

SUPERIOR COURT
OF THE
STATE OF DELAWARE

John E. Babiarz, Jr.
Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801

January 8, 2008

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RE: *The Whayland Company, Inc. v. Coastal Properties, I, LLC*
C. A. No. 02L-11-008-JEB (Sussex)

Dear Counsel:

This is a mechanics lien and contract action brought by a general contractor, The Whayland Company, Inc., against a property owner, Coastal Properties I LLC., for the balance due on a construction contract for renovation and construction on a property known as the Bellmoor Inn. Coastal has counterclaimed for damages related to alleged construction defects. Various subcontractors have been brought in as third

party defendants and some of them have asserted claims on their own behalf. There is the usual plethora of claims, counterclaims, crossclaims, and affirmative defenses. The suit was filed in November of 2002. A non-jury trial is scheduled to begin January 22, 2008.

Pending are four motions in limine. One, filed by Whayland, seeks to preclude Coastal from presenting evidence of diminution of market value due to a specific alleged construction defect, on grounds that diminution of value is not an available measure of damages in this case. The issue is better left for resolution post-trial. The motion is denied as premature.

The other three motions, filed by Whayland and K.B. Coldiron, Inc. a third party defendant and the siding sub-contractor, seek to preclude Coastal from presenting evidence of repair costs for alleged siding defects and expert evidence in support of the claim on grounds that the repair contract, an expert report and associated documents were not produced by Coastal until after the expiration of a Court ordered discovery cut-off date, May 1, 2007. Some of these documents were produced a few weeks after the deadline; some, on November 19, 2007; and one, according to Coldiron, not until December 31, 2007.

Coastal, while acknowledging the late production, counters by arguing that technically it met the supplementation requirements of Rule 26(c). It also says that it informally disclosed the contract for siding repairs and that Whayland and Coldiron

should have moved for leave to re-open discovery, a move it says it would not have opposed. And finally it claims that Whayland and Coldiron are not prejudiced by certain late disclosures, because they already knew the information. In the event this Court is inclined to grant the motions, Coastal asks that instead the Court continue the case to allow additional discovery. It says that the siding damages amount to over half of its counterclaim and to preclude it from proving them would be unduly harsh.

On the other side of the coin Coldiron asks the Court to continue the trial to allow discovery if the motions are denied. Whayland does not state a position regarding a continuance if the motions are denied; but, given the vigor with which it argues prejudice, it is not difficult to believe that it would join in Coldiron's position.

The parties' positions regarding a continuance if the motions are either granted or denied in effect render the motions in limine moot. In either event, the Court would grant a continuance either to avoid the unjust result of precluding evidence pertaining to a major part of Coastal's counterclaim or precluding counterclaim defendants from a fair opportunity to defend the claim. The Court is of the opinion that the late discovery was inadvertent and not a deliberate attempt to deceive the moving parties. The Court will therefore continue the trial and reopen discovery, solely on this siding claim. The motions in limine will be denied, but without prejudice in the event that Whayland or Coldiron can demonstrate substantial prejudice at the conclusion of discovery.

Two other important considerations impel the Court to this result. First, the pre-trial stipulation submitted by the parties lists eighty-four issues of fact and thirty-six issues of law which remain to be litigated. Whayland lists only two issues of fact but number one is a whopper: among many other things, whether there is factual support for 85 change orders. This Court simply cannot believe that after more than five years of litigation the parties could not agree that at least a couple of change orders were either valid or invalid or that some simply are not worth fighting over.

Among the issues of law are whether Whayland properly filed its mechanics lien action and whether certain portions of a third party complaint fail to state a claim on which relief can be granted. These are matters usually raised and resolved early on in litigation, not on the eve of trial. These circumstances tell the Court that the parties are not really ready to try the case. They have not separated the wheat from the chaff to streamline the case for a cogent trial. A brief continuance will allow the parties to do this work.

Second, at the pre-trial conference the Court was informed that there have been no meaningful settlement negotiations since a mediation session five years ago when the case was filed. The mediation was unsuccessful, according to counsel, because it took place too early, before there had been any meaningful discovery. As far as the Court can tell there are no great issues or principles involved in this case, or even any small ones for that matter. This case is about money, and money

disputes, particularly among businessmen, should be susceptible to compromise, and settlement. A brief continuance will allow meaningful settlement discussions to take place.

The Superior Court does not schedule jury trials during the last two weeks of August. This non-jury trial will start on Monday, August 18, 2008. A pre-trial conference at a place to be determined later will be held on Friday August 1, 2008 at 10:30am. Discovery is reopened on Coastal's claim relating to siding and is to be completed no later than March 31, 2008. All of Whayland and Coastal's motions are denied without prejudice.

IT IS SO ORDERED.

Very truly yours,

Judge John E. Babiarz, Jr.

JEB,Jr./bjw
Original to Prothonotary