MEMORANDUM

SUPREME COURT, STATE OF NEW YORK
COUNTY OF SUFFOLK

DAVID DRISCOLL and CAROL DRISCOLL,

Plaintiffs,

-against-

ROBERT MCCARTHY, ROBERT MCCARTHY d/b/a RJM CUSTOM CONSTRUCTION INC. RJM CONSTRUCTION,

Defendants.

TRIAL TERM PART 37

BY: HON. JOSEPH FARNETI A.J.S.C.

DATED: SEPTEMBER 17, 2008

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The parties by stipulation consented to the submission of this matter for the Court's consideration without a jury. By further stipulation, the plaintiffs limited the pursuit of their complaint to two causes of action only. The first cause of action for breach of contract, and the second cause of action for common law fraud, whose gravamen was fraud in the inducement. The remaining third through fifth causes of action were withdrawn by stipulation at the time of trial.

The Court in rendering this memorandum decision has relied upon the testimony and exhibits received in evidence at trial as amplified by the parties' post-trial memoranda.

A plaintiff has the burden of proving a breach of contract. The first question as to whether or not a contract existed between the parties is a simple one, and must be answered in the affirmative.

The parties entered into a contract for the performance of excavation services by the defendant at the plaintiffs' residence ("contract"). The contract contained a description of the scope of the work and services to be performed and the agreed-upon price for those services. It is at this point where each of the parties accuses the other of being responsible for the delay in performance.

The plaintiffs accuse the defendant of inordinate and unacceptable delay in the performance of the excavation services. The defendant accuses the plaintiff/homeowner DAVID DRISCOLL ("plaintiff") of inexperience as a general contractor, and contends that the plaintiff's inexperience and lack of preparation caused the ensuing delays. The plaintiffs attempt to impose responsibility for the delays on the defendant and further seek to hold the defendant solely responsible for the failure to perform the agreed-upon work in a suitably timely fashion.

The written contract terms do not contain any provision for a schedule of completion or a final completion date. The plaintiffs' attempt to have the Court insert contract terms which were not included by the parties is unavailing. While the contract contained a commencement date, it did not contain any language to the effect that time was of the essence or any more specific temporal performance requirement. A court is without power to modify a written, unambiguous contract by inserting additional terms (*Wallace v 600 Partners Co.*, 86 NY2d 543 [1995]; *Rocar Realty Northeast, Inc. v Jefferson Val. Mall Ltd. Partnership*, 38 AD3d 744 [2d Dept 2007]).

The plaintiffs' contention that the defendant should have known from the surrounding circumstances and discussions both prior to and after the execution of the contract that time was of the essence was an important factor to the plaintiffs. This was the plaintiffs' stated position at trial, and was further argued by their counsel.

In this instance the delay, in and of itself, without any contract language containing the obligation in the first instance, and the consequences which would flow therefrom, is without legal significance or consequence. There

is simply no time frame language in the contract and, as discussed, none can be added by the Court. A "start date" alone does not transform a contract to one where time is of the essence in the absence of specific language stating that obligation or setting forth a completion date (*Conquest Cleaning Corp. v N.Y. City Sch. Constr. Auth.*, 2 AD3d 565 [2d Dept 2003]; *Bilotto v Webber*, 172 AD2d 639 [2d Dept 1991]). The contract makes no mention of timely performance or any consequence for failure to timely perform.

In this case, there was significant partial performance of the contractor's obligation prior to his discharge by the plaintiffs/homeowners. The plaintiffs contend that the work was not performed in a workmanlike manner, and that certain shrubbery and other valuable vegetation were destroyed by the contractor. The plaintiff, during testimony, claimed that too much dirt was excavated and that the hole dug was "too big." Upon cross-examination, the plaintiff's opinion failed to set forth in what way the contractor's performance was deficient. His general statements of dissatisfaction are insufficient to convince this Court that the work was not done properly to the extent that it was performed.

Further, there were no dimensions contained within the contract as to the magnitude of the excavation required, and the plaintiff's credentials as a teacher of industrial arts did not add any additional weight to his opinion regarding the scope of the required excavation. There was no testimony other than that of the plaintiff and the defendant on the subject. As such, the Court finds that the plaintiff did not sustain his burden of proof on the issue of the sub-standard performance of the contract. Likewise, there was no credible evidence of failure to perform. There is no question that the defendant performed substantial services.

The parties are in agreement that weather required significant repetition of certain excavation as a result of rain in more than one instance. The parties cannot control the weather, and they each suffered the consequences.

The plaintiffs' burden upon the second cause of action for common law fraud in the inducement requires proof by a preponderance of the credible evidence of representation of a material fact, falsity, scienter, reliance, and injury (*see Vermeer Owners v Guterman*, 78 NY2d 1114 [1991]). The only fact that the plaintiffs claim the defendant misrepresented was that at the time of the formation

of the contract, the defendant contractor was licensed by the appropriate local administrative body. The plaintiffs allege that the defendant claimed to be both licensed and insured. Where a party seeking to recover for fraud has the independent means available to ascertain the reliability of an affirmative statement upon which he relies by the exercise of ordinary intelligence, he is required to ascertain the truth of such representation (*see Shao v 39 College Point Corp.*, 309 AD2d 850 [2d Dept 2003]; *Stuart Silver Assocs. v Baco Dev. Corp.*, 245 AD2d 96 [1st Dept 1997]; *Pinney v Beckwith*, 202 AD2d 767 [3d Dept 1994]). The Court finds the plaintiffs cannot claim justifiable reliance upon the defendant's alleged misrepresentation that he was licensed, as plaintiffs had the means to verify such representation by the exercise of ordinary intelligence. Therefore, the representation may not serve as the basis for granting relief for fraud in the inducement.

The Suffolk County Department of Consumer Affairs is the governmental agency charged with the licensing function for all contractors in and for Suffolk County. The law requires a party to exercise reasonable means to ascertain the licensing status of the contractor involved. The defendant never exhibited a license or any indicia of insurance to the plaintiff, nor did the plaintiff ever demand or specifically require the same as a condition of the contract. In addition, the plaintiff/homeowner acted as his own general contractor. There is no credible evidence in this record that there was any statement of experience by either party.

The Court finds that the plaintiffs are only permitted to recover for work paid for and not performed or for defective work actually performed. The attempt to recover the difference between the contract price and the actual cost to complete the job is unavailing. Under these circumstances, the contract is rescinded and generally "the parties . . . should be left as they are" (*Segrete v Zimmerman*, 67 AD2d 999, 1000 [2d Dept 1979]; *see Brite-N-Up, Inc., v Reno*, 7 AD3d 656 [2d Dept 2004]; *Goldstein v Gerbano*, 158 AD2d 671 [2d Dept 1990]; *Allen v Miller*, 1 Misc 2d 102 [App Term, 2d Dept 1955]).

The plaintiffs made partial payment and the contractor provided partial performance. Plaintiffs may not recover for partial payment voluntarily made (*Voo Doo Contr. Corp. v L & J Plumbing & Heating Co.*, 264 AD2d 361 [1st Dept 1999]). The parties are as they are.

The plaintiffs have not sustained their burden of proof on the issue of non-performance or on the issue of defective work. Under the circumstances of this case, on the first cause of action for breach of contract, the Court awards judgment for the defendant.

Moreover, the plaintiffs have not satisfied the elemental requirements for common law fraud. Under the circumstances of this case, on the second cause of action for fraud, the Court awards judgment for the defendant.

Submit judgment on notice in accordance herewith.

Dated: September 17, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court