IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL SOLOVEY	)	**CASE NO. CV 12 776005**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
VKR, LLC, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

The plaintiff filed this lawsuit on February 15, 2012. The complaint includes causes of action for breach of contract, unjust enrichment, "detrimental reliance," negligence and slander of title. Both defendants filed an answer generally denying the plaintiff's claims and defendant VKR asserted counterclaims for breach of contract and foreclosure on a mechanic's lien. A bench trial was held on October 29 and this entry follows.

STATEMENT OF THE FACTS

Three people testified at trial: plaintiff Michael Solovey, defendant Victor Rymko and Roger Gerber, an expert witness for the plaintiff. Plaintiff's exhibits 1 through 15 and defendants' exhibits A, B, C-1, C-2, C-3 and F were admitted into evidence.

Michael Solovey owns a condominium at 660 Allison Drive, Richmond Heights. Around September, 2010, he contracted with defendant VKR to do home remodeling. The work was intended to be performed in stages as the plaintiff could pay for it. The contract was never put in writing.

The first stage involved tear out of the existing kitchen cabinets and flooring on the first floor. VKR was then to assemble kitchen cabinets and prepare the floors for installation of new granite and marble tile. Additional work for the first stage of the contract, but not connected to the dispute in this lawsuit, required VKR to remove wallpaper and wash the walls and to tear out the first and second floor bathrooms.

VKR satisfactorily completed the first stage and was paid $3,100 for that work on October 15, 2010.

The dispute in this case centers on the next phase of the job -- the installation of marble and granite tile on the first floor. This part of the remodeling required VKR to install material purchased by Solovey. The plaintiff spent $4,454.07 to buy 570 white marble tiles and 350 black granite tiles. He then entrusted VKR to put the tiles in the condominium. Solovey never testified to an agreed price for VKR's installation of the floors.

VKR substantially completed the installation. The only work left undone was to grout the black tile portion.

Rymko, the sole member of VKR testified that he then requested payment from Solovey and was told, for the first time, that the floor was not acceptable. The plaintiff's complaints included the floors not being even, the white tiles being mismatched, and the failure to grout the black tile.

Because the plaintiff did not pay what VKR claimed was owed, a mechanic's lien in the amount of $9,520 was filed on December 22, 2010. This amount was supported at trial by plaintiff's exhibit 13, a December 2, 2010, invoice from VKR to Solovey. That invoice includes seven items, the largest of which is a charge of $7,400 for installing the tiles on the first floor.

After the mechanic's lien was filed, Solovey retained Roger Gerber to offer an opinion about whether VKR's work was professionally done. Gerber has been in the flooring business for 40 years. He has installed thousands of floors. For most of the past eight years he operated a business known as Pro Inspection Advantage where his job was to inspect floors and give opinions on the quality of the construction. He has certifications from the Flooring Inspectors Training Service and other similar organizations. He has inspected over 3,500 floors.

Gerber scrutinized the floors at 660 Allison Drive on January 13, 2011. He testified to several deficiencies that render VKR's performance unworkmanlike. First, there is excessive lippage, a difference in the elevation of adjacent tiles, throughout the job. Second, VKR did not use layers of "thin set" (an adhesive mortar) and alkali-resistant mesh joint tape that were required for proper installation. Third, VKR erred by using sanded grout because it scratched the tile finish and did not completely fill the narrow grout joints. Fourth, the installer used a tile cutter on pieces that were placed in the field. Gerber testified that only factory cuts should be placed in the field; any cuts made by the installer should be at the borders only. Fifth, edge protection at the stairwell was required and not installed. Sixth, the black granite tiles are not aligned correctly and have joints that are too wide and ungrouted. Last, VKR failed to match the white tiles as closely as possible, leaving mismatched colors throughout the field of white.

Gerber testified that it is impossible to remedy the defects without pulling out the floor and starting over with new tile since the installed tile cannot be reused.

Solovey testified that the white marble tile has been replaced at a total cost of $7,168.64. That includes $1,307.04 for porcelain tile to replace the marble which is now too expensive; $3,167.85 to tear out VKR's defective work; and $2,693.75 to install the new porcelain tiles. The granite tile has not yet been replaced and Solovey estimates the total cost

of granite replacement at $6,042. The plaintiff is also seeking costs and attorney's fees in connection with his slander of title claim.

Rymko denies that the floors were installed in an unworkmanlike manner. He has counterclaimed for the $9,250.

LAW AND ANALYSIS

The elements Solovey must prove on his breach of contract claim are (1) the existence of a contract, (2) that Solovey fulfilled his obligations, (3) that VKR and/or Rymko failed to fulfill their obligations, and (4) that damages resulted from VKR and/or Rymko's failure. *Carr v. Acacia Country Club Co.*, 8th Dist. Nos. 96731 and 96732, 2012-Ohio-1940, ¶37. It is well settled that the law imposes a duty on builders to construct improvements in a workmanlike manner. *Watershed Mgmt., LLC v. Neff*, 4th Dist. No. 10CA42, 2012-Ohio-1020, ¶34. When a contractor enters a contract to provide future services, there exists an implied condition that the contractor will perform in a workmanlike manner, and any claim that the contractor failed to perform this obligation arises from the contract, and is not a separate tort. *Id*.

Solovey proved by a preponderance of the evidence that VKR breached its duty to install the tiles in a workmanlike manner. Gerber's testimony about the flaws in the installation was credible and persuasive in showing that the end product was not professional. That leaves the issue of damages.

The general measure of damages for a breach of contract is the amount necessary to place the non-breaching party in the position he or she would have been had the breaching party fully performed under the contract. *Id*., ¶33. Solovey did not pay for the installation, therefore his damages do not include the cost already incurred to install the porcelain tile and the future cost to replace the granite tile. Instead, his damages are limited to that expense to

place him in the position he was before VKR's breach: with a bare floor and $4,454.07 worth of usable tile. From that perspective, his damages are 1) the $4,454.07 value of the tile, 2) $3,167.85 to tear out VKR's defective work on the white tile and 3) the cost to tear out the black tile. As to that third element, the separate cost to tear out the black tile was not shown by a preponderance of the evidence. To the contrary, a review of plaintiff's exhibit 10 shows that the $3,167.85 to tear out the defectively installed white tile also included tear out of the black. Exhibit 10 is a proposal from Leo Pavimenti, LLC for "removal of the marble/granite" throughout the first floor, including the hallway where most of the black tile was laid. Therefore, the damages owed to the plaintiff by the defendant VKR, LLC for breach of the implied duty to perform in a workmanlike manner amount to $7,621.92.

As to the claim against defendant Rymko personally for breach of contract, the court finds no evidence that the contract was between Solovey and Rymko and that claim is decided in Rymko's favor.

The plaintiff's second cause of action is for unjust enrichment. The elements of a claim for unjust enrichment include (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Grey v. Walgreen Co.*, 197 Ohio App. 3d 418, 2011-Ohio-6167, ¶20 (8th Dist.). Putting aside the fact that the contract between Solovey and VKR would ordinarily preclude the possibility of a claim for unjust enrichment, there was no benefit conferred by Solovey on the defendant that would be unjust for VKR to retain. Solovey only paid for the tear out, which VKR did and deserved to be paid for. Solovey did not pay for the defective installation and is thus unable to establish the elements of unjust enrichment. That claim is decided in the defendants' favor.

The third cause of action is captioned as “detrimental reliance.” "Detrimental reliance" is not a viable cause of action in Ohio. *Auckerman v. Rogers*, 2nd Dist. No. 2011-CA-23, 2012-Ohio-23, ¶30. Instead, detrimental reliance is an element of a claim for promissory estoppel. *City of Marion v. Hoffman*, 3rd Dist. No. 9-10-23, 2010-Ohio-4821, ¶25. Because Solovey has not actually asserted a separate cause of action here, the court finds for the defendants’ on the claim for “detrimental reliance.”

The plaintiff’s fourth cause of action is for negligence. As noted above, the duty that VKR breached arose from contract and does not support the assertion of a tort claim. Hence, the plaintiff’s negligence claims are decided in the defendants’ favor.

Solovey’s fifth and last cause of action is for slander of title. Slander of title to real estate is a tort action against one who falsely and maliciously defames title to property and causes some special pecuniary damages or loss. *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶11. Generally, slander of title to real estate involves the wrongful recording of an unfounded claim, such as a mechanic's lien, to the property of another. *Id*. To prevail, a claimant must prove: (1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages. *Id*., ¶12.

In this case Solovey cannot establish the elements of malice or special damages. As to malice, VKR did install the tile and could have reasonably expected that the job was performed satisfactorily, despite this court’s opposite conclusion on the merits. As to damages, there is no evidence that the presence of the lien caused Solovey to be unable to sell the house or to

borrow money on the property. Because the plaintiff did not prove the elements of slander of title, that cause of action is decided for the defendants.

VKR's first counterclaim cause of action is for breach of contract, namely the plaintiff's failure to pay the $9,520 invoice of December 2, 2010. The lion's share of that invoice – $7,400 – is for the faulty installation of tile. As to that portion of the invoice, VKR failed to prove by a preponderance of the evidence that it fulfilled its obligation under the contract and is not entitled to payment. As to the remaining $2,120, it is mostly for the installation of cabinets, with $280.00 charged to cut tiles for use as baseboard. The preponderance of the evidence supports a finding that VKR properly performed this work and Solovey should have paid for it and did not. Solovey is therefore liable to VKR for the $2,120. That amount is offset from the $7,621.92 due from VKR to Solovey, leaving a balance of $5,501.92 owed by VKR to Solovey.

The second counterclaim cause of action is for foreclosure on the mechanic's lien. That claim is denied for lack of evidence that Solovey owes anything to VKR and for the defendant's failure to join all parties with an interest in the real property.

CONCLUSION

The court hereby enters a judgment in favor of plaintiff Michael Solovey and against defendant VKR, LLC in the total amount of $5,501.92 with interest at the statutory rate beginning on the date of this entry and court costs. The court further enters judgment in favor of defendant Victor Rymko on the plaintiff's complaint and in favor of plaintiff Michael Solovey on the defendant VKR, LLC's counterclaim.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this 13th day of November, 2012, to the following:

Robert G. Stiefvater III, Esq.
rstiefvater@stiefvaterlaw.com
Attorney for Plaintiff

R. Michael O'Neal, Esq.
rmoneal@ohioelaw.com
Attorney for Defendants

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Judge John P. O'Donnell