IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

GEORGE C. BOUGOURD, and **GLORIA J. BOUGOURD,**	:	**C.A. No. 00-06-136**
Plaintiffs,	:	
v.	:	
VILLAGE GARDENS HOMES, INC. A Delaware Corporation, and **THURMAN G. HICKS,**	:	
Defendants.	:	

DECISION AFTER TRIAL

Submitted Friday, November 1, 2002
Decided December 31, 2002

In the present action, Plaintiffs George and Gloria Bougourd (hereinafter "Plaintiffs") seek a judgment against Defendant Village Gardens Homes, Inc. (hereinafter "Defendant corporation") and its corporate president, Thurman G. Hicks (hereinafter "Defendant Hicks"), based upon the allegedly negligent performance by the latter two parties of their contractual duties and failure to perform construction work in a workmanlike manner. Plaintiffs seek payment from Defendants in the amount of $37,533.50. This Court finds no merit to Plaintiffs' claim against Defendant Hicks in his personal capacity. However, for the reasons stated below, this Court finds in

favor of Plaintiffs against Defendant corporation, but will await further evidentiary submissions by the parties before rendering a final judgment as to an award of damages.

FACTS

On or about January 19, 1999, Plaintiffs contracted with Defendant corporation for the purchase of a modular home built by Superior Builders of Muncy, Pennsylvania. The new home was to be built on a lot owned by Plaintiffs in Millsboro, Delaware. Plaintiffs and Defendant corporation agreed upon the cost of the new home to be $76,879.00, with payments to be made in installments as specified in the Sales Agreement (see Joint Exhibit 1). While Defendant corporation would be responsible for laying the foundation, Plaintiffs expressly agreed that they would be responsible for grading the lot where the new home was to be located. After the first floor of the new home was completed, Plaintiffs moved in and soon thereafter noticed several defects. A number of cracks had appeared in the kitchen ceiling and walls, including the areas over the windows and doorways, and a large lump had appeared in the kitchen floor. Defendant corporation made several attempts to address these problems, but ultimately was never able to do so to Plaintiffs'

satisfaction. Plaintiffs subsequently consulted Frederick T. Legge, a licensed structural engineer in Delaware and an expert in the design of light and heavy foundations and structural inspection of residential buildings. Based upon Legge's professional opinion, Plaintiffs filed this suit on June 30, 2000, against both Defendant corporation and Defendant Hicks.

ANALYSIS

Defendant Hicks

As an initial matter, Plaintiffs named Hicks individually as a defendant in the complaint. Generally, an officer of a corporation is not personally liable on corporate contracts as long as that officer does not act and purport to bind him/herself individually. See, e.g., Brown v. Colonial Chevrolet Co., 249 A.2d 439, 441 (Del. Super. 1968); 19 Am.Jur.2d *Corporations* § 1341 (1965). No evidence has been presented that Hicks was acting in anything but his capacity as an officer of Defendant corporation in this matter. Accordingly, this Court finds in favor of Defendant Hicks.

Defendant Village Gardens Homes, Inc.

Implied Warranty

As to Plaintiffs' claim against Defendant corporation, neither party denies that a contract was formed. Rather, the basic issue before this Court is whether the latter party satisfactorily performed its contractual obligations. More specifically, Plaintiffs allege that Defendant corporation failed to properly lay and set the foundation for the new home in accordance with industry standards. Generally, the law implies a duty in every building contract that the work or services be performed skillfully, carefully, diligently and in a workmanlike manner. See 17A C.J.S. *Contracts* § 329, at 292-94. The law in Delaware recognizes such an implied builder's warranty of good quality and workmanship. Smith v. Berwin Builders, Inc., 287 A.2d 693, 695 (Del. Super. 1972). If a person "holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possess the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner." Bye v. George McCaulley & Son Co., 76 A. 621, 622 (Del. Super. 1908). Failure to

perform in a workmanlike manner may constitute a breach of the contract.

In the instant case, it is evident that Defendant corporation, acting through Hicks, clearly held itself out as possessing the requisite skill to achieve the results Plaintiffs desired. Hicks represented that Defendant corporation had been in the business of doing the type of work Plaintiffs desired since the 1970s. Hicks also represented to Plaintiffs that he himself had over twenty years of experience in building modular homes. In fact, Hicks spoke to Plaintiffs about the Preston modular homes built in the Cape Cod style, and was able to compare and contrast the styles and prices of the various types of modular homes. This Court is satisfied that Hicks held Defendant corporation out as a competent contractor and therefore created an implied warranty of good quality and workmanship in its contract with Plaintiffs.

Implied warranties may only be disclaimed by clear and unambiguous language. Council of Unit Owners v. Simpler, 1993 WL 81285 *5, Graves, J. (Del. Super.). Defendant corporation does not contend, and indeed the record does not indicate, that the implied warranty of good quality and workmanship had been disclaimed.

This Court thus finds no effective disclaimer of such an implied warranty.

Since one who would otherwise be subject to an implied warranty of good quality and workmanship cannot escape liability by merely arranging for the actual construction to be performed by his/her contractual agent, the issue now before this Court is whether Defendant corporation breached such a warranty. See Council of Unit Owners v. Simpler, 603 A.2d 792, 796 (Del. Supr. 1992).

Plaintiffs introduced considerable evidence showing that Defendant corporation's performance did not pass the reasonableness test. For example, the quality of the concrete used to construct the foundation for the new home did not meet industry standards. Frederick Legge, a structural engineer and an expert in matters concerning the use of concrete in the foundations of modular homes, testified persuasively that, based upon Plaintiffs' videotape of the construction effort, the concrete was well below average in quality. He was particularly concerned with how the concrete initially appeared normal in consistency, but then quickly thinned out. According to Legge, it appeared as though water had been added, thus dramatically compromising the strength and quality of the

concrete used in the foundation. Carl Thomas, a general contractor with extensive experience in masonry work and foundations for modular homes, concurred in Legge's assessment. After viewing the videotape, he believed the concrete to be too wet since many of the elements of the concrete had been separated, thus producing a nonhomogeneous mix to be used in the construction of the foundation. Thomas further testified that, in his experience, he had never used a concrete mix so thin, and speculated that this was done in order to save labor costs for Defendant corporation.

The expert testimony based on visual inspection alone as detailed above was strengthened by the testimony concerning the testing of the concrete's strength. Both parties agreed that the Sussex County Code requires a minimum strength of 2500 pounds per square inch (hereinafter "PSI"). Compliance with applicable laws and regulations is a requirement and condition of building contracts for work to be performed in the State unless the contract expressly provides for a different measure of performance. See, e.g., Koval v. Peoples, 431 A.2d 1284, 1286 (Del. Super. 1981). Here, no such expression can be found in the Sales Agreement. Thus, Defendant corporation was contractually obligated to comply with the 2500 PSI

requirement *at a minimum*. While Plaintiffs claim that 3500 PSI was required under the original construction plan, that the Code inspector signed off only on this plan, and that the common practice is to follow the plan unless a consulting engineer approves otherwise, this Court need not reach these arguments. It is sufficient to note only that Defendant corporation's own witness testified that while an April 2002 test revealed the concrete to be at 2692 PSI, the concrete would not have met the Code requirement had a similar test been conducted after the concrete was twenty-eight days old. Therefore, Defendant corporation's failure to comply with local requirements necessitates a finding by this Court that it also did not comply with its obligations to Plaintiffs under the Sales Agreement.

Plaintiffs also presented evidence that Defendant corporation did not properly lay the new home's foundation in other respects. Legge testified that the supports were placed in the wrong positions, thus leading to distortions (e.g., humps and hollows in the flooring) that became evident soon after Plaintiffs moved into their new home. He also noted that he had viewed the factory specifications for the new home and recognized that the construction of the new home was not done in accordance with those specifications in numerous

instances. Thomas testified that wooden stakes were left in the footer, causing them to swell and reduce the net width of the footer, and thereby reduce its strength. Underneath the house, he saw numerous head joints with large gaps where mortar was missing, which typically causes the blocks to shift. Common industry practice is to fill all head joints with mortar. In sum, Defendant corporation engaged in several practices in the construction of Plaintiffs' new home that would not constitute conduct commonly associated with good quality workmanship in the building construction industry.

The effects of Defendant corporation's negligent construction of Plaintiffs' new home are palpable and easy to identify. The sum of the evidence presented leads this Court to conclude, as did Plaintiffs' expert witnesses, that the lump in the kitchen floor and the numerous cracks on the walls, as well as those above the doors and windows, are indicative of significant problems with the construction of the foundation. The evidence supports the conclusion that the quality of the concrete used will severely impact the durability of the new home's foundation over time. Barring extensive repair, the problems that have appeared here will only worsen over time, as both Plaintiffs and Defendant corporation are surely well aware due to the latter's

numerous attempts to repair and cosmetically improve the final product. As Legge testified, the conclusion is inescapable that if the foundation is not constructed properly, the resulting structure will be unsound. Accordingly, this Court is persuaded that the problems with Plaintiffs' new home are properly attributed to the defects in the foundation as constructed by Defendant Corporation.

Damages

Having already determined that Defendant corporation breached its contractual obligations to Plaintiffs, the only remaining inquiry before this Court concerns the proper award of damages. First, Plaintiffs claim entitlement to $37,000 as the cost of repairing the damage to their new home. Delaware courts have formulated the following rule for awarding damages in construction defect cases: "If a party to a construction contract fails to perform its obligations under the contract, the aggrieved party is entitled to damages measured by the amount required to remedy the defective performance unless it is not reasonable or practicable to do so." Council of Unit Owners v. Carl M. Freeman Associates, Inc., 564 A.2d 357, 361 (Del. Super. 1989); Farny v. Bestfield Builders, Inc., 391 A.2d 212, 214 (Del. Super. 1978); Carey v. McGinty, 1988 WL 55336 *6, Chandler, J.

(Del. Super.). See also *Restatement, Contracts* § 346 (1932); Williston, *Treatise on the Law of Contract* § 1363, at 344-45 (3d ed. 1961). In the instant case, Plaintiffs' claim for $37,000 includes the cost of grading the lot, which both parties agree was not included in the Sales Agreement. Therefore, Plaintiffs are entitled to recover an amount equal to $37,000 minus the cost of the grading in order to cover their repair costs.

Second, Plaintiffs seek $533.50 in consequential damages since they cannot stay in their new home while repairs are being performed. Plaintiffs estimate that repairs will take approximately six to eight weeks, and therefore seek to recover their expenses incurred over that period of time, including telephone, internet, television and trash services.

Delaware law has a long-established standard governing consequential damages that applies regardless of whether the action is founded upon breach of contract or negligence. A party may recover damages in a breach of contract action for those injurious consequences, which "might have been foreseen or anticipated" to follow from the breach. Clemens v. Western Union Telegraph Co., 28 A.2d 889, 890 (Del. Super. 1942). In the present action, Plaintiffs

may not recover for their expenses incurred for telephone, internet, television and trash services, since those costs were neither foreseeable nor anticipated to follow from Defendant corporation's breach. Plaintiffs would have incurred these expenses regardless of where they reside, and therefore those costs are not the natural and probable consequences of the breach.

The remaining issue concerns Plaintiffs' claim for reimbursement of its expert witness fees. Under Delaware law, a party may recover an expert's fee as a cost of litigation, but recovery is limited to only the time necessarily spent in actual attendance before this Court for the purpose of testifying. See Deardorff v. Paul, Del. Super., C.A. No. 98C-10-260, Toliver, J. (April 27, 2000). Plaintiffs are therefore entitled to this limited form of recovery in the instant case.

In summary, Plaintiffs are entitled to recover the cost of repairs in the amount of $37,000 minus the cost of grading, plus costs of litigation for expert witness fees actually incurred while testifying before this Court.

Request for Additional Evidence

Since the evidence presented by Plaintiffs at trial did not itemize the damages sought, this Court is unable to enter final judgment against Defendant corporation at this time. In Taylor v. Bell, 21 Cal.App.3d 1002, 1007 (Cal. App. 2d Dist. 1971), the court held: "[W]e believe that a trial court, sitting without a jury, not only may call witnesses upon its own motion during trial ([citing California state Evidence Code § 775[1]]), but it has the inherent power to reopen the case for the taking of additional evidence even after submission of the case where it determines in its discretion that the interests of justice require doing so."

In the instant case, this Court takes judicial notice of Rule 614[2] of the Delaware Rules of Evidence, which is the counterpart to California Evidence Code § 775, and determines that it cannot in the interests of justice award damages in the total amount requested by Plaintiffs, nor can it award merely nominal damages to Plaintiffs in light of their substantial injuries caused by Defendant corporation's breach of contract. Accordingly, this Court hereby directs Plaintiffs to

[1] This section provides: "The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action...".

submit within ten days of this decision evidence of (1) the reasonable cost of grading their lot for the new home, and (2) the expert witness fees reasonably incurred for trial testimony. Upon service of Plaintiffs' submissions, Defendant corporation shall have ten days to respond. This Court shall make a more precise determination as to the amount of damages awarded to Plaintiffs and render its final judgment in the instant action upon receipt and after consideration of these submissions.

IT IS SO ORDERED, this _____ day of December, 2002.

_____
Rosemary B. Beauregard, Judge

[2] Subsection (a) of the Rule provides in relevant part: "The court may, on its own motion or at the suggestion of a party, call witnesses...". Subsection (b) provides: "The court may interrogate witnesses, whether called by itself or by a party."