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JAN 15 2002

STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA)
COMMUNITY

JEANNE A. KRIEGER
CLERK OF COURT

Stephen and Tammy Florez,

Court File No. 473-01

Plaintiffs,

vs.

MEMORANDUM OPINION

Jordan Construction Co. and
Fritz M. Jordan,

Defendants.

Defendants Jordan Construction Company and Fritz M. Jordan (hereinafter "Defendant" or "Jordan") filed a motion for summary judgment asserting Plaintiffs' claims for breach of contract, breach of warranties, breach of covenant of good faith and fair dealing, fraud, negligence, and conversion fail as a matter of law. As explained herein, because material questions of fact remain, Defendant's motion is denied.

I. FACTS

Plaintiffs allege facts in this case as follows. Plaintiffs Stephen and Tammy Florez are residents of the Shakopee Mdewakanton Sioux (Dakota) Community ("SMS(D)C" or "the Community"). Complaint ¶ 1.1. They live at 2699 Eagle's Circle in Prior Lake, Minnesota, on land held in trust for the Community and assigned to Stephen Florez. Id. On May 5, 2000, Plaintiffs entered into a contract with Defendant Jordan Construction Company and its sole proprietor, Fritz Jordan. Id. ¶ 2.1. Jordan lives and keeps his principal place of business at 5260 Town Hall Drive, Rockford, Hennepin County, Minnesota. Id. ¶ 1.2-3. Jordan operates a home construction business and solicits and conducts business in the Community. Id. ¶ 1.

In the Contract executed on May 5, 2000, Defendant agrees to construct "a two-story addition to the south side of house as per plans & specs" according to a payment and work time schedule for a total cost of \$128,000. Id. Exh. 1. The payment schedule requires \$35,000 to start, \$25,000 in June following the demolition of the deck and framing of the new structure, \$25,000 in July following completion of the drywall, and \$43,000 "upon completion of job and lien waivers." Id. The Contract guarantees all materials and labor "as specified, and the above work will be in accordance with the drawings and specifications provided." Id.

The job specifications attached to the Contract include a provision requiring the contractor to obtain all building/electrical permits for the project and expectations for the completion of demolition, construction, drywall, and electrical work, as well as windows, stucco finish, paint, certain fixtures and appliances. Id. Exh. 1. The Bid Form signed by Jordan indicates an expected start date of May 8, 2000 and an expected completion date of August 15, 2000. Id. Jordan verbally promised Plaintiffs that he would use only experienced laborers and would be present on the worksite to supervise work crews, and Plaintiffs relied upon these promises in agreeing to Contract provisions. Id. Exh. 4; Stephen Florez Affid. ¶ 7.

Plaintiffs paid Defendant \$35,000 to start on May 8. Complaint Exh. 2. Plaintiff Stephen Florez kept a journal for the project in which he noted his concern that by mid-May, Defendant did not yet have a SMS(D)C construction permit at the worksite. S. Florez Deposition p. 40. By May 17, Plaintiff Stephen Florez believed construction was progressing slowly. Id. at 46. On May 23, Stephen Florez picked up the construction permit himself from SMS(D)C Administrator Bill Rudnicki. Id. at 50. Also on May 23, framing began, and Stephen Florez became concerned about the lack of workers' safety precaution on the work site. Id. at 61. On May 24, one of Defendant's workers, Dan Morton, accidentally shot a nail through his hand with a nail gun. Id.

at 57, 61. At around that time, two of Defendant's workers quit or were suspended from the job. Id. at 62. By May 27, Stephen Florez was dissatisfied with the work progress because of workers failing to show up, safety concerns, and "as far as tools, numerous items." Id. at 73. At one point, the SMS(D)C building inspector, LeRoy Houser, visited the work site and remarked that the framing was not straight, or "plumb." Id. at 76. On June 12, Stephen Florez sent a letter to Defendant demanding that "major problems" with construction be corrected, claiming that framing was not plumb and progress was not according to the work schedule. Complaint Exh. 4. Plaintiff asserted in the letter that Defendant had not been present on the work site to supervise crews as promised, and workers had arrived on the site without proper tools. Id. Plaintiff also alleged Defendant had failed to comply with directives by Leroy Houser that framing be corrected prior to placing roof trusses. Id. Plaintiff informed Defendant that he had proceeded in a manner that would "require extensive repair and rehabilitation" and that the general quality of workmanship was "far below standard." Id. Plaintiff stated: "This situation is absolutely not acceptable. This letter is notice that I am not satisfied with your work and progress on the project. If the problems are not corrected immediately, I will be forced to cancel our contract and locate another builder to complete the project." Id. (emphasis in original). Defendant promised Plaintiffs he would complete framing and get back on schedule. Complaint ¶ 3.4.

Plaintiffs paid Defendant the next installment of \$25,000 on June 27. S. Florez Depo. p. 31. Despite Defendant's promises, however, he continued to ignore the building inspector's directive to correct the framing, and he did not complete it by the end of June as provided in the Contract. Complaint ¶ 4.3, Exh. 1. Defendant also allegedly asked Plaintiff to lie to the state electrical inspector about a permit so that Defendant could run the wiring. S. Florez Depo. p. 90. Defendant's crew rough framed the windows for crank-out instead of the double-hung windows

provided in the specifications, twice ordered the wrong type of windows, and installed two windows incorrectly. Id. at 90-91.

On July 6, 2000, Defendant told Stephen Florez that he planned to attend a week retreat for his church. S. Florez Depo. at 84. Stephen Florez told Defendant the framing needed to be fixed immediately, and Defendant said he was attending the retreat anyway. Id. Stephen Florez then fired Defendant and ordered him to collect his workers and tools and leave the property. Id. at 85. Florez sent a letter canceling the Contract as a result of Defendant's breach of the Contract and failure to perform as promised. Complaint Exh. 5. In this letter, Plaintiff demanded a full accounting of the \$60,000 paid on the Contract, documentation of any payments, the return of any unused portion, and lien waivers. Id. Defendant did not respond to the letter. Complaint ¶ 4.6.

Plaintiffs hired a new contractor, Mahowald Builders, Inc., to correct deficiencies in Defendant's work and complete the job. Id. Exh. 6, 7. Mahowald claimed 170.5 hours of correction time on the addition, Id. Exh. 7, and estimated remediation cost at \$7,260. Complaint ¶ 4.9. On August 2, 2000, Leroy Houser sent a letter to Defendant reiterating Plaintiffs' concerns and demands and threatening to petition the Tribal Business Committee to revoke Defendant's privilege of doing business in the Community if Defendant did not produce documentation fully accounting for the project as requested. Id. Exh. 6. Defendant responded by producing documentation that Plaintiff says was "fraudulent on its face." Complaint ¶ 4.8.

Defendant disagrees with Plaintiffs' version of the facts. Defendant contends that Plaintiff Stephen Florez "interposed himself in almost every aspect of the project including ongoing and disruptive behavior" but that, "[r]egardless, the project proceeded in a workmanlike manner." Fritz Jordan Affid. ¶ 4-5. Jordan states that he promised and fully intended to comply

with the Contract. Id. ¶ 6. Jordan does not admit or deny his alleged promise to be present on the worksite to supervise work crews but admits that he told Plaintiff of his intention to spend a week at a church retreat and “further assured Plaintiffs that the project would continue in my absence.” Id. ¶ 8-9. Defendant contends that, had Plaintiffs not terminated him on July 6, six weeks away from the expected completion date, “[t]he project would have been completed on August 15, 2000 in strict concordance with the contract.” Id. ¶ 10. Finally, Defendant disputes the measure of Plaintiffs’ damages, stating that the second contractor was hired on a “cost-plus” basis rather than bidding the project and therefore having to abide a higher standard of efficiency as Defendant had done. Id. ¶ 12.

II. ANALYSIS

A. Summary Judgment Standard

Rule 28 of the SMS(D)C Rules of Civil Procedure requires that summary judgment only be entered for the moving party if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). Summary judgment is not appropriate where there are disputed issues of material fact. Welch et al. v. SMS(D)C, No. 023-92 (SMS(D)C Tr. Ct. June 3, 1993). When considering a motion for summary judgment, it is the duty of the Court to view the evidence in the light most favorable to the non-moving party and to give that party the benefit of all reasonable inferences drawn from the evidence. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990).

B. Breach of Contract

Common law principles concerning the existence, performance and breach of contract are well established. “A contract is a promise or a set of promises for the breach of which the law

gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement (Second) of Contracts § 1 (1979 Main Vol.). “When performance of a duty under a contract is due, any non-performance is a breach.” Id. § 235. An oral promise may be binding, Id. § 4, and a promise reasonably inducing action may be enforceable. Id. § 90. If one party fails to perform as specified under the contract, the other party may cancel the contract upon consideration of all the circumstances, including the allowance of a reasonable time to cure any failure or defect in performance. Id. § 237. The critical inquiry is whether the parties’ conduct was reasonable under the circumstances. Such an inquiry is necessarily fact-specific and is not usually appropriate in the context of summary judgment. Rather, factual disputes are appropriately addressed at trial and resolved by the factfinder.

In this case, the parties agree that they entered into a Contract on May 5, 2000 for Defendant to construct an addition to the south side of Plaintiffs’ home for a total cost of \$128,000, with payments to be made according to a time and work schedule. Plaintiffs allege that Defendant induced Plaintiffs’ agreement to Contract terms by promising to be present on the work site to supervise work crews and by using only experienced employees. Plaintiffs claim Defendant breached the Contract by, at various times, failing and refusing to appear at the worksite and by using inexperienced laborers. Plaintiffs also allege Defendant’s breach of the Contract by failing to correct structural flaws in the framing according to the contractual timeline. Defendant, by contrast, responds that he did not breach the Contract and asserts that it was Plaintiffs who breached by canceling the Contract on July 6, 2000. Defendant further contends that Plaintiffs’ measure of damages is skewed to Jordan’s detriment because the second contractor was hired on a “cost-plus” basis.

The material questions of fact dominating the parties' dispute preclude summary judgment. Did Defendant breach the contract through improper performance? Were Plaintiffs justified in terminating Defendant and canceling the contract? If so, is Defendant entitled to keep any of the \$60,000 paid to him, and how much? May Plaintiffs collect the full amount they claim was required for remedial work? Each of these questions and more require factual inquiry at trial. Defendant claims summary judgment is appropriate because no material fact exists, but his argument rests on contradictions of fact.

Defendant's sole legal argument regarding Plaintiffs' contract claims—notwithstanding those arguments that entirely ignore Plaintiffs' factual and legal assertions that it was Defendant who first breached the contract and failed to account for the \$60,000 he was paid—seems to be that Plaintiffs' evidence of breach would be inadmissible and therefore disregarded for purposes of summary judgment. Defendant points to no legal authority for his rather startling proposition that only expert testimony would be admissible at trial and Stephen Florez's personal observations must somehow be disregarded because he is "not an experienced contractor" (itself a factual assertion). Defendant's Brief in Support of Motion at 9. This Court requires evidence to establish a claim, which may be presented at trial by witnesses with personal knowledge of a matter, not only by "experts." SMS(D)C Rule 27 (applying Minnesota Rules of Evidence to the trial of actions before the Court); Minn. R. Evid. 602. Whether a witness is credible is a fact issue for trial. As detailed below, each of Plaintiffs' claims entails standards of proof that require full discovery and determination of facts.

C. Breach of Warranties

Plaintiffs allege Defendant breached express, implied, and statutory warranties by promising to build and repair the new addition and failing to do so. Whether Plaintiffs' factual

assertions are true are factual issues for trial. Defendant may not invoke summary judgment by merely contradicting Plaintiffs' version of the facts.

D. Breach of Covenants

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," and the appropriate remedy for breach of that duty varies with circumstances. Restatement (Second) of Contracts § 205 (1979 Main Vol.). Plaintiffs' allegation that Defendant breached his duty of good faith and fair dealing is coextensive with Plaintiff's factual allegations supporting claims for breach of contract, negligence, and fraud. Defendant has not responded to Plaintiffs' assertion that he had a duty of good faith and fair dealing but admits there is a Contract between the parties and denies that he has conducted himself in an "unworkmanlike manner." Questions of material fact remain for trial.

E. Negligence

To establish a prima facie case of negligence, Plaintiff must allege facts sufficient to demonstrate (1) that Defendant owed him a duty, (2) that Defendant breached that duty, (3) that Defendant's breach was the proximate cause of plaintiff's injuries, and (4) that Plaintiff suffered actual injury. See Kostelnik v. Little Six, Inc., No. 019-97 (SMS(D)C Ct. App. March 17, 1998), at 5.

The supporting facts and required determinations for negligence in this case are identical to Plaintiffs' breach of contract claim. Plaintiffs have alleged that Defendant had a contractual duty to timely construct Plaintiffs' home addition in a workmanlike manner, that they paid Defendant \$60,000 for which he has not fully accounted, and that Defendant breached his duty in numerous ways, entitling Plaintiffs to cancel the contract and requiring Plaintiffs to incur the additional expense of repairing problems caused by Defendant. Plaintiffs' allegations, if true,

entitle them to recover from Defendant under principles of negligence. Defendant disputes Plaintiffs' version of the facts but has not shown as a matter of law any fatal deficiency in Plaintiffs' cause of action. This is a matter to be resolved at trial.

F. Conversion

A claim for conversion requires a showing that Defendant has wrongly taken or withheld money or personal property that is rightfully Plaintiffs'. See generally 18 Am. Jur.2d Conversion §§ 1, 2 (1985). Plaintiffs allege that Defendant took payment of \$60,000 to construct the home addition but did not account for expenditure of it under the parties' Contract, entitling Plaintiffs to the return to all or a portion thereof. Plaintiffs have stated a claim for conversion, and Defendant has responded only with contradicting factual assertions without a demonstration that Plaintiffs' prima facie case fails as a matter of law. This is a factual dispute for trial.

G. Fraud

The elements of fraud are the making of a false representation of a past or existing material fact that is susceptible of knowledge, while knowing it to be false or without knowing whether it was true or false, with the intention of inducing the person to whom it was made to act in reliance upon it or under such circumstances that such person was justified in so acting and was thereby deceived or induced to so act to his damage. Children's Broadcasting Corp. v. Walt Disney Co., 2001 WL 345207 (8th Cir. 2001). A basic rule of contract law is that a contract induced by fraud may be rescinded by the defrauded party. 17A Am. Jur.2d, Contracts § 567 (2000). In the case of material misrepresentations made and relied upon affecting work under a building or construction contract, the contract may in some circumstances be rescinded upon discovery of the misrepresentations. 13 Am. Jur.2d Building and Construction Contracts § 110 (2000).

In this case, Plaintiffs allege that the Defendant fraudulently induced them to enter into the Contract by promising he would be present on the work site to supervise work crews and assuring that only experienced laborers would be employed. Defendant admits in his Affidavit that he planned to take a week off to attend a retreat. Defendant alleges disputed facts in support of his conclusion that Plaintiff Stephen Florez's presence on the construction site was disruptive and negatively affected work progress. The questions whether Defendant used inexperienced laborers and misrepresented his intentions, and whether Plaintiffs reasonably relied on Defendant's alleged misrepresentations, are material fact questions for trial.

III. CONCLUSION

In consideration of the foregoing, Defendant's Motion for Summary Judgment is denied.

IT IS SO ORDERED.

Date 1/15/02

Robert Grey Eagle
Hon. Robert A. Grey Eagle

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STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

JEANNE A. KRIEGER
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Stephen and Tammy Florez,

Court File No. 473-01

Plaintiffs,

ORDER

vs.

Jordan Construction Co. and
Fritz M. Jordan

Defendants.

This matter came before the Court for telephonic hearing on November 2, 2001 before the Honorable Robert A. Grey Eagle. Steven H. Siltan, Esq. appeared on behalf of the Defendants. Mitchell Scott Paul, Esq. appeared on behalf of the Plaintiffs.

The Court issues this Order following a thorough review of the record in this case and the materials contained therein.

IT IS HEREBY ORDERED:

Defendant's Motion for Summary Judgment is denied.

Dated: 1/15/02


Hon. Robert A. Grey Eagle
Judge of the Tribal Court