Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

DOUGLAS KLEIN	)	**Windsor Superior Court**
	)	**Docket No. 620-9-08 Wrcv**
v.	)	
	)	**on appeal from**
JAMES CHURCHILL	)	**Docket No. 747-12-07 Wrsc**

SMALL CLAIMS APPEAL
Decision

Plaintiff Douglas Klein appeals from a judgment of the Small Claims Court issued July 21, 2008. The Judge denied Mr. Klein's claims for breach of a construction contract and awarded $1,950.00 to defendant/contractor James Churchill on a counterclaim for failure to pay the final installment. Mr. Klein contends that the Judge made findings of fact that were not supported by the evidence and drew erroneous conclusions of law. For the following reasons, the judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

Oral argument was heard on February 3, 2009. Both parties represented themselves on appeal and during the lengthy Small Claims hearing, during which many exhibits (primarily photographs) were introduced. This Court has reviewed all of the exhibits, including the photographs, and listened to the recording of the hearing.

It is not the function of the Superior Court to substitute its own judgment for that of the Small Claims Judge. Rather, the role of the Superior Court is to determine whether or not the evidence presented at the hearing supports the facts that the Judge decided were the credible facts, and whether or not the Judge correctly applied the proper law and procedure. V.R.S.C.P. 10(d); *Blanchard v. Villeneuve*, 142 Vt. 267, 269–70 (1982).

Decision and Order of the Small Claims Court

Mr. Klein owns a commercial building. His complaint alleged that he hired Mr. Churchill to repair and repaint the ceiling plaster in his store, and that Mr. Churchill breached the contract by leaving the job site before work was complete. He alleged that the store was "a complete mess" and that there was "plaster dust everywhere" when Mr. Churchill left the premises. Mr. Klein sought compensation for the expenses he incurred in hiring other contractors to complete the work and clean up the plaster dust; the amounts allegedly exceeded $5,000.

Mr. Churchill filed a counterclaim seeking the final installment due under the parties' contract. The amount of the counterclaim was $1,950.00.

The Judge made the following findings in his written decision issued July 21, 2008:

Mr. Churchill submitted an estimate to perform rehabilitation and repair work on the store. The estimate proposed to "tape off pipes, re plaster any area in need, base coat and finish coat, fix any wall caulk all, spray white ceiling, [and] paint all walls and ceiling." The estimated price was $7,800.

The parties entered into an agreement to do work. However, the estimate did not constitute a written contract between the parties. Instead, the parties reached a meeting of the minds at some other time regarding the scope of the work that was to be performed. There were no findings regarding when this agreement was reached, or what the terms of the agreement were.

The work was supposed to be completed during the month of October 2007. The purpose of this timing was to accommodate a new commercial tenant. Mr. Churchill hired a subcontractor on September 5th, and started work on October 8th after receiving a deposit from Mr. Klein in the amount of $3,900. This represented half of the contract price.

Soon after beginning the work, Mr. Churchill realized that the plaster was in much worse shape than he had thought, and that repair would be more time-consuming and expensive than he had estimated. He asked for more money from Mr. Klein, who declined to modify the contract. (Mr. Klein later agreed to an early payment of $1,950, which represented half of the final installment.) Mr. Churchill ended up using about 650 pounds of plaster to repair the ceiling, rather than the 250–300 pounds he originally anticipated.

Mr. Klein was occasionally present while Mr. Churchill's crew was working. Mr. Klein tore down some plaster by himself and directed the crew to do some work that was outside the scope of the contract. The change orders were not put in writing, and the Judge did not specify what these changes were.

Mr. Churchill left the job site on November 1st because Mr. Klein had represented that it was necessary to complete the job by that date. The Judge found that on that date, there were "details left undone," but that the details were of the sort "that typically appear on a punch list" and that the "job as bid was substantially complete." Later, in his conclusions of law, the Judge described the condition of the property on November 1st as "clearly unacceptable" and said that the rehabilitation project was "incomplete" on that date.

Mr. Klein hired two other workers to perform work on the store after November 1st. He paid Eric Foster $1,775 to clean plaster dust from shelves and floors and to mop the floors; this work was performed between November 5th and November 16th. Mr. Klein then paid Dave Smith $4,600 to perform plaster work and finish work between November 15th and December 21st. The work performed by Mr. Smith included "seven

items in the nature of finish work or work outside the scope of Defendant's original estimate from June 2007."

Based upon these findings, the Judge concluded that there was an oral agreement between the parties that was "based on Defendant's estimate." He explained that as the project developed, the parties became aware that the estimate had been "too low to address adequately the actual work that needed to be done." The bid had underestimated both the amount of plaster and the number of hours that would be needed to complete the project.

The Judge concluded that the condition of the property was "clearly unacceptable" on November 1st, but that both parties were responsible for the situation. Mr. Churchill was responsible because he unreasonably left the project on November 1st without completing the work. Mr. Klein was responsible because he refused to address "the significant change in the scope of work that became clear after the project got under way," and because he "contributed to the increased work by taking it upon himself to knock plaster down on his own."

Given these findings and conclusions, the Judge determined that the work performed by Mr. Churchill amounted to substantial completion of the scope of work contemplated by the parties at the outset of the bargain. The plastering and painting work performed by Mr. Smith in November and December was partly punch list items that should have been completed by Mr. Churchill and partly work that was not part of the estimate. For these reasons, the Judge concluded that it would be "unjust enrichment" to require Mr. Churchill to compensate Mr. Klein for the work performed by Mr. Smith.

The Judge next considered the request for approximately $2,000 associated with the clean-up services provided by Mr. Foster. The Judge explained that the cleaning of plaster dust was not part of the written estimate, and that Mr. Klein had not met his burden of proving that the work performed by Mr. Foster represented part of the cost of completing Mr. Churchill's work. The Judge therefore denied this part of Mr. Klein's claim.

Finally, the Judge considered the request for consequential damages in the form of lost rent. The Judge denied this component of damages because Mr. Klein did not meet his burden of proving that the tenant was able to move in prior to December 15th, which is when the lease was signed. For these reasons, the Judge did not award any money to Mr. Klein on his claims for money damages.

The Judge then considered the counterclaim for failure to pay the final installment due. He explained that Mr. Churchill had made a "good faith effort to meet his end of the bargain he believed he'd made," and that he was entitled to payment because he "put in more work than he bargained for." The Judge therefore awarded Mr. Churchill $1,950.00, which represented the remaining amount due under the contract. Mr. Klein appeals from this judgment.

Discussion

In many construction disputes, the key issue is determining whether it was the owner or the contractor who breached the contract. *VanVelsor v. Dzewaltowski*, 136 Vt. 103, 105 (1978). In this case, the Judge determined that both parties were "equally responsible" for the situation that occurred. The court interprets this as a conclusion that both parties breached the contract.

Whether Mr. Klein breached the contract

The Judge concluded that Mr. Klein was not entitled to damages because he unreasonably refused to address the "significant change in the scope of the work that became clear after the project got under way."

This conclusion rests in part upon the erroneous findings that the written estimate did not define the scope of the agreement between the parties, and that the parties instead entered into an oral agreement at some other time that was "based upon" the written estimate. The evidence does not support the existence of an oral agreement made at some other time with terms specific and definite enough to constitute a contract.

Instead, the evidence shows that the contractor submitted a written estimate to perform defined tasks for the fixed price of $7,800, and that the bid was accepted. This constituted the formation of a written contract between the building owner and contractor. See *Bachli v. Holt*, 124 Vt. 159, 163 (1964) (explaining that acceptance of a construction bid normally constitutes formation of a contract). Thus, the written estimate is a written contract under which the contractor promised to re-plaster "any area in need" and paint the walls and ceilings for the price of $7,800.

In addition, under the circumstances presented here, it was not correct to suggest that Mr. Klein had an obligation to modify the contract price after it was discovered that the plaster was in worse shape than originally anticipated. The contract price would have been subject to change if the contractor had offered to perform plastering, painting, and other rehabilitation work on a time and materials basis (meaning that the contractor would be paid for whatever time and materials he put into the project). In a time-and-materials contract, the written estimate is a good-faith projection rather than a binding promise, and it is the homeowner who bears the risk that the project will be more difficult or time-consuming than anticipated.

Instead, the contractor submitted a written estimate to perform a defined set of tasks for the fixed price of $7,800. In a fixed-price contract, it is the contractor (and not the owner) who assumes the risk of underestimation. This allocation of risk is necessary because it protects the reasonable expectations of the parties. It would be unfair for an owner to rely upon the lowest fixed-price bid when selecting contractors, and then learn that the price was subject to change as the project went along based upon the contractor's own underestimation when making the bid. It would also be unfair to other contractors who made accurate bids and were not chosen. Therefore, absent proof of some

misrepresentation, omission, or concealment on the part of the owner when soliciting the bid (of which there is no evidence in the present record), the risk of underestimation in this case should have been assigned to the contractor who submitted a bid to do work for a fixed price.

Time has shown that the estimate was too low. But under these circumstances, it was not unjust enrichment to the owner when the contractor ultimately put in more work and materials than he expected. In the inverse, it would not have been unjust enrichment to the contractor if less work and materials than expected were required. Such is the risk of a fixed-price contract. Thus, it was error to conclude that Mr. Klein was unjustly enriched by refusing to address the "significant change in the scope of work that became clear after the project got under way."

Whether Mr. Churchill breached the contract

The Judge did not specifically determine whether Mr. Churchill breached the contract. Instead, he found that Mr. Churchill had substantially completed the contract, even though the rehabilitation project was "incomplete" when Mr. Churchill left the job site. He also found that Mr. Smith later performed work that should have been performed by Mr. Churchill, but did not allow any offset or damages for the cost of completing Mr. Churchill's work.

The finding of substantial performance cannot be affirmed at this time because it rests upon the erroneous determination that the written estimate did not define the tasks to be performed for the fixed price. In a construction contract, "substantial performance" means that the contractor has substantially completed the defined tasks set forth in the contract, that any remaining defects or uncompleted work are minor, and that the material obligations and purposes of the contract have been fulfilled. If substantial performance has been tendered, the contractor is entitled to the full price of the contract, but the owner is entitled to offset any amounts that are reasonably necessary to make good any defects or complete any remaining "punch list" work. *VanVelsor*, 136 Vt. at 106; *Vermont Structural Steel Corp. v. Brickman*, 126 Vt. 520, 523 (1967).

On the other hand, if the remaining defects and uncompleted work are material to the contract, then the contractor has committed breach. In the event of breach, the measure of damages is the "reasonable cost of reconstruction and completion in accordance with the contract." *VanVelsor*, 136 Vt. at 105. This measure of damages seeks to put the owner in the position he expected upon completion of the contract. In other words, this measure of damages represents the difference between what the homeowner actually paid and what he expected to pay for completion of the tasks set forth in the contract.

It is apparent from the findings and from the evidence that Mr. Churchill did not complete all of the work that he promised to do. However, additional specific findings are needed as to the degree to which the defined tasks set forth in the written estimate remained incomplete as of November 1st.

Thus, on remand, the Judge should determine whether the work that was completed by Mr. Churchill amounted to substantial performance of the defined tasks set forth in the written estimate, or whether the defects and incomplete work instead amounted to a material failure to complete the rehabilitation project. Once that determination is made, the Judge should make any findings necessary to determine the amount of damages to be awarded, as described in more detail above.

ORDER

For the foregoing reasons, the judgment of the Small Claims Court dated July 21, 2008 is ***reversed*** and the matter is ***remanded*** for further proceedings consistent with this opinion. The Judge may determine whether the taking of additional evidence is necessary or not.

Dated at Woodstock, Vermont this 25 day of February, 2009.

Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

FEB 25 2009

WINDSOR COUNTY CLERK