NEW YORK STATE
COUNTY OF ONTARIO
CITY OF CANANDAIGUA **CANANDAIGUA CITY COURT**

RONALD D. STERN

Claimant,

vs.

DECISION
CC-001598-09/CA

BONNIE BARBOUR CROSSETT

Defendant.

BONNIE BARBOUR

Plaintiff,

vs.

DECISION
CV-000099-10/CA

RONALD D. STERN

Defendant.

Presiding: Hon. Stephen D. Aronson

Appearances: Claimant by: Scott P. Falvey, Esq.

Defendant by: Robert Tucker, Esq.

In this small claims case the claimant ("contractor") seeks $3850 from the defendant ("owner"). The owner filed a counterclaim against the contractor seeking $11,563, an amount which exceeds the jurisdictional limit of small claims court. The parties agreed that the counterclaim would be referred to the court's civil calendar where the jurisdictional limit is $15,000. The parties also agreed that the small claim and the counterclaim would be consolidated and heard together utilizing the informal procedures governing small claims. The hearing took place on March 30, 2010.

The contractor and owner entered into a written contract for work on the owner's rental property at 12 South Ave. in Manchester, New York. The work was to include a roof tearoff, roof replacement and installation of a dormer. A building permit was obtained before the work was started. The contractor contends that he was discharged from the work site prematurely and not given an opportunity to complete the work required by the building inspectors to meet code requirements. He contends that he is owed the balance of the contract price ($2700) and money for extras ($1500) that were done. The owner contends that she was justified in discharging the contractor. She contends that she shouldn't have to pay the contractor anything above and beyond the $2700 deposit. She contends that the contractor should be responsible to pay her over $11,000, which represents the cost of finishing the job, the cost to repair a roof leak and other damages. She has contracted to sell her house about May 1, 2010, and is also concerned about a mechanic's lien that was filed by the contractor's supplier.

There are two legal standards applicable in this consolidated case. In every small claims case, the court is bound to perform substantial justice to the parties in accordance with principles of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence. *See Uniform City Court Act § 1804*. In a civil case, the complaining party (owner) is required to establish her counterclaim causes of action by a preponderance of the evidence and she is bound by rules of practice and the rules of evidence. Nevertheless, the result will not differ because the same principles of substantive law are applicable to the contractor's claim and the owner's counterclaim.

The credible evidence established that the contractor commenced work on the project on or about October 6, 2009, after receiving a $2700 deposit and the total contract price was $5400 with the balance due on completion. Subsequent to the execution of the contract, the owner insisted upon having subcontractors sign a release of liability form which also provided that the work was to be done by October 16, 2009. Even though the project was not finished by October 16, 2009, there was no penalty provision for noncompliance and there was no "time of the essence" provision in the contract or the release form. The owner's explanation of the delays is no less credible than the contractor's explanation. In any event, the delays, if any, were only two weeks and the owner was unable to prove damages attributable to the delay.

The credible evidence established that during the course of the project, the contractor performed extra work at the request of the owner. The credible evidence showed that the contractor had neared completion of the project before the end of October and was ready, willing and able to perform the remainder of the work required by the building inspectors. The credible evidence showed that the owner became frustrated with the contractor's quality of work and based on her self-described poor experiences with the contractor, she decided to discharge the contractor and hire someone else (Tripodi Contractors) without giving the contractor an opportunity to complete the project. The parties agree that there was work left to do under the contract.

A contractor seeking to recover under a contract must prove that his failure to perform fully was inadvertent or unintentional and that the defects, if any, were insubstantial. *See PJI*

4:20, page 783. Here, the contractor's failure to perform fully was unintentional because the owner discharged him. Therefore, the issue is whether there were defects and whether the defects were insubstantial. Here, there was convincing evidence that the work was not skillful and that the work was performed in an unworkmanlike manner. The photographs demonstrated a number of suspect conditions. The building inspector, a disinterested witness produced by the owner, testified that the work "passed code minimally" and that on a scale of 1 to 10, the quality of work was a 5. The Tripodi employee also testified that the roof job was "not quality work", "not good work." Mr. Fagner, the person that hooked up the parties, testified that there was "a lack of formal workmanship." Moreover, the roof leaked and the owner had a difficult time finding a contractor to make repairs. Accordingly, the issue becomes whether the defects were insubstantial. Under New York law, any defective or omitted work must be "slight" to be insubstantial. *PJI 4:20, page 783. See, e.g., Windjammer Homes, Inc. v Lieberman, 278 AD 2d 411 (2d Dept 2000)* (held contractor did not substantially perform under the contract and was not entitled to final payment where contractor failed to complete between 14 percent and 43 percent of the contract); and, *Carefree Bldg. Products, Inc. v Belina, 169 AD2d 956 (3d Dept 1991)* (held contractor did not substantially perform the contract where omissions or defects in the contractor's performance amounted to 25% of the contract). The contractor's testimony that only about $150 worth of work was left to be done is not credible. Here, the credible evidence showed that construction defects were not insubstantial.

Where it is determined that the contractor's work was performed in an unworkmanlike manner, the contractor is entitled to recover the contract price less such an amount as is necessary

to permit the owner to complete or replace the work, unless the cost of replacement is so grossly and unfairly out of proportion to the good to be attained that to require replacement would be economic waste, in which case the measure of the deduction is the difference in value between the work as specified and the work as completed. *See PJI 4:20, page 783*. With due consideration being given to all of the credible evidence, the difference in value between the work as specified and the work as completed supports a conclusion that the contractor should be paid ½ of the $2700 due on the contract. The contractor also seeks $1150 of extras. Under the law, contractors are entitled to recover for extra work that is authorized even though not included in the written contract. *See PJI, 4:20, page 782*. The credible evidence supports the contractor's claim for $1150 of extras.

The owner's counterclaim seeks a reimbursement for corrective construction. When an owner sues to recover damages for a defect in construction, the measure of damages is the fair and reasonable cost of completing or correcting the contractor's performance as of the date of the breach. *See PJI 4:20, page 784.* The owner seeks an amount of damages to reimburse her for money she paid the new contractor. The owner submitted a separate invoice for repairing the leaky roof. This proof is satisfactory and she is entitled to an award of $800 for repairing the leaky roof.

She also submitted proof of the cost of corrective construction but the proof included extra work (interior construction and drywall) that the contractor was not obligated to do. There was no breakdown between the cost of the corrective work and the cost of the extra work. The

court is not permitted to speculate on the damages. Thus, this portion of the owner's counterclaim is denied because there was no specific delineation as to the amount of the costs for corrective action.

The credible evidence also shows that there is an unpaid mechanic's lien of $2253.70 against the owner's property for supplies ordered by the contractor. The owner presented a receipt of $524.91 which she testified were for supplies chargeable to the contractor. The credible evidence does not support her testimony. Some of these items are for the extra work performed by the contractor. She should be responsible for these items.

The owner's request for damages of $500 for loss of prospective sales must also be denied. The court cannot engage in speculation in awarding damages. Also, under New York law, consequential damages are not recoverable for breach of contract unless the owner proves such damages were foreseeable and within the contemplation of both parties when the contract was made. *See PJI 2:40, page 773*. The loss of prospective sales is a consequential damage and is not recoverable under New York law.

Likewise, the owner's claim for $300 toward cleaning and the heat bill is not awardable. The figures adduced by the owner were speculative. The court cannot award damages that require the court to engage in speculation. Damages must be certain and ascertainable. Similarly, an award of $183.00 for the balance of an unpaid dumpster bill are not certain and ascertainable where the court must engage in speculation as to whether the contractor will pay it

and whether the dumpster company will seek recovery from the owner.

SUMMARY

The contractor is entitled to recover ½ of the balance of the contract ($1350) and credit for the extras ($1150) but is obligated to pay $2253.70 for supplies under the mechanic's lien. The owner proved her entitlement to an award of $800 for the roof repair. Thus, the owner is entitled to recover $2253.70 for the mechanic's lien, $800 for the roof repairs, less $1350 for ½ the contract balance and less $1150 for the extras.

Judgment is awarded as follows: the contractor's claim is dismissed. The owner is entitled to a judgment against the contractor for $553.70, plus costs and disbursements.

Stephen D. Aronson
Canandaigua City Court Judge

Dated: April 13, 2010
Canandaigua, New York

"An appeal from this judgment must be taken no later than the earliest of the following dates: (I) thirty days after receipt in court of a copy of the judgment by the appealing party, (ii) thirty days after personal delivery of a copy of the judgment by another party to the action to the appealing party (or by the appealing party to another party), or (iii) thirty-five days after the mailing of a copy of the judgment to the appealing party by the clerk of the court or by another party to the action."