

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-556

SEPTEMBER TERM, 2004

|                                 |   |                             |
|---------------------------------|---|-----------------------------|
| Richard and Nicole Whittemore   | } | APPEALED FROM:              |
| dba Woody's Sales and Services  | } | Lamoille Superior Court     |
|                                 | } |                             |
| v.                              | } | DOCKET NO. 118-6-02 Lecv    |
|                                 | } |                             |
| Gary Valway dba Turn-Key        | } | Trial Judge: John P. Meaker |
| Construction, Paul Loughran and | } |                             |
| Amy Dempsey                     | } |                             |
|                                 | } |                             |

In the above-entitled cause, the Clerk will enter:

Plaintiffs Richard and Nicole Whittemore, doing business as woody's Sales and Services, appeal from the trial court's order awarding damages to defendant Gary Valway, and dismissing defendants Paul Loughran and Amy Dempsey in this construction contract dispute. Woody's argues that the trial court erred because: (1) its findings are not supported by the evidence, and it failed to make certain findings; (2) it failed to determine if there had been a material breach or substantial performance of the contract; (3) plaintiffs should not be held liable for alleged defects that were caused by Valway's specifications or directions, or were done with his approval; and (4) there was insufficient evidence to support the damages award. We affirm in part, but reduce the court's damages award to reflect the amount withheld by Valway.

Loughran and Dempsey, residents of Charlestown, Massachusetts, entered into a fixed price construction contract with Valway, doing business as Turn-Key Construction, to construct a home in Morrisville, Vermont. Valway is a general contractor. Plaintiffs own Woody's, a plumbing, heating, and air condition business. In September 2001, Woody's entered into two agreements with Valway to perform plumbing, and heating and air conditioning work at the Loughran home. Valway agreed with Loughran to supervise and direct the work, to be responsible for construction work, and to hire and pay subcontractors. In January 2002, Woody's provided Valway with a final invoice for its work; Valway refused to pay, finding the work faulty and incomplete.

In June 2002, Woody's filed a complaint against defendants seeking \$10,562, the amount of its final invoice. Valway counterclaimed for damages, asserting that the plumbing, heating, and air conditioning system contract had not been fully or satisfactorily performed. woody's then filed an amended complaint, asserting that Loughran should be estopped from denying payment because he had promised to pay Woody's for its work, and woody's had relied on this promise. After a five-day trial, which included a site visit, the court issued judgment in favor of Valway, and dismissed defendants Loughran and Dempsey.

The court found that Woody's had not performed its work in a workmanlike manner, and it made numerous findings detailing the defects in Woody's work. The court found that woody's had constructed the heating system in a way that obstructed the efficient flow of return air to the furnace. It had also overused flex duct in constructing the system, and constructed the cold air returns around electrical wiring in violation of the electrical code. The system did not sufficiently heat the mud room or the lower den, and there was no cold air return provided for the two lower level bedrooms or the master bedroom and bath area. The court also found that the system had not been balanced, the cutouts in the furnace plenum were undersized for the ductwork; woody's had failed to install locking dampers in the branch supply lines; the furnace and supply ducts leaked because they had not been properly sealed; the zone dampers were installed too close to the furnace, no heat was supplied to the storage room; there was water leakage from an air conditioning leak above the furnace, causing the furnace to rust; and the grating for the downstairs cold air return had

been improperly installed.

The court also found that duct work had not been insulated, and as a result, it sweat and dripped when used for air conditioning in the summer. This caused some ceiling staining. Woody's had informed Valway that it did not insulate duct work in conditioned spaces but it would be willing to do so for an additional \$600. The court found that good workmanlike practice required the insulation of this duct work to prevent sweating problems, and it should have been part of the original job, and not an extra. The court also found that Woody's had refused to wire the controls for the system. The court explained that it was the general practice in residential construction for the heating/air-conditioning subcontractor to wire the controls, and Woody's failure to do so, in the absence of express language to the contrary in its contract, constituted a breach of its agreement to provide a working heating/air conditioning system and A supply all materials and labor.@ The court also found that the heating system had been shutting down because snow had been accumulating over the exhaust vent that had been stubbed out by Woody's. The court stated that good workmanlike practice called for Woody's to complete the exhaust vent so that it would remain snow-free.

The court also found that Valway had made a mistake in his supervision of woody's work by directing woody's to place the air conditioning system condenser outside the master bath near the master bedroom. The court explained that it required no special expertise to know that this was not a good location for the condenser, and Valway did not follow good workmanlike skill in locating this unit outside the bedroom where its noise interfered with sleep.

Based on its findings, the court concluded that Woody's had not installed the heating system in a manner compliant with good workmanlike standards common in the vicinity. It therefore concluded that Woody's had breached its contract with Valway, and awarded damages to Valway. The court found that Valway was entitled to the amount of money that it would cost to redo woody's installation so that the heating system operated properly. The court thus ordered Woody's to pay defendant Valway \$17,698.23 plus interest of \$3097.19. The court found that Valway was the substantially prevailing party, and it therefore set a hearing to determine allowable attorney fees and expenses pursuant to 9 V.S.A. § 4007(c). The court dismissed Loughran and Dempsey as party defendants. Woody's appealed.

woody's first challenges the court' s finding that it failed to install the system in a workmanlike manner. Specifically, it asserts that the court erred in making findings with respect to the use of flex duct, locking dampers, insulation and sealing of ductwork, furnace supply ducts, storage room heat, panning, and the adequacy of the existing system. Woody's also asserts that the court failed to determine if there had been a material breach or substantial performance of the contract. Finally, Woody's argues that there was insufficient evidence to support the court' s damages award.

Pursuant to its contract with Valway, Woody's was obligated to install a heating and cooling system in a workmanlike manner. See S. Burlington Sch. Dist. v. Calcagni-Frazier-Zajchowski Architects, Inc., 138 Vt. 33, 44 (1980) (A In the obligation assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes a breach. In addition, accompanying every contract is an implied duty to perform with care, skill, reasonable expedience and faithfulness.@ ) (internal quotation marks and citation omitted). The court' s conclusion that woody's failed to perform its duties in a workmanlike manner is supported by the evidence presented at trial, and its findings support a conclusion that damages should be awarded to Valway for woody's material breach of the contract.

At trial, defendants presented expert testimony that the system installed by woody's was insufficient to meet the heating needs of the home, and its workmanship was poor. Jason Patnaude stated that he had inspected the system as installed by woody's, and he testified as to all of the problems that he identified with Woody's work, including: the furnace was placed directly on the floor; the gas cock on the furnace was improperly placed; the supply and return ducts were not adequately sized to move air into the right areas; there was no insulation around the duct work; there was overuse of flex duct; there was improper placement of flex duct; the duct work had not been sealed; there were no balance dampers at the supply duct take-offs; the system was improperly balanced; and there was an insufficient number of cold air returns. He stated that the generally accepted standard for residential construction projects was to have even heat throughout the rooms of a home. He testified to the general standards prevailing in the residential construction industry, including standards that all duct work be sealed, and all systems be designed and constructed to have the straightest possible routing of duct work. He stated that it was standard practice to minimize the use of flex duct. The expert testified that the duct work in the Loughran home had not been designed or installed in a workmanlike manner.

A second expert also testified that he had inspected the system, and he identified problems similar to the first expert. He testified to the goals of a properly designed heating system. He stated that a very high priority in the layout of duct work would be straight duct runs, maintaining consistent air direction, not reversing air flow, and not disrupting air flow patterns through elbows and plenums. He testified that, in designing a system, the rigid duct should be designed so as not to use more than six feet of flexible duct. He explained that this was standard practice, and common use. The expert testified that woody's design for the heating system was inadequate, and the duct work needed to be removed, inspected, sealed, insulated, and reinstalled.

woody's urges us to make findings contrary to those found by the trial court. This we will not do. We defer to the trial court' s findings because that court is in a unique position to assess the credibility of witness and weigh the persuasiveness of the evidence. Cabot v. Cabot, 166 Vt. 485, 497 (1997). We will uphold the trial court' s findings of fact A unless, viewing the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, a finding is clearly erroneous. A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding.@ Agency of Natural Res. v. Deso, 2003 VT 36, & 21, 824 A.2d 558 (mem.) (internal quotation marks and citations omitted). As discussed above, the court' s findings as to the defects in woody's workmanship are supported by the evidence.

woody's next argues that it should not be held liable for any claim of defective workmanship if it followed the specification or directions that Valway provided. Woody's argues that it was required to use flex ductwork and panning because Valway directed that the ceiling should be as high as possible. According to Woody's, Valway directed where the intake and exhaust pipes should be located, and he told woody's that he did not want the ductwork to be insulated. woody's also asserts that Valway either accepted the heating work in January 2002, or waived any objections to it by paying Woody's for the extra work that it had performed, and by continuing with the contract after having had the opportunity to inspect the heating system and its ductwork in late December 2002 when the central heating and air conditioning system were substantially completed.

We find these arguments without merit. Woody's relies on Fairman v. Ford, 70 Vt. 111 (1898), to support its assertion that Valway should be held liable for the defects found by the trial court. woody's reliance is misplaced. We have interpreted Ford to stand for the proposition that A absent an express warranty to produce a job free from defects, a contractor who faithfully follows plans or specifications supplied by the owner is not liable for loss or damage to the owner which results solely from defective or insufficient plans or specifications.@ See Alexander v. Morrissey, Inc., 137 Vt. 20, 26 (1979) (citing Ford, 70 Vt. at 111). In this case, woody's, not Valway, was charged with designing and installing a proper heating system. As the trial court found, woody's failed to install the system as designed, and it failed to perform its duties in a workmanlike manner. woody's assertion that Valway accepted its faulty work, or waived any objections to it, is equally without merit. woody's has not established that the numerous defects in its workmanship, which required the installation of a new system, should be attributed to Valway.

woody's next argues that the court failed to determine if there had been a material breach of the contract or substantial performance. Woody's maintains that there was not a material breach, and it is entitled to the credit for the balance it is owed, less the cost to complete. Woody's also asserts that if Valway does not owe it damages, Loughran does because he promised woody's that he would pay him if the work was completed in a workmanlike manner. According to Woody's, Loughran should be estopped from withholding payment.

These arguments are without merit. The court found that a new system would need to be installed due to Woody's faulty workmanship. Thus, woody's breached its contract with Valway. Given this breach, we need not address Woody's argument that Loughran should be estopped from denying payment. In this case, damages are measured A by the reasonable cost of reconstruction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste.@ Van Velsor v. Dzewaltowski, 136 Vt. 103, 105-06 (1978) (internal quotation marks and citation omitted). Defendants presented evidence that it would cost \$17,800 to replace the system, \$5200 of which reflected the purchase of a new furnace and the addition of a third zone to the heating system. The court found that the cost to cure the breach was \$12,600. It explained that a new furnace was not required, and a two-zone system would be used. The court also found that Valway had incurred consequential damages of \$5098.23. The court thus awarded Valway \$17,698.23, with interest, for a total of \$20,795.42. Although woody's complains that interest should not have accrued on the cost of replacing the system until the cost was actually incurred, our case law is to the contrary. See Van

Velsor, 136 Vt. at 1104 (A Interest begins to run from the time that the debt becomes payable or payment is demanded, or when suit is brought, a judicial demand.@ ). Valway filed a counterclaim against Woody's in August 2002. Valway acknowledges that the court' s final damages award of \$17,698.23 should be reduced by \$10,052.60, the amount that Valway withheld, and that Valway would have owed had the contract been fully and completely performed. We therefore direct that the court' s damages award be reduced by \$10,052.60 with an additional deduction for the interest that accrued on this portion of the damages award.

Affirmed in part, damages award reduced by \$10,052.60 plus interest accrued on this amount.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned