IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JERRY SMITH	:	C.A.#01-02-102
Plaintiff below/Appellant	:	
v.	:	
RED BARN, INC., t/a MAACO AUTO PAINTING AND BODYWORKS	:	
Defendant below/Appellee	:	

ORDER

Jerry Smith, Appellant, appeared pro-se.
John C. Andrade, Esquire, appeared for Appellee, Red Barn, Inc.

BEAUREGARD, Judge.

On this _____day of _____, 2003, the Court considers the following matters: a) Red Barn's Appeal of the Commissioner's REPORT, dated August 23, 2002, recommending that Red Barn's Motion for Relief from the Default Judgment be denied, b) Red Barn's Appeal from the Commissioner's Findings of Fact and Recommendations, dated February 25, 2002, concerning the extent of damages, and c) Smith's Motion To Strike and Dismiss the Appeal. Both of the Appeals and

the Motion are consolidated and will be determined by this ORDER. In determining the Appeals from the Commissioner's findings of fact and recommendations, the Court has conducted a careful *de novo* review of those portions of the foregoing REPORTS to which a timely and proper objection has been made. In addition the Court has reviewed the pleadings, docket entries and applicable transcripts relevant to this review. After doing so and for the reasons stated below, the Court concludes that Red Barn's objections to the Commissioner's findings of fact and recommendations concerning a) relief from the default judgment and b) the extent of damages are either untimely, not stated with sufficient particularity, or without merit. Moreover, the Court concludes that Smith's Motion To Dismiss should be denied.

Pursuant to 10 *Del. C*. § 1316 (b) (1) d. and CCP Civ. Rule 112 (A) (4) (ii) and (iv), the Court shall make a *de novo* determination of those portions of a Commissioner's Report, specified proposed findings of fact or recommendations to which a party has filed written objections. The objections must set forth the basis of the objections with particularity and be filed within ten days after the filing of the Commissioner's proposed findings and recommendations. *Id*.

Relief from Default Judgment

1. At the outset, it should be noted that Red Barn did not appeal, i.e. file specified objections to, the Commissioner's REPORT, dated October 23, 2001,

which contained a finding that Red Barn, a Corporation of the State of Delaware, had failed to appear in this proceeding after it had been notified that it must appear through a member of the Delaware Bar. The Commissioner also found that Red Barn had been notified that failure to appear at the Pretrial Conference or submit a pretrial worksheet could result in sanctions, to include the entry of a default judgment, pursuant to CCP Civ. Rule 37 (b) (2) (C). Therefore, the Commissioner recommended that a default judgment be entered against Red Barn on the liability issue and set the matter down for a hearing to determine the extent of damages. The Court accepted the Commissioner's findings of fact and recommendations on November 9, 2001.

2. Red Barn makes only one timely objection in its August 22, 2002 Appeal From the Commissioner's August 9, 2002 Findings of Fact and Recommendations concerning the Motion for Relief from Default Judgment. Red Barn contends at paragraph three of its Appeal that the Commissioner, in fact, found that notice of the Pretrial Conference was sent to Red Barn at an incorrect address. Red Barn alleges that this insufficient notice would constitute excusable neglect in failing to appear. The Commissioner recommended that the Court not grant relief from the judgment because, in part, Red Barn had failed to appear at the Pretrial Conference after receiving notice and his non-appearance was willful and intentional. Review of the Commissioner's REPORT reveals that the footnote reference on page five to

note two is a typographical error. (On August 23, the Commissioner filed a corrected copy of his REPORT, pursuant to CCP Rule 60 (a), correcting typographical errors of the dates appearing in the text.) However, at note four of the REPORT, the Commissioner found, and the record reflects, that each of the three notices scheduling the pretrial conference was sent to the correct address. The record supports the Commissioner's finding that Red Barn's failure to comply with Court Rules and failure to appear in Court proceedings after sufficient notice established willful conduct rather than excusable neglect.

Damages

3. Despite receiving notice of the inquisition on damages, Red Barn failed to appear to offer any evidence regarding damages. It is uncontroverted that in 1999 Smith contracted with Red Barn to have his 1992 Lexis painted for $900.00, which was the price for a "top of the line Signature Series paint job." Smith testified that he originally went to Red Barn's production paint shop ("MAACO AUTO PAINTING AND BODYWORKS") to inquire about the feasibility of repairing three "parking lot dings and a ding on the hood." Red Barn's principal declined to repair the "dings" because the paint might not match and suggested that Smith have the whole car repainted. (TR 46) In its Appeal from the Commissioner's Findings of Fact and Recommendations concerning the extent of damages, Counsel for Red Barn contends that Smith did not complain about the

paint job until August 15, 2000. The evidence presented, however, refutes this contention. Smith's testimony and the documents introduced at the hearing, without objection, establish that when he inspected the newly painted car, on June 26, 2000, he observed defects in the paint job. His dissatisfaction is noted on the original invoice, which confirms that he was entitled to return the vehicle for rebuffing. Red Barn's contention is thus merit less.

4. Red Barn attaches to its pleading a writing, dated August 15, 2000, which purports to be an itemization, in Smith's hand, of alleged defects in the paint job, and contends that the damages recommended by the Commissioner are inconsistent with the contents of this writing. This contention is without merit. Smith's testimony establishes that Smith called Red Barn several times to schedule the rebuffing, but Red Barn was unable to accommodate him for one reason or another. About five months after the original paint job, the paint began to peel. Red Barn's principal eventually admitted that there was a paint adhesion problem around the moldings and agreed to repaint the car. Smith prepared the August 15, 2000 itemization of defects at this time and before this second repainting of his car. The Commissioner's findings concerning the extent of the damages (costs of labor, parts and paint supplies) are related to damages resulting from the second repainting of Smith's vehicle. Therefore, Red Barn's contention that the

recommended damages are inconsistent with the August 15, 2000 writing is immaterial.

5. Red Barn also contends in its Appeal concerning damages that it was error to recommend damages in excess of the $900.00 judgment entered for Plaintiff in the Justice of the Peace Court. To the extent that Red Barn is contending that the Court is precluded, as a matter of law, from entering a judgment in excess of the amount awarded by the Justice of the Peace, no authority is cited for this proposition, which is without merit. The record reflects that Smith claimed damages in excess of $3500.00 in the court below. The language of 10 *Del.C*. §9571 (c), which states that the proceedings on appeal shall be a trial *de novo*, implies that this Court is required to make an independent determination of the facts. Although "[t]he case on appeal…is the same case that was commenced below," the appellate court disregards the judgment of the lower court, and the proceeding is conducted as though no action whatever had been instituted there. 2 Victor B. Woolley, *Woolley's Practice in Civil Actions* § 1416 (1906); 5 C.J.S. *Appeal and Error* §756.

6. To the extent that Red Barn is contending that the damages recommended by the Commissioner are excessive, I have conducted a careful review of the record, to include the transcript of the hearing and the Commissioner's February 25, 2002 REPORT on damages, and conclude that this objection is also without

merit. Smith testified that when he picked up the car after the second repainting, he discovered that the surface contained several spots of chipped clear coat. He also discovered that Red Barn's workman had applied paint to non-paint-bearing surfaces. (TR 48) Smith testified that, when he confronted Red Barn's principal with these defects, the latter admitted that his workman had failed to follow correct procedures and declared that "the only way this car can be straightened out now, because of the amount of paint that I've put on it, is that it has to be stripped….I'm not going to fool with the car anymore, take me to Court." (TR 48)

7. Smith produced an expert witness at the hearing on damages who offered an opinion concerning a) the cause of the above-referred-to defects in the second repainting, and b) the reasonableness of the itemized charges appearing on the lowest of several repair estimates. The expert is the proprietor of an auto body and paint shop located in Berlin, Maryland. He has owned the shop for nine years and has thirty-five years of experience in the business. (TR 21-22) The expert testified that he examined the car and noted painted moldings, painted rubbers and gaskets, and painted factory assembled door handles. (TR 23) The expert opined that these non-paint-bearing parts should have been masked or removed prior to the second repainting. (TR 37) The expert also testified that he observed chipped and peeling paint in the vicinity of these non-paint-bearing parts. (TR 44) Finally, the expert testified that, in his professional opinion, these defects were the result of poor and

unworkmanlike preparation for the repainting. (TR 38, 44) To be more precise, it was the opinion of the expert that the surface of the car had not been properly sanded around the non-paint-bearing parts; therefore, the paint in those areas failed to adhere. (TR 26, 31)

8. Under Delaware law, the measure of damages for defective performance is the reasonable cost of making the work performed conform to the contract. *Justice v. Phillips*, 1991 WL 166071, Lee, J. (Del. Super.). The expert testified that because the third coat of paint and clear coat (the second of the two applications by Red Barn on top of the factory application) was chipping and peeling, all of the paint would have to be stripped from the car before it was repainted. (It should be noted that this opinion was corroborated by Red Barn's principal, see paragraph 6., above.) The expert also testified that the non-paint-bearing parts to which paint had been applied would have to be replaced. (TR 31-32)

9. As stated above, Smith had obtained several estimates from auto body shops to repaint the car. Pursuant to DRE 703, Smith's expert was requested to offer his opinion concerning the reasonableness of the itemized charges set forth on the lowest of these estimates, which had been prepared by Rich Farris Auto Body, Inc. ["Farris estimate"]. The expert testified that the charges appearing on the Farris estimate for parts ($1198.25), paint supplies ($584.00) and labor ($1689.80) were "in line" with what he himself would charge. It was the expert's professional

opinion that these charges provided "a very good estimate" of the cost to correct the problems created by Red Barn. (TR 24) The charges on the Farris estimate for "body labor" and "paint labor" were the subject of considerable testimony. The expert offered an opinion concerning the cost of removing and replacing the damaged parts, as well as the cost of stripping the paint down to bare metal. In his opinion, the cost of stripping is higher than it might have been, because it included the cost of removing the three coats of paint, as well as the cost of re-repairing the "dings." (TR 29, 32, 42-43) He also testified that preparing the car for stripping is labor-intensive and included the cost of removing the front windshield, rear windshield and sunroof, as well as properly masking around the doors and windows so that liquid stripping agent does not drip down into the door cracks. (TR 29-30, 41-42) Finally, he testified that refinishing included the cost of sanding the surfaces exposed by the removal of these parts, as well as the bumpers, etc. so that the paint would adhere. (TR 41-42) He concluded that, in his professional opinion, the labor costs on the Farris estimate were reasonable. (TR 29-30)

10. Based on this uncontroverted evidence, the Commissioner accepted the opinion of the expert and found that the reasonable cost to correct Red Barn's defective performance and make the work performed conform to the contract was the total of the estimated charges for parts, paint supplies and labor, or a sum total of $3472.05. The Commissioner's REPORT contains three additional findings

concerning the extent of damages. Acknowledging that "...the costs of labor and replacement parts are substantial," he found that these costs are the "...direct result of the Defendant's failure to prepare the car for painting." The Commissioner concluded that "[a]warding Plaintiff these costs is the only way to "give him the benefit of his bargain…and to put him in as good a position as he would have been in had the contract been performed." *See Council of Unit Owners v. Carl M. Freeman Associates, Inc.,* 564 A.2d 357, 360 (Del. Super. 1989), *citing Restatement (2d) of Contracts* § 347. Next, the Commissioner found that the " 'cost to undo what has been improperly done' is not clearly disproportionate to the loss in value to the Plaintiff." Finally, the Commissioner found that awarding damages based on the cost to remedy the defects does not result in a "substantial windfall" for the Plaintiff. *Cf. Restatement (2d) of Contracts* § 348 cmt (c).

11. Red Barn attempts to revisit the matter of damages in its August 22, 2002 Appeal From the Commissioner's Findings of Fact and Recommendations, dated August 9, 2002, which recommended denial of Red Barn's Motion for Relief from the Default Judgment. At paragraph five of its petition in this Appeal, Red Barn contends that: a) "…the expert's opinion was not to a reasonable degree of probability for an expert in the bodywork field"; b) "…the testimony was that the car would cost $2500.00 to paint….[and] Plaintiff testified that the damages he requested of $3372.05 included the $900.00 that he paid [Red Barn]"; and c) it

would be inappropriate to refund the $900.00 that he paid Red Barn, since to refund the $900.00 would mean that Smith had paid nothing for a finished paint job, "and further his expert testified that he would have had to pay more than $900.00 for the paint job he wanted for his vehicle." These objections to the findings and recommendations of the Commissioner, as set forth in his February 25, 2002 REPORT concerning the extent of damages, should have been filed within ten days after the filing of that REPORT. However, they were not filed until August 22, 2002. Hence, pursuant to 10 *Del. C*. § 1316 (b) (1) d. and CCP Civ. Rule 112 (A) (4) (ii), the objections are untimely and may not be considered. Moreover, the objection that the opinion of Smith's expert did not rise to "a reasonable degree of probability," is procedurally flawed and may not be considered because it lacks the specificity required by the above-referred-to statute and Rule.

Motion To Dismiss

12. Smith's Motion To Strike the Pleading and Dismiss the Appeal is grounded on the appearance of a typographical error in the caption of Red Barn's August 22, 2002 Appeal. There has been no showing of prejudice. A motion to strike is not the proper way to obtain the dismissal of an appeal. Such motions are viewed with disfavor and seldom granted. 5A Wright, Miller and Kane*, Federal Practice and Procedure: Civil 2d*, § 1380. A non-prejudicial error in the caption of

the appeal does not preclude the Court of Common Pleas from exercising subject matter jurisdiction. *Freibott v. Patterson*, 740 A.2d 4, 6 n.5 (Del. Super. 1999).

NOW THEREFORE, after careful and *de novo* review of the record in this action and for the reasons stated in the Commissioner's REPORTS of February 25, 2002 and August 23, 2002,

IT IS ORDERED that: a) the well-reasoned findings and conclusions of the Commissioner are accepted in whole; and b) Smith's Motion is DENIED.

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Rosemary B. Beauregard, Judge