¹ Plaintiff, however, has a responsibility of proving damages as an essential element of his claim by a preponderance of the evidence.¹²

At the same time, however, a party has a duty to mitigate once a material breach of contract occurs.¹³ Whether a breach is material and justifies non-performance is a matter of degree and is determined by weighing the consequences in light of the contract.¹⁴

Notwithstanding a material failure to perform, the complaining party may, nevertheless, recover the value of benefit conferred upon the other party.¹⁵ Further, “...a slight breach by one

⁷ *Williams v. Vertical Blind Factory*, 2009 WL 5604428 at *3 (Del. Com. Pl. Nov. 17, 2009) citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

⁸ *Wilson v. Klabe Construction Co.*, 2003 WL 22931390 at *4 (Del. Com. Pl. July 22, 2003) citing *Phillips Home Builders v. The Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. Super. Ct. 1997).

⁹ *Pro Fuels, Inc. v. Silver Spring Apartments, Inc.*, 2006 WL 4128769 at *2 (Del. Com. Pl. Dec. 21, 2006) citing *N&P Partners, LLC v. Council of Unit Owners of Bayberry Woods Condominium*, 2006 LEXIS 38 at *17, 2006 WL 456781 (Del. Ch. 2006) (internal citations omitted).

¹⁰ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007) citing *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, 251 A.2d 571, 573 (Del. Super. Ct. 1969).

¹¹ *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009) citing *Delaware Limousine Services, Inc. v. Royal Limousine Svc., Inc.*, 1991 LEXIS 130 at *8 (Del. Super. Ct. Apr. 5, 1991).

¹² *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009).

¹³ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007) citing *Lowe v. Bennett*, 1994 WL 750378 at *4 (Del. Super. Ct. Dec. 29, 1994).

¹⁴ *Id.* citing *Eastern Electric & Heating v. Pike Creek Professional Center*, 1987 WL 9610 at *4 (Del. Super. Ct. Apr. 7, 1987).

party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract.”¹⁶ “Non-performance by the injured party under such certain circumstances will operate as a breach of contract.”¹⁷

A “good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished.”¹⁸

III. Discussion

In sum, Plaintiff argues that he entered into a contract with Defendant. He received correspondence from Defendant stating that Defendant wished to cease the project. However, according to Plaintiff, he received the above correspondence from Defendant after he had sent an invoice for payment in the amount of \$1,500.00 to Defendant.

In sum, Defendant argues that Plaintiff never produced final working drawings. Plaintiff seeks payment for final working drawings that are in essence, sketches. Defendant argues that his approval of the final working drawings is null as Defendant is not an architect.

Defendant further argues that Plaintiff’s failure to provide final working drawings to the City allows him the ability to void the contract. Defendant seeks return of the deposit made in the amount of \$1,500.00 plus court costs.

The sole dispositive issue pending before this Court is whether by a preponderance of the evidence in this trial record Plaintiff produced final working drawings to Defendant and if so, whether he is entitled to payment for such.

¹⁵ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007) citing *Heitz v. Sayers*, 32 Del. 207 (Del. Super. Ct. 1923).

¹⁶ *Accents of Nature Landscaping and David Evans v. Savage*, 1998 WL 1557442 at * 4 (Del. Com. Pl. Oct. 21, 1998) citing 11 *Willston on Contracts*, § 1292 at 8 (3d Ed. 1968).

¹⁷ *Id.* citing 11 *Willston on Contracts*, § 1292 at 8 (3d Ed. 1968).

¹⁸ *Id.* citing *Del. Civ. Pattern Jury Instructions* § 19.18 (1998).

The evidence submitted by the parties in this matter speaks to the essence of the present dispute.

The contract¹⁹ executed between the parties states “The fee for the above is \$3,900.00 with payments as follows: \$1,500.00 deposit, sketches approved and working drawings \$1,500.00, balance at completion \$900.00.” Thus, the second tier payment was due and owing upon approval of the sketches and working drawings.

The invoice²⁰ dated January 26, 2009 states “sketches approved and working drawings ready for final approval.” Correspondence²¹ from the Defendant to Plaintiff dated February 3, 2009 states “the afore mentioned garage project has been put on hold until further notice. In so far as I have not discussed and or approved your final working drawing (s), your invoice for \$1,500.00 is premature. I will give you a call when I decide to continue our relationship with regard to the garage project.”

Correspondence²² from Plaintiff to Defendant dated February 6, 2009 states “In reference to the invoice I sent you for the \$1,500 is due and payable, based on contract dated 5-14-07. After we completed your property line reconfiguration with New Castle County, which I reviewed with you and also discussed the need to hire an engineer to do new lines and grades, which I reported to you the fee necessary for that and during the same time period, you and I met to review the preliminary sketches which I produced for you with the City of Wilmington, involving variances [sic] and property lines. At that meeting we re reviewed those sketches and made some minor modifications and you instructed me to proceed with the working drawings so you could put the project out to bid. This was the second time you approved the sketches and I

¹⁹ See Plaintiff’s Exhibit # 1 (4); Defendant’s Exhibit # 3.

²⁰ See Plaintiff’s Exhibit # 1 (23).

²¹ See Plaintiff’s Exhibit # 1 (26); Defendant’s Exhibit # 2.

²² See Plaintiff’s Exhibit # 1 (25); Defendant’s Exhibit # 4.

proceeded under your direction...Working drawings are approximately 60% completed and could be completed in approximately 4-6 hours.”

There is no dispute that the parties entered into a contract for the design services. Further, there is no doubt that Plaintiff cooperated with and assisted Defendant with revisions to the project as they arose. Plaintiff appears to have acted gratuitously, in that he assisted Defendant on numerous occasions with receipt of payment for such services. The contract²³ clearly states that fee for Plaintiff’s services “does not include any meetings involving variances required or attendance of public hearings. This will be done at an additional cost.” The contract included meetings between the parties, surveyors and the City of Wilmington. The contract also included production by Plaintiff of a set of prints to be presented in order to obtain the necessary building permits.

There has been no evidence submitted to the Court or testimony adduced from the parties to indicate that Plaintiff charged Defendant for the additional assistance he provided in regard to the variance process. Plaintiff gratuitously exceeded the scope of the contract in that he assisted Defendant by working with the City of Wilmington Board of Adjustment, presenting Defendant’s matter to the Board at hearings, making efforts to overcome the objections of Defendant’s neighbors to the project and formulating letters to Defendant’s neighbors in reference to the project.

The dispositive evidence with regard to the instant dispute is found in the letter²⁴ dated February 6, 2009 from Plaintiff to Defendant which states: In reference to the invoice I sent you for the \$1,500 is due and payable, based on contract dated 5-14-07. After we completed your property line reconfiguration with New Castle County, which I reviewed with you and also

²³ See Plaintiff’s Exhibit # 1 (4); Defendant’s Exhibit # 3.

²⁴ See Plaintiff’s Exhibit # 1 (25), ¶ 3; Defendant’s Exhibit # 4.

discussed the need to hire an engineer to do new lines and grades, which I reported to you the fee necessary for that and during the same time period, you and I met to review the preliminary sketches which I produced for you with the City of Wilmington, involving variances [sic] and property lines. At that meeting we re reviewed those sketches and made some minor modifications and you instructed me to proceed with the working drawings so you could put the project out to bid. This was the second time you approved the sketches and I proceeded under your direction...Working drawings are approximately 60% completed and could be completed in approximately 4-6 hours.”

After the receipt of an abundance of evidence and testimony received from the parties, this Court concludes that the dispute between the parties involves the subject fee due and owing the plaintiff. This Court concludes that a valid contract existed between the parties; Defendant breached that contract by failing to fulfill the payment due and owing under the contract when Plaintiff produced the working drawings to Defendant and Plaintiff is entitled to relief as per the contract for the amount of services that he provided to Defendant. There is no evidence to indicate that Plaintiff breached the contract and that Defendant is entitled to void the entire contract and be awarded the deposit fee and court costs. The Defendant argues that he never approved the working drawings and also claims that work was delayed on the project. Defendant further argues that he hired another architect to complete the job.

However, the Defendant overlooks the fact that the essence of the contract was accomplished – Defendant received sketches and working drawings as per the contract. Plaintiff met with representatives from the City of Wilmington to discuss the project. There is no contractual requirement that Plaintiff submit the sketches and working drawings to the City of Wilmington Licenses and Inspections Department. It is clear to this Court that Plaintiff

performed as per the contract. Defendant, however, did not, in that he did not remit payment to Plaintiff for the services provided by Plaintiff. It appears to this Court that Defendant failed to communicate to Plaintiff the various issues that he was experiencing with Plaintiff's work.

The evidence indicates that Plaintiff made 60% progress on the final working drawings. Thus, by a preponderance of the evidence, Plaintiff has proved that he is entitled to payment in the amount of \$900.00 (60% progress x \$1,500.00) for damages for the proximate cause of this breach of contract plus pre-judgment and post-judgment interest at the legal rate.

IV. Opinion and Order

Therefore, on Plaintiff's claims, for the reasons discussed *supra*, judgment is entered for Plaintiff and against Defendant in the amount of \$900.00 plus pre-judgment and post-judgment interest.²⁵ Each party shall bear their own costs.

IT IS SO ORDERED this 7th day of January 2011.

John K. Welch
Judge

Cc: Ms. Tamu White, Supervisor
Civil Division

²⁵ See 6 Del. C. § 2301 *et. seq.*