

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

CHOICE HOMES, INC.,

Plaintiff/Counter-Defendant,

v

File No. 03-23201-CK
HON. JAMES R. McCORMICK

EDWARD CHEMOSKY and JULIE
CHEMOSKY, husband and wife,

Defendants/Counter-Plaintiffs.

_____ /

William G. Burdette (P49174)
Attorney for Plaintiff/Counter-Defendant

Rex O. Graff, Jr. (P14250)
Attorney for Defendants/Counter-Plaintiffs

DECISION

The above-captioned¹ residential building contract case was taken under advisement after a five-day bench trial ending on September 28, 2004.

On the basis of the entire record, including testimony of several witnesses, voluminous exhibits and final arguments, the Court makes the following findings of fact and reaches the following conclusions of law:

I. Background

During the summer of 2002, Plaintiff Choice Homes, Inc., began work on a project involving the demolition/remodeling of two rooms and the addition of three new rooms to the residence of Defendants Edward and Julie Chemosky. The contract price was to be Acost plus coordination.@ The Acost@ was to be time and materials, to which would be added a 12 percent charge for the

¹The caption reflects the correct spelling of AChemosky.@ The original complaint was filed under the erroneous spelling AChemoosky.@

builder=s Acoordination@ of the project.

In early December 2002, some five months into the project, at which time the job was estimated to be within two weeks of completion, Choice Homes walked off the job, refusing to complete it because the Chemoskys were withholding a payment in connection with a dispute over work quality, credits, excessive labor charges and delays. The parties attempted mediation and engaged in other unsuccessful attempts to compromise their differences.

Eventually the Chemoskys hired other contractors to complete some of the unfinished work and to redo or correct allegedly poor workmanship. Much additional work remains to be done, two years after the project began. Inspections in early 2003 revealed major deficiencies requiring costly additional work, especially to the foundations and roof. (These problems were unknown to either party at the time of their impasse in early December 2002.)

In August 2003, Choice Homes sued the Chemoskys, seeking \$19,099.25 in damages, representing the unpaid balance for work performed up to the point when Choice Homes, deeming the Chemoskys to be in substantial breach of contract (Article 14) by virtue of their refusal to make payment as work was performed (Article 5), quit the project. The Chemoskys counterclaimed, alleging breach of contract by virtue of Choice Homes= abandonment of the job, seeking consequential damages in excess of \$40,000, representing out of pocket costs for remedial work done so far, plus future costs for remedial work still to be done. The Chemoskys also seek damages and actual attorney fees under the Michigan Consumer Protection Act (MCPA).

II. MCPA Exemption

The parties disagree as to whether MCPA applies to this dispute. Choice Homes has moved for dismissal of the count alleging fraud and deception under MCPA on the grounds that disputes over construction of homes by licensed residential builders are outside the Act. MCPA addresses unfair and deceptive trade practices by one engaged in trade or commerce. There is, however, a statutory exemption, sec. 4(1)(a), for a Atransaction or conduct specifically authorized under laws administered by a regulatory board or offices acting under statutory authority of the state or the United States.@

Smith v Globe Life Ins Co, 460 Mich 446, 597 NW2d 28 (1999) holds that the words

A transaction or conduct@ in sec. 4(1)(a) refer to the general transaction at issue rather than the specific misconduct alleged. *Smith* held the sale of credit life insurance exempt from MCPA coverage because (1) such a transaction, in general, is specifically authorized by a state statutory scheme, and (2) those laws are administered by a regulatory body, namely the Insurance Commission.

The doctrine announced in *Smith* clearly applies to the kind of transaction involved in the case at bar, namely residential construction by a licensed builder, because the Occupational Code regulates conduct of residential builders and they are governed by a Aregulatory board,@ i.e., the Residential Builders and Maintenance and Alteration Contractors= Board.

Smith adopts a bright line test for wholesale exemption of whole categories of trade or commerce, regardless of the existence or adequacy of remedy provided by the regulating authority. That problem, however, is one for the legislature to address, not a trial court.

III. The Issues

The two basic issues to be decided are (1) which side breached the contract and (2) what damages have been suffered.

IV. Findings and Conclusions

This bench trial lasted five days because there are a multitude of points of disagreement concerning the quality of the construction performed by Choice Homes. Although the Court has weighted each of these fractious points, it would be impractical to discuss each individually and enunciate a specific finding as to the merits of the conflicting arguments. Suffice it to say that the Chemoskys had justification to withhold partial payment in November 2002 on the basis of excessive delays in performance, unresolved disputes as to quality of workmanship, improper billing on hours of labor, failure to give appropriate credits, and billings which were vastly exceeding estimates. By that time, a total of approximately \$86,000 had been paid, including payment of all subs up to date. In the contract, Choice Homes had estimated a total price of \$60,000 to \$80,000. Later, it came up with an itemized, very detailed estimate of about \$89,000. In addition, several change orders had been added, for another several thousand dollars. As of early December 2002,

Choice Homes was asking for another \$19,000 for work already performed, and the job was not done! Field correction orders from September had not been complied with.

At this point, both sides gambled that their position had substantial merit, that the other party was in material breach of contract. The Court concludes that the Chemoskys had good cause to withhold part of the monthly payment for work performed, as leverage to force Choice Homes to comply with their contractual obligations.

The Court finds that Choice Homes, in the negotiations leading to the impasse, was not very forthcoming in acknowledging responsibility to correct deficiencies, another factor giving the Chemoskys reason to use what leverage they had by withholding partial payment. The claim by Choice Homes that it simply Acouldn=t@ continue to work without full, up-to-date payment is without merit.

V. Damages

The Court finds that, at the time of the impasse, when Choice Homes abandoned the job, it had legitimate unpaid billings of about \$10,000 of the approximately \$19,000 it claimed. However, the Chemoskys have expended about \$16,000 for repairs and claim they will need to pay out another \$24,000 for a total of approximately \$40,000. They seek that as counterclaim damages. It is found that major roof repairs and major foundation work were or will be necessitated due to the faulty design and/or workmanship of Choice Homes. In addition, numerous other repairs, some of the punch list variety and others not, have been done at the Chemoskys= expense or remain to be done. Finally, their enjoyment of the home has been delayed by more than a year due to Choice Homes improvident decision to abort the project. This Court, finding some fluff in the Chemoskys= figures, allows a total of \$30,000 for all work done or to be done which was necessitated by Choice Homes= errors, including deficiencies in retrofitting the old and new roofs and the old and new foundations. From this the Court will deduct the \$10,000 which was earned by and unpaid to Choice Homes. This results in a net judgment in favor of the Chemoskys on their counterclaim in the amount of \$20,000. Plaintiff Choice Homes, Inc.=s complaint is therefore without merit and will be dismissed.

The Court, pursuant to Article 14 of the contract, finds that the prevailing party is also entitled to reasonable attorney fees incurred in connection with the enforcement of their contractual rights. A proposed judgment is to be submitted within 10 days pursuant to Court rules, either stipulated as to form or noticed for entry.

IT IS SO ORDERED.

HONORABLE JAMES R. McCORMICK
Assigned Circuit Court Judge

Dated: s/ 10/03/04