NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0347-10T1

MICHAEL A. WALTER BUILDERS, INC.,

Plaintiff-Respondent,

v.

BARBARA BEDNAR,

Defendant-Appellant.

Telephonically argued June 3, 2011 –
Decided September 23, 2011

Before Judges R. B. Coleman, Lihotz and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-553-04.

Keith A. Bonchi argued the cause for appellant (Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys; Mr. Bonchi, of counsel and on the briefs; Rosann Allen, on the briefs).

Stephen W. Barry argued the cause for respondent (Barry, Corrado, Grassi & Gibson, P.C., attorneys; Mr. Barry, on the brief).

PER CURIAM

Defendant Barbara Bednar appeals from a final judgment granting relief to plaintiff Michael A. Walter Builders, Inc. following a bench trial, and an order dismissing her

counterclaim. On appeal, defendant argues the trial court's factual findings are not supported by the record and certain legal conclusions supporting the relief ordered in favor of plaintiff and in dismissing her counterclaim were reached in error. We affirm.

These facts are contained in the trial record. Defendant owned the Heritage Inn Motel in Cape May. Defendant had obtained architectural and mechanical drawings for the motel's proposed modifications that were prepared by architect Blane Steinman, mechanical engineer John Schade, P.E., and structural engineer Tom Shepard. After reviewing these materials, plaintiff's principal, Michael A. Walter, drafted estimates for completion of the job and submitted his "Proposal" dated November 20, 2003, which was accepted by defendant. In the contract, plaintiff, designated as "the Builder," would construct a third-floor addition to the motel and perform other renovations[1] for defendant, designated as "the Customer," for the agreed sum of $1,037,300.

Certain provisions of the proposal as accepted by the parties as their contract are relevant to our review. First,

[1] Plaintiff had drafted three proposals for defendant, the last of which was executed by the parties bearing the date of November 20, 2003 but actually signed sometime in late January 2004.

the proposal expressly incorporated Steinman's architectural plans that utilized Schade's mechanical specifications for thirty-three Mitsubishi "heat pump systems at 14,500 BTUs cooling."[2] Also, the plans required each room to be equipped with condenser and air handling units from the same manufacturer with the same energy output of 14,500 BTUs.

Second, the agreement included a payment schedule to provide fourteen draws. Each draw was in a stated amount and was due upon completion of various stages of the project.

Third, all renovations and the addition were to be completed within six months from the date construction commenced, or by May 20, 2004. The agreement allowed a thirty-day extension for weather-related delays.

Fourth, additional general provisions: (1) mandated any changes were not effective "unless in writing, signed by both Builder and Customer"; (2) required builders' risk insurance be "provided by [the] Builder to [the] Customer for [the] new

---

[2] A BTU, short for British Thermal Unit, is a basic measure of thermal energy. One BTU is the amount of energy needed to heat one pound of water one degree Fahrenheit, measured at its heaviest point. When speaking of cooling power, the BTU works in reverse. The air-cooling power of an air conditioning system refers to the amount of thermal energy removed from an area. The higher the BTU output, the more powerful the heating or cooling. http://www.eia.gov/emeu/consumptionbriefs/cbecs/pbawebsite/office/office_refbtu.htm (last visited August 30, 2011).

addition" and the Customer would provide home-owner's insurance "for [the] existing hotel"; (3) provided the "Builder will guarantee all workmanship of [the B]uilder and all of [the] Builder's Subcontractors, for one year from the day of settlement."

Two additional provisions listed under "Additional Clauses" must also be mentioned. Subsection (F) stated, in pertinent part:

> Additional work may be performed on hotel. Cost for work will be priced by Builder and accepted by Customer. A spreadsheet for additional items will be provided and updated by Builder periodically. . . . Payments for work shall be made the beginning of each month, during construction. Ongoing cost for additional work shall not exceed 2% of the total house [sic] construction cost, as stated [i]n this [c]ontract.
>
> Additional work performed will affect the time of [a]ddition/renovation completion. . . .

and subsection (J) provided:

> Failure to insist upon strict compliance with any of the terms, covenants or conditions hereof shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any right or power hereunder at any one or more times be deemed a waiver or relinquishment of such right or power at any other time.

The construction did not proceed smoothly. We will discuss the dilemmas which bear on the parties' claims in litigation.

As the details of the agreement were ironed out, plaintiff commenced demolition on November 20, 2003. The first step was to remove the second floor ceilings, erect scaffolding, and construct the third-floor "block walls" atop the second floor. Plaintiff used subcontractors for this job. It was decided the second floor roofing would be removed and the block for the third-floor wall would be laid in a piecemeal fashion because of "weather concerns." Walter explained:

> [Y]ou just can't build a wall straight up and then build the back wall and then another side wall . . . [i]t has to be done simultaneously with another room. . . . Because a block wall might be up six feet, another block wall might be up four foot, another one up two foot. So, it wasn't on a level plane where we could put boards across and tarp [the open roof] . . . .

To protect the property from water damage during this process, plaintiff placed a tarp over the block walls and laid wooden planks on the tarps to hold them in place. Also, a rope was woven through the eyelets of the tarps and tied to the sides of the building.

During November and December 2003, before the new roof was shingled, three rainstorms occurred. Notwithstanding the protective measures employed, "[w]hen the storms came through,

there [were] heavy winds that ripped the tarps off and water got into the [m]otel." After the first storm in November, plaintiff added ropes and tarps, but "still the storm[water] got in[,]" damaging the sheetrock ceilings of the first floor, the first and second-floor carpeting, and some of the furniture stored in the first-floor rooms.

Upon discovering the extent of the damage, plaintiff suggested the parties' submit claims to their respective insurance carriers. Plaintiff hired subcontractors to restore the existing structure. This work included installing new sheetrock on the ceilings and walls; removing the old and installing new carpeting; repairing bathroom tile damage and "put[ting] new trim [], new doors, and paint" on the walls. At the same time, plaintiff continued construction of the third floor, believing "the insurance companies would take care of the cost[s]" which the parties would "sort[] out later."

Because of these construction delays, the parties agreed the new third-floor guest rooms would be finished for the summer and the meeting room, exercise room, and owner's quarters could be completed in the fall. Although the third-floor rental rooms were completed on May 26, 2004, restoration of the first and second floor rooms was not completed until immediately prior to the July Fourth weekend.

Another problem resulted regarding the heating, ventilation and air conditioning (HVAC) installation. First, plaintiff and the architect agreed to deviate from the contract specifications, and installed the condenser units on a fiberglass deck located on the roof. Consequently, some condensers were closer to some rooms, "both vertically and horizontally[,]" than originally designed. Second, plaintiff learned the Mitsubishi 14,500 BTU condenser and air handling units specified by the mechanical engineer's drawings were unavailable as "[t]here was no such thing." Walter consulted with defendant and outlined the attempts to find a comparable unit. Defendant expressed concern regarding the efficiency of any proposed units. On April 7, 2004, plaintiff presented defendant with three options, set forth in a written "additional work authorization." On May 4, 2004, defendant chose the second alternative listed, requesting the proposed units be upgraded to larger units. She told Walter she desired plaintiff install a 17,000 BTU condenser and Arcoaire air handling units manufactured by Bryant. Walter inserted this information into the additional work authorization, which he signed that day.

In July or August 2004, defendant expressed concern that the air conditioning units were "getting cool too fast and some mold was being created" in some of the rooms. At trial,

defendant asserted she never experienced a mold or mildew problem in any motel rooms prior to hiring plaintiff. Further, she expressed that for the first time she began receiving complaints from guests about dampness in rooms. Plaintiff observed mold growth which was confined to the first floor and attributed it to leaky pipes that "weren't pitched properly" in a downstairs crawlspace. Defendant retained a different contractor to remove and replace the HVAC units at a cost of $117,895.98.

The last payment defendant provided to plaintiff -- the eleventh draw -- was in May 2004. On June 24, 2004, plaintiff requested the twelfth draw. After plaintiff made three additional requests for payment, defendant allegedly responded, stating she had no more money.

Plaintiff filed its two count complaint, alleging breach of contract and misrepresentation. Specifically, plaintiff sought payment under the contract for services rendered totaling $148,100, expenditures for storm damage repairs amounting to $120,000 and "extras" of $60,694. Additionally, it alleged defendant fraudulently induced plaintiff to provide services for which she had no intention of paying.

Defendant denied an obligation to plaintiff and filed a five-count counterclaim. She asserted breach of contract,

consumer fraud, breach of express and implied warranties, common law fraud, and negligence. Defendant sought rescission of the contract and return of the $971,705 she had paid plaintiff along with compensatory damages resulting from plaintiff's failure to follow the contract's specifications, lost profits, interest, costs, and attorney's fees.[3]

The seven day bench trial began on December 2, 2008. In addition to the parties' testimony concerning the contract and construction, they each presented fact and expert witnesses. With regard to the HVAC units, plaintiff offered Jim Berry, the principal of the HVAC subcontractor, who testified the installed units were marketed at approximately 17,000 BTUs but as a result of installation, specifically the length of the refrigerant line between the condenser and air handler, a loss of capacity resulted in an average effective BTU capacity of 14,960. Defendant's expert, Frank A. Vinciguerra, inspected the motel in December, noting the rooms "were humid, very humid, and many areas had mold growth within them." He concluded the units were oversized, caused short-cycling, and had an "inability to dehumidify spaces." He countered Berry's assertions, opining

[3] Defendant later amended her pleadings to include a third-party complaint against nineteen additional parties, including the subcontractors and their respective insurers. Each of these parties settled the claims or were dismissed prior to trial.

the reduction in capacity caused by the length of the lines was irrelevant since "the ability to control humidity" is not the same as effective cooling.

Defendant also offered expert testimony of Sander J. Greenberg, who quantified her lost revenue between $140,000 and $240,000. This was rebutted by plaintiff's accountant, James A. Stavros, who maintained Greenberg's methodology did not "follow the standards set forth by the [American Institute of Certified Public Accountants]" for the calculation of lost profits, because he failed to specify a "period of loss" and exaggerated potential lost profits of the motel by including business loses of another entity owned by defendant.

In a written opinion, the trial judge found defendant, not plaintiff, unilaterally breached the contract by ceasing the scheduled payments for completed work. The judge considered the parties' testimony. He rejected, as incredible, defendant's assertions plaintiff assumed full responsibility to pay for the storm damage repair costs and that plaintiff never asked for the twelfth draw. Conversely, the judge noted plaintiff's principal was "straightforward and believable," and "kept meticulous notes and records that record[ed] the dates he requested the next draw." The trial court described the uncompleted items discussed by defendant at trial as last-minute "punch list

items," which would have been completed by plaintiff had defendant not terminated the agreement and found defendant failed to mitigate her lost revenue damages by her six month delay in accepting her contractor's proposal to rectify the HVAC problems.

On the complaint, the court entered an order awarding plaintiff damages of $221,752.57, plus prejudgment interest and costs of $42,377.58. With respect to defendant's counterclaim, the court considered only whether plaintiff breached the parties' contract. He found no evidence of fraud or misrepresentation by plaintiff, rather the court determined plaintiff "met the standard of good faith, honesty in fact and observance of fair dealing." The court declined to credit Greenberg's expert opinion as to any claimed economic damages, concluding "the delays were caused by a number of factors which Greenberg did not take into account." The trial judge dismissed Defendant's counterclaim with prejudice.

On appeal, defendant argues the trial court erred in concluding plaintiff had no liability as a result of the faulty performance of the HVAC subcontractor and for failing to properly secure the property from storms while work was progressing. Finally, defendant argues plaintiff was not

entitled to the twelfth draw under the contract. We turn to our review of these issues.

The scope of our review of a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). The findings on which a trial court bases its decision will "not be disturbed unless they are so wholly insupportable as to result in a denial of justice[.]" Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974) (internal citations and quotations omitted). On the other hand, although a trial court's factual findings will not be overturned absent an abuse of discretion, questions of law are subject to de novo review. Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 372 (1999).

Defendant first argues the trial court erred as a matter of law in concluding the engagement of a subcontractor to install the HVAC units shielded plaintiff as the general contractor from liability for alleged resultant damage in failing to follow the contract specifications and instead installing nonconforming HVAC units. We reject defendant's characterization of the trial court's legal conclusions.

Defendant focuses on one portion of the trial judge's opinion, which mentions defendant's claim resulted from her dissatisfaction with the performance of the HVAC subcontractor,

Berry. In the discussion, the judge commented that if the HVAC did not work properly, "it would be the responsibility of Berry or the manufacturer of the product; and not [plaintiff.]" This comment related to the causation question; that is, whether the mold resulted from the efficiency of the units. It was not the basis of the court's conclusion regarding plaintiff's liability, as defendant now suggests.

"Disputes between contractors and owner[s] as to extra work and changes on building or working contracts are as old as the practice of contracting for such work and are a fertile cause of litigation." Headley v. Cavileer, 82 N.J.L. 635, 637 (E & A 1912). The "fundamental difficulty" encountered in this field of litigation is that "there is no statute requiring such contracts . . . to be in writing[.]" Id. at 637-38. No matter how "'solemn in form'" the original agreement, parties are free to renounce or modify it in any way they see fit. Id. at 638 (quoting Cooper v. Hawley, 60 N.J.L. 560, 563 (E & A 1897)). Therefore, a "writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties or their duly authorized representatives." Home Owners Constr. Co. v. Glen Rock, 34 N.J. 305, 316 (1961). See also Salvatore v. Trace, 109 N.J. Super. 83, 103 (App. Div. 1969), aff'd, 55 N.J. 362 (1970) (observing that contracting parties can waive a

writing requirement through their conduct). These aged pronouncements reflect little has changed over time and aptly describe what occurred in this matter.

The judge thoroughly detailed his findings regarding who made the decision to alter the specified HVAC units once those identified in the specifications were unavailable. In doing so, he specifically rejected defendant's claims that the decision was unilaterally made by plaintiff. Further, the trial judge found defendant's suggestion that she was ignorant of the problem was not believable and he credited the painstaking testimony, supported by documentation, presented by plaintiff and Berry. The court determined defendant knew of the problem because plaintiff had discussed the "HVAC issues" with her on "at least [six] occasions[,]" she selected the chosen unit and authorized the change. Moreover, plaintiff delayed her decision for almost a month, giving her ample opportunity to consult with Shade or Steinman, the architect and engineer who drew the original plans. Finally, the court found no evidence submitted by defendant showing plaintiff breached the amended proposal regarding the installation of the HVAC units.

These findings by the trial judge, including the credibility determinations leading to his conclusion plaintiff had not breached the parties' agreement, are "supported by

adequate, substantial and credible evidence." Rova Farms, supra, 65 N.J. at 483-84. The court's findings and conclusion will not be disturbed.

Defendant next maintains plaintiff breached the contract's implied covenant of good workmanship by failing to adequately protect the property from storm damage. Defendant asserts she relied upon plaintiff's express expertise, but the means employed by plaintiff to secure the motel from storm damage after removing the roof were performed improperly and not in a workmanlike manner. Defendant argues the court erred in requiring her to pay plaintiff to correct the damage caused by its breach and maintains she is entitled to recover judgment against plaintiff on this issue. We find these arguments unavailing.

Absent an express guarantee of good workmanship, "the law implies a covenant that the contract will be performed in a reasonably good and workmanlike manner." Ramapo Brae Condo. Ass'n, Inc. v. Bergen Cnty. Hous. Auth., 328 N.J. Super. 561, 576-77 (App. Div. 2000), aff'd, 167 N.J. 155 (2001); see also McDonald v. Mianecki, 79 N.J. 275, 293 (1979).

In the first count of her counterclaim, defendant includes a claim of breach of contract. The bases stated for the breach include: the work performed and materials used were not in

compliance with the plans and the work was not in compliance with applicable construction codes and regulations. The court found defendant's proofs on each of these issues was lacking and denied relief, concluding defendant, not plaintiff breached the contract.

The third count of the counterclaim asserts "breach of UCC warranties." The trial judge specifically found: "The Uniform Commercial Code claim in the [t]hird [c]ount of the [c]ounterclaim was not pursued at trial and deemed abandoned by the [c]ourt. The [t]hird [c]ount is dismissed with prejudice."

The fifth count of the counterclaim is the only claim directed to plaintiff's alleged failure "to protect the interior of the structure from [] exposure to the elements." The claim asserts plaintiff was negligent. As to this issue, the trial judge correctly noted defendant released plaintiff and his subcontractor when she settled the matter with the insurance carrier.

The release is limited to the negligence claims in count five of the counterclaim and specifically reserves all other claims between plaintiff and defendant. The question is whether a claim of breach of the implied covenant of good workmanship was pled and proven. We find it was not.

In support of this issue, defendant suggests plaintiff could have proceeded by removing smaller sections of the roof at any given time. Additionally, she notes the use of tarps, wood and ropes did not allay the wind gusts of the storms and the property was damaged. From these facts, defendant concludes that because the tarps did not hold, plaintiff's workmanship was improper.

At trial, defendant's evidence regarding plaintiff's breach of the contract was directed to its summer 2004 construction stoppage and the alleged mold formulation from the flawed HVAC installation. Defendant did not offer expert testimony opining that the methods chosen to protect the property in the event of a storm evinced a defect in workmanship (or merely was a result of exceptional storm circumstances, as suggested by plaintiff). In fact, there was no evidence offered to prove plaintiff's workmanship in choosing the manner of roof removal, undertaking piecemeal construction of the third-floor rooms and weatherproofing the structure during construction, was improper.

Defendant's final argument urges reversal of the trial court's conclusion that she, not plaintiff, breached the contract when she failed to release the twelfth draw payment. Before the trial court, defendant argued plaintiff never asked her for the twelfth draw. This contention was soundly rejected

by the trial judge, who found plaintiff's evidence credible. On appeal, defendant now argues the completion of certain work, which was not performed, was a precondition for the release of the draw. Thus, her obligation to pay was not triggered. We decline to consider this assertion, which was not raised before the trial judge.

It is well-settled we "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)). See also Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 479 (App. Div. 2008), certif. denied, 197 N.J. 476 (2009).

Affirmed.