

Mr. Gambatese testified that all property contaminated by black water was no longer fit for retention by the homeowner unless it could be properly remediated. Hard surface items could be properly cleaned but items, such as some furniture and plaster board, that had wicked up the black water were deemed no longer usable and should be discarded.

Immediately after Defendant retained Plaintiff's services, Plaintiff cleaned and sanitized the affected area of Defendant's home. Plaintiff's services included cutting out drywall, cabinets and a bottom plate to remove soiled carpeting. Contaminated items were removed from the basement and taken outside for later disposal. An antimicrobial agent was applied to the area and dehumidifiers and air movers were installed to quickly dry out the basement to further prevent additional hazards, such as mold. Plaintiff completed all work on April 13, 2011 but for allowing the dehumidifiers and air movers to completely dry the area.

On April 14, 2011, Defendant sent a termination notice to Plaintiff noting that he had "specifically directed repeatedly that certain items not be removed from our property" including furniture items and cabinets that, as Plaintiff's representatives and Mr. Gambatese of Grange Insurance testified, had wicked up the black water and needed to be discarded for sanitation reasons. The items in question had been removed from the basement by Plaintiff but were apparently moved back into the basement by Defendant at a later date. Plaintiff sought to remove the dehumidifiers and air movers but was denied access to Defendant's home.

The total charges for Plaintiff's services were \$4148.82. The testimony of Defendant's insurance adjuster validated that the charges for services rendered were within a reasonable range of the amounts ordinarily attributed by Grange Insurance for similar services. Defendant has not paid Plaintiff anything for the services rendered. Plaintiff has asserted claims of breach of contract and unjust enrichment. Defendant maintains that he owes nothing because he was

entitled to cancel the contract within 72 hours under the terms of the contract and the Home Solicitation Sales Act, R.C. 1345.21 *et seq.*

II. LAW AND ANALYSIS.

A. The Parties' Contract.

The parties executed several documents related to the work performed at Defendant's property. ~~One document, the First Party Work Authorization which authorized the work to commence and for Defendant's insurance company to pay for the remediation work directly,~~ provided:

Termination: This authorization can be terminated within 72 hours of date enforced. If terminated after the time period any and all fees will be paid for services rendered to date of termination.

A second document executed by the parties, the Authorization to Mitigate Content Items "Black Water" provides, in pertinent part:

Customer hereby further authorizes Company to remove items for safety concerns. This may need to have a disposal company brought in to discard items which may take additional time to have disposal company drop container to have items discarded. Customer understands that if they take items from black water loss this can contaminate the swelling and re-introduce bacterial and other air born disease into the home. Customer agrees to take their own inventory of items that are discarded. Company will not inventory items being discarded. ...

* * *

Termination:

The Customer may terminate this agreement 72 hours after date listed. You may cancel this transaction without penalty or obligation within three business days of date listed. ...

Payment:

Customer agrees to pay in full any and all activities related to the work of this agreement. If cancellation is given then Customer agrees to pay for any and all work done up to the point of cancellation. If Collections have to be initiated for nonpayment Customer agrees to pay for any and all Attorney fees used to collect if Customer has defaulted this agreement.

Defendant asserts that the provisions of the contract allowed him to cancel within 72 hours and owe Plaintiff nothing. The plain language of the contract does not support Defendant's position. While the contract states that no penalty will be incurred for termination, the contract clearly requires payment for work performed. Payment for services rendered is not a penalty—it is compensation for a benefit received. Neither Plaintiff nor the contract seeks to impose an early termination penalty through this action.

Accordingly, under the express terms of the contract even if Defendant's termination is assumed to be a valid termination, Defendant must pay for services rendered prior to April 14, 2011. It is undisputed that all of the work on Defendant's home was completed on April 13, 2011. The only ongoing remediation was to ensure that the basement was fully dried through use of the dehumidifiers and air movers. While Defendant may have been entitled to reduce Plaintiff's invoice by the amount charged for the dehumidifying equipment, his refusal to allow Plaintiff access to the premises to mitigate its damages precludes this reduction.

Further, the Court finds that even in the absence of a contract Plaintiff would be entitled to recover the same amount as invoiced as quantum meruit for services received.

B. Home Solicitation Sales Act.

Defendant also maintains that he is excused from performance under the contract with Plaintiff by the Home Solicitation Sales Act, R.C. 1345.21 *et seq.* that generally allows

consumers to cancel some contracts within 72 hours without obligation. There are exceptions to the Home Solicitation Sales Act applicable to the current case:

(5) The buyer initiates the contact between the parties, the goods or services are needed to meet a bona fide immediate personal emergency of the buyer which will jeopardize the welfare, health, or safety of natural persons, or endanger property which the buyer owns or for which the buyer is responsible, and the buyer furnishes the seller with a separate, dated, and signed statement in the ~~buyer's handwriting describing the situation requiring immediate~~ remedy and expressly acknowledging and waiving the right to cancel the sale within three business days;

(6) The buyer has initiated the contact between the parties and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property. If, in the course of such a visit, the seller sells the buyer additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services does not fall within this exclusion.

R.C. 1345.21(A).

Substantial testimony centered on whether the mitigation of raw sewage in a basement constituted an emergency repair, a necessary repair or, apparently, an optional repair to be completed at some other time. The law does not establish any bright line tests for when a repair is an emergency as compared to when one is merely necessary or optional. Under the statutory definition, an "emergency repair" requires "a bona fide *immediate* personal emergency of the buyer which will jeopardize the welfare, health, or safety of natural persons, or endanger property which the buyer owns or for which the buyer is responsible" (emphasis supplied). Under the circumstances of this case, clearing the drain to halt the sewage back up would

constitute an emergency. Action was required within a matter of minutes to hours to preserve health, safety and property.

Defendant argues that once the sewage water had drained, the remaining solid waste and residue no longer constituted an emergency and could have remained in place for an undetermined period of time. The Court finds Defendant's position to be untenable. Plaintiff ~~waited for approximately two days before allowing cleanup to commence.~~ While the cleanup did not need to be completed within minutes to hours to preserve health, safety and property, it certainly had to be completed within hours to a day or so to prevent further contamination throughout the home.

The Court finds, therefore, that black water remediation is a necessary repair. Consistent with the holding in *Paul Davis Restoration of Cleveland Metro W. v. Karaman*, 8th Dist. No. 84824, 2005-Ohio-4017, which found water mitigation to prevent mold to be a necessary repair, the Court finds that the services provided by Plaintiff in remediating black water backup are excluded from the Home Solicitation Sales Act pursuant to R.C. 1345.21(A)(6).

C. Attorneys' Fees.

The documents executed between the parties contain the following provisions:

If collections proceedings occur upon default of the Customer, the Customer agrees to pay for any and all costs required to settle claim for which is in default.

Customer Contract.

In the event any Legal proceedings must be instituted to recover the amount due, Complete Onsite Restoration Experts shall be entitled to recover the costs of collection including reasonable Attorney Fees.

First Party Work Authorization.

Customer agrees to pay in full any and all activities related to the work of this agreement. If cancellation is given then Customer agrees to pay for any and all work done up to the point of cancellation. If Collections have to be initiated for nonpayment Customer agrees to pay for any and all Attorney fees used to collect if Customer has defaulted this agreement.


Authorization to Mitigate Content Items "Black Water".

The Court finds that Plaintiff is entitled to recover its reasonable attorneys' fees and costs associated with its efforts to collect on Defendant's account. Plaintiff to submit its brief supporting its request for specific attorneys' fees and costs by April 13, 2012. Defendant to submit his brief in opposition by April 27, 2012. A hearing on the matter will be scheduled upon request by either party.

III. CONCLUSION.

For the foregoing reasons, **JUDGMENT IS RENDERED IN FAVOR OF PLAINTIFF COMPLETE ONSITE RESTORATION EXPERTS, LTD. AND AGAINST DEFENDANT ROGER BOLLEN IN THE AMOUNT OF \$4148.82 PLUS REASONABLE ATTORNEYS' FEES AND STATUTORY INTEREST FROM THE DATE OF THIS ENTRY.**

IT IS SO ORDERED.


JUDGE BRENDAN J. SHEEHAN

Dated: 3/27/12

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 27th day of March, 2012:

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Jim Petropouleas
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