STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 330-6-19 Wncv

LIBERTY MUTUAL INSURANCE COMPANY, as Subrogee of Marni Leikin, and MARNI LEIKIN, Individually,
Plaintiffs,

v.

A. WHITE & SON, INC., LARRY WHITE, and Unnamed Shareholders of A. White & Son, Inc.,
Defendants.

RULING ON THE MERITS

This suit arises out of the renovation of an old two-story carriage barn in Montpelier, Vermont. Plaintiffs commenced this suit in June of 2019, to recover amounts allegedly owed to them by the Defendants for alleged defects in the renovation of the barn. Plaintiffs' Complaint asserts claims for breach of contract, breach of warranty, breach of the covenant of good faith and fair dealing, and violation of the Consumer Protection Act. The Defendants deny the Plaintiffs' claims.

On May 17, 2022, this Court held an evidentiary hearing on the merits. Plaintiffs were represented by Michael J. Tarrant, II, Esq. Defendant Larry White represented himself. No one appeared for Defendant A. White & Son, Inc., which is out of business. Based upon the credible evidence, the court makes the following findings, conclusions and orders.

Findings of Fact

In the fall of 2015, Plaintiff Marni Leikin purchased property at 35 Loomis Street in Montpelier, Vermont, consisting of an old house with attached two-story carriage barn on approximately ¾ of an acre of land. Leikin also purchased a homeowners' policy providing insurance coverage for the property through Liberty Mutual Insurance Company.

The carriage barn had been built in the 1870s, and it needed substantial renovation work. Leikin had architectural and engineering plans drawn up for a full-scale renovation of the barn, and she hired a contractor to perform the work in accordance with those plans. In January of 2016, however, Leikin fired her contractor after her engineer discovered serious structural defects in the contractor's work.

Leikin then approached some other contractors about fixing the defects caused by the first contractor and completing the remaining renovations. One of the contractors she spoke with was Larry White of A. White & Son, Inc. White told Leikin that his firm could complete the work in accordance with her architectural and engineering plans, that the firm was large enough to complete the work by her June 30, 2016, deadline, and that the firm performed high-end quality work. Based on those representations, Leikin agreed to hire A White & Son, Inc. to perform the work.

A. White & Son, Inc. submitted a written "Quote" to Leikin under which White undertook to repair the first contractor's structural defects for $6,000.00 and to perform the remaining renovation work for $124,5487.61 (Exhibit Z). The Quote contained a provision stating "[e]xtras to be billed as time and/or material…." and "[c]hange orders to be paid in full up front" (Id.). There were no express warranties set forth in the Quote (Id.). Lastly, the Quote set forth a payment schedule, with $40,000 due "[u]pon contract acceptance" (Id.) Leikin accepted the Quote, she made the initial $40,000 payment on January 31, 2016, and A. White & Son, Inc. began work on the project (Id.).

The project was not completed by the agreed-upon deadline of June 30, 2016. Each party shared some blame for the delay. Leikin made a number of change requests as the job proceeded, and those requests resulted in some delays. The primary reason why the project was not completed on time, however, was because A. White & Son, Inc. did not staff the project with enough workers to get it done on time. There is no evidence that Leikin sustained any economic loss on account of the delay.

Some of the work that A. White & Son, Inc. performed on Leikin's project clearly failed to meet the "high-end quality" standard that Larry White had told Leikin the firm strived to provide. For example, a wall in the mudroom that the White firm installed was not plumb, a custom-made maple bench was cut and taped in the process of installing it, recessed ceiling light fixtures were installed that were the wrong size, and some of the exterior trim was less than high end (*see* Exhibits I, K, L and O). The out-of-plumb wall was the result of deficient workmanship and, based on a 2017 estimate it will cost Leikin $12,650 to repair the wall (Exhibits L and Q). The light fixtures were not the size agreed upon and, based upon a 2017

estimate it will cost Leikin $3,275 to replace the fixtures (Exhibit U minus Exhibit R). There is no credible evidence as to what it would reasonably cost to repair the other items listed above, however, nor is there any evidence as to the difference in value between the quality construction that Leikin contracted for and what she claims to have gotten.

Leikin testified that A. White & Son, Inc. failed to install a heated seat in steam shower and that it will cost her $9,775 to have one installed (Exhibit R). Larry White denies that a heated seat was part of the contract, and he testified that, when Leikin asked for the heated seat, he advised her that the plumbing as installed by her first contractor could not accommodate a heated seat there. The Court finds that a heated shower seat was never part of the parties' contract. It is not mentioned in the contract (Exhibit Z), and no written change order calling for one was ever offered into evidence.

The most serious problem caused by A. White & Son, Inc. involved the plumbing for the radiant-heated hardwood floor in the barn. While installing the radiant-heating equipment, an employee of A. White & Son, Inc. cut off the end of a pipe that had been installed by the previous contractor and failed to cap the pipe. As a result, water could flow through the pipe directly into the radiant heating spaces beneath the bathroom tile floor. Later in the project, another employee of A. White & Son, Inc. mistakenly turned on the water valve from the furnace that supplied that pipe, causing water to pour into the radiant-heat space beneath the bathroom. The worker heard the water rushing thorough the walls and flooring and allowed it to continue to run while he tried unsuccessfully to figure out where it was coming from. Over time, the water from that event spread beneath the hardwood flooring, causing the floorboards throughout the barn to buckle, separate, crack and develop black mold (Exhibits E, F, M, P, V and W). It cost $17,720.95 to remediate the mold and replace the water-damaged hardwood floor, of which Liberty Mutual Insurance Company paid $16,720.95, and Leikin paid $1,000 (Exhibits A, B, C, and G). The last payment was made on December 11, 2017 (Exhibit A).

Although Leikin became dissatisfied with A. White & Son, Inc., she never fired them. A. White & Son, Inc. completed the last of its work on September 27, 2016 (Exhibit N). Leikin refused to pay A. White & Son, Inc.'s final invoice for $6,000, so White refused Leikin's request that they return to perform repairs. A. White & Son, Inc. closed its doors in December of 2018.

Leikin testified that she was personally involved in the renovation project more than she had wanted to be because she needed to constantly check White's work and remind White of things needing to be done. Leikin also testified that White overbilled her approximately $22,000 to redo work that it had done

improperly. However, Leikin did not present evidence proving any specific incidents of such overbilling.

Discussion – Conclusions of Law

In interpreting a contract, the "goal is to effectuate the parties' intent as expressed in their writing, according, whenever possible, to the plain meaning of the contract language." Southwick v. City of Rutland, 2011 VT 53, ¶ 4, 190 Vt. 106. Moreover, in interpreting a contract the court must "try to 'form a harmonious whole from the parts,' recognizing that 'an interpretation which harmonizes all parts of the contract is preferable to an interpretation which focuses on one provision heedless of context." Besaw v. Giroux, 2018 VT 138, ¶ 27, 209 Vt. 388 (citation omitted). In addition, "a course of dealing between parties … may give meaning to, supplement, or qualify their agreement." Mongeon Bay Props. V. Mallets Bay Homeowners Ass'n., 2016 VT 64, ¶ 30, 202 Vt. 434.

Under the agreement at issue here, A. White & Son, Inc. agreed to perform certain repair and renovations work in accordance with Leikin's architectural and engineering drawings, and Leikin agreed to pay a fixed "Base Price," with "Extras to be billed as time and/or material," unless otherwise agreed between the parties (Exhibit Z). Although the parties' contract did not contain any express warranties, Larry White did represent to Leikin that his firm performed high-end quality work, and Leikin relied on that representation in deciding to accept White's "Quote." The Court concludes, therefore, that White impliedly warranted to Leikin that his firm would perform the repair and renovation work in a good and workmanlike manner and that the project when finished would be free from latent defects. *See* Rothberg v. Olenik, 128 Vt. 295, 305 (1970) (recognizing that, in selling a newly constructed house, the builder/vendor implicitly warrants to the buyer that the house is built in a good and workmanlike manner); *and* Meadowbrook Condo Ass'n. v. S. Burlington Realty, 152 Vt. 16, 19 (1989) (clarifying that the implied warranty "applies only with respect to defects that were latent at the time of purchase").

Based upon the foregoing findings, the Court concludes that A. White & Son, Inc. breached its contract with Leikin by deficiently installing an out-of-plumb wall in the mudroom and by installing wrong-sized recessed light fixtures in the ceiling. The estimated cost of repairing those defects in 2017 was $15,925 ($12,650 for the wall plus $3,275 for the light fixtures). In addition, based upon the foregoing findings, the Court concludes that A. White & Son, Inc. also breached its implied warranty. As noted earlier, the renovated project contained a latent defect caused by poor workmanship, namely, an uncapped cut-off pipe beneath the bathroom tiled floor. As a result, Leikin's brand-new hardwood floors were destroyed by water from that pipe, and they had to be replaced in 2017 at a cost of $17,720.95.

Thus, Plaintiffs are entitled to an award of $33,645.95 ($15,925.00 plus $17,720.95) on their breach of contract and breach of warranty claims, less the $6,000.00 that Leikin still owes A. White & Son, Inc, for work completed but not paid for, resulting in a net award in favor of the Plaintiffs of $27,645.95, not counting pre-judgment interest. Pre-judgment interest is clearly warranted for the sums that were incurred in 2017 (i.e, $17,720.95 for the water damaged floors and $6,000 for White's unpaid final bill). However, Leikin has not yet actually incurred the $15,925 to repair her mudroom wall and ceiling fixtures. Nonetheless, the court concludes that she should be allowed prejudgment interest on that sum, too, because the defects which make those expenditures necessary have existed in the barn since it was renovated, that figure is based on estimates made in 2017, and it would be unjust to deny Leikin prejudgment interest while at the same time requiring her to pay interest to White for the unpaid $6,000 final invoice. *See* Heath v. Palmer, 2006 VT 125, ¶ 18, 181 Vt. 545 (mem.) ("We have held that an award of prejudgment interest is mandatory where damages are liquidated or readily ascertainable and otherwise discretionary where the court determines that it is necessary to make the plaintiff whole or avoid an injustice." (citation omitted)). Therefore, the Court will award Plaintiffs five years (2017-2022) of pre-judgment interest on their net recovery, resulting in a total judgment of $44,232.95 (damages of $27,645.95 plus interest of $16,587.00 ($276.45 per month for 60 months)).

Plaintiffs seek judgment against both A. White & Son, Inc. and Larry White, its sole shareholder. However, the contract that Leikin entered into was with the corporation, not the shareholder (*see* Exhibit Z). Moreover, "[a] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct." 11A V.S.A. § 6.22(c). There is no credible evidence that the defects or damages referred to above were caused by Larry White personally. Therefore, the Court will enter judgment solely against the corporation.

Plaintiffs contend that the Defendants committed not only a breach of contract and warranty but also a breach of the covenant of good faith and fair dealing. Plaintiffs contend that the Defendants breached the covenant by "failing to clean up the water damage," failing to inform Leikin about the time when a White employee mistakenly turned on a water valve and heard water rushing through the walls and flooring, attempting "to deflect blame from themselves to the flooring contractor," refusing to return to the job to complete requested repairs, "exhibiting a lack of diligence and oversight of the Project," "misrepresenting the skill, experience, knowledge and capabilities of their commercial enterprise," "willfully rendering imperfect renovation work," and "taking advantage of Plaintiff Leikin's necessitous circumstance in having an exposed building in January in Vermont to secure the bid…." (Complaint, ¶¶ 86, 97).

"The covenant of good faith and fair dealing is implied in every contract." Tanzer v. MyWebGrocer, Inc., 2018 VT 124, ¶ 32, 209 Vt. 244 (citation omitted). "We have explained that the covenant acts to protect the parties to a contract, and to ensure that they 'act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Id. "A breach of the covenant may be shown by evidence that a party to a contract acted in such a way as to 'violate[] community standards of decency, fairness or reasonableness, demonstrate[] an undue lack of diligence, or [take] advantage of [other parties'] necessitous circumstances.'" Id. ¶ 33. However, "[w]here a party alleges both breach of contract and breach of the implied covenant of good faith and fair dealing, dual causes of action are permitted only where the different actions are premised on different conduct – "we will not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when the plaintiff also pleads a breach of contract *based upon the same conduct.*'" Id.

There is no credible evidence that either Defendant acted in such a way as to violate community standards of decency, fairness or reasonableness, willfully rendered imperfect renovation work, demonstrated an undue lack of diligence, intentionally misrepresented the capabilities of the firm, attempted to blame the flooring contractor for the failure of the floors knowing that the flooring contractor was not to blame, intentionally withheld information from Leikin, or knowingly took unfair advantage of Leikin's necessitous circumstances. Moreover, the facts found by the Court, that A. White & Son, Inc. performed work that was defective, failed to assign enough workers, inadequately supervised its workers, failed to clean up the water damage, and failed to return to the job to complete requested repairs, can and do all support Plaintiffs' breach of contract claim, but they cannot also be used to support breach of the covenant claim. *See* Tanzer. Therefore, Plaintiff's breach of covenant claim fails.

For similar reasons, Plaintiffs' claimed violation of the Consumer Protection Act also fails. The Act declares that "unfair or deceptive acts or practices in commerce" are unlawful. 9 V.S.A. § 2453(a). A consumer who contracts for products or services in reliance upon deceptive acts prohibited by § 2453 may bring an action to "recover from the seller … the amount of his or her damages, or the consideration … given by the consumer, reasonable attorney's fees, and exemplary damages not exceeding three times the value of the consideration given by the consumer." Id., § 2461(b), The Vermont Supreme Court has adopted the following test as to what constitutes a deceptive act: "(1) there must be a representation or omission likely to mislead the consumer; (2) the consumer must be interpreting the representation or omission reasonably under the circumstances; and (3) the misleading effects of the representation or omission must be 'material,' that is likely

to affect the consumer's conduct or decision with respect to the product or service offered." Terry v. O'Brien, 2015 VT 132, ¶ 28, 200 Vt. 511 (citation omitted).

Plaintiffs' claim under the Act is based upon the representations that Larry White made to Leikin in January of 2016, that his firm could complete the renovation and repair work in accordance with her architectural and engineering plans, that the firm was large enough to complete the work by her June 30, 2016, deadline, and that the firm performed high-end quality work. These statements, however, were largely expressions of opinion, rather than statements of fact. Moreover, to the extent that they were statements of fact, there is no credible evidence that they were false when made. The mere fact that the firm subsequently failed to live up to these representations is not evidence that they were untrue when made. *See* Winey v. William E. Daily, Inc., 161 Vt. 129, 136 (1993) ("We have cautioned against confusing principles of contract with fraud so that the elements of fraud are made out by a mere breach of contract…. Similarly, we are reluctant to conclude that the Legislature intended a mere breach of contract to raise a presumption of fraud.") (citation omitted).

Conclusion and Order

For all the foregoing reasons: (1) judgment will be entered against A. White & Son, Inc. and in favor of Plaintiffs Liberty Mutual Insurance Company and Marni Leikin for $44,232.95 on their breach of contract and breach of implied warranty claims; and (2) all other claims in this matter are dismissed with prejudice

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SO ORDERED this 31st day of May, 2022.

Robert A. Mello
Superior Judge