

STATE OF NEW YORK
COUNTY OF ST. LAWRENCE

JUSTICE COURT
VILLAGE OF CANTON

CYNTHIA DELEEL,

Plaintiff

- against -

JAMES O'NEILL,

Defendant

DECISION

*Case appealed and
decision upheld
by Judge Nicandro*

The defendant moved to dismissed the proceedings on the grounds that the wrong defendant was named. The defendant, James O'Neill, claimed that a corporation was the actual party with whom the contract was made with the plaintiff. There is no basis in the evidence produced at the hearing to establish that this claim was improperly brought against James O'Neil individually. There is no proof of the existence of the corporation nor were any of the contract documents, that is the proposal and the receipt for payment executed by or on behalf of a corporation nor did any documents contain the name of a corporation.

The plaintiff, through the acceptance of a proposal, contracted with the defendant for the defendant to supply labor, tools and equipment to strip an existing roof of it's shingles and to install new roofing to include roof and ridge vents, felt ice and water barrier and drip edge as necessary.

The defendant was given the opportunity to inspect the premises prior to the trial and had access to the premises for a half hour on the Saturday before the trial. A blue tarp was in place over the outside top of the roof preventing inspection of the outside. The defendant and his expert, Mr. Scott Hudson, examined the interior of the attic. The plaintiff testified that there was leakage problem with the roof about a month or so after it was installed. The defendant had come out upon first being called to repair leakage caused by roof vents. These roof vents were apparently picked up by the plaintiff at the direction of the defendant and installed by the defendant's workers. As it turns out the roof vents had been improperly manufactured with the louvres facing the wrong direction causing rain to come in when it rained. The roof vents were taken out and new roof vents were installed and the bathroom light fixture leakage problem corrected at the end of September 1997.

The plaintiff called the defendant and left messages at his telephone in November of 1997 and December of 1997. The defendant testified that he returned the calls and left a message on the plaintiff's telephone. The plaintiff testified that in her

messages she mentioned that she was calling about having problems with the roof. The defendant testified that the telephone calls by the plaintiff left only the message to return her calls without giving a reason for the call.

The plaintiff and the plaintiff's witness testified that there were leakage problems in November and December such that at the end of November 1997 water was coming down from the ceiling and running down behind the door moulding and coming onto the floor. The plaintiff testified that when she called the defendant to report that, that there were no calls returned. The defendant testified that he did make a return call and left a message on the answering machine of the plaintiff. The telephone records of the defendant indicate that a call was made to the plaintiff's number on November 30, 1997. Although the defendant testified that he left a message to have the plaintiff return the call, no call was made back to him, the plaintiff testified that they did indeed call back but it was not until the latter part of December 1997 when further leakage problems were occurring.

The plaintiff contended that the leakage caused the insulation to become wet and reduced its insulating value. Photographs were introduced into evidence showing the insulation in the attic and also showing buckets in place which were testified to by plaintiff's witness to be receptacles for water coming through the ridge vent. Photographs were also introduced to show that the ceiling in one of the bedrooms had sagged. The plaintiff testified that this was due to the water coming in and soaking the material above the ceiling. Photographs submitted by both sides showed the ridge vent area from inside the attic and also a couple of other locations where a roof vent had been installed. It appeared that in some of these areas that openings were made for the vent in a manner which involved the breaking of the wood rather than sawing it in straight edges in all locations. Furthermore, the black felt underlayment, which is placed below the shingles, did not appear to have been cut but rather to have been broken through and pushed into the roof. The defendant's expert witness said that that was not a good practice and that conditons of the roof vent could be indicative of careless work.

The defendant's workman testified about the manner in which the ridge vent is installed and fastened to the roof and testified that indeed on some occasions the opening was made larger with a hammer rather than sawing down the length of the roof below the ridge vent to make a clean cut. Furthermore, the photographs introduced by the plaintiff showed a haphazard patching job that was done by the defendant's workman on a obvious older hole in the decking of the roof.

Further pictures introduced by the defendant and testimony of the defendant's expert witness, Mr. Hudson, showed and indicated that the front side of the roof had apparently been struck by an object apparently during the ice removal process at time of the ice storm of 1998. Indications for this were the broken chips off the

shingles and apparent scuff marks or dents in shingles that were or broken. There was no indication, one way or another, that any of this pounding on the ice on the roof caused any visible signs of leakage on the interior. In fact, Mr. Hudson's testimony was that he was unable to find any signs of leakage on the interior of the roof whether from the ridge vent or any other location on the roof. That is to say that he was unable to tell from the condition of the interior wood inside the attic that leakage had occurred. However, there was, without question, leakage testified to and established through the roof vents that had to be replaced and leakage in the bedroom which caused the sagging ceiling apparently and the water stains on the ceiling shown in another photograph as well as the water which appeared on the door casing. Therefore, the witnesses observation that he saw no tell-tale signs of leaking on the inside wood framing on the house is of little probitive value in assisting the court in making it's decision. The defendant's expert witness testified that he saw no signs from his inspection of the roof that the job was done other than adequately. He testified that he was unable to tell whether or not there was a leakage problem with respect to the roof end from his inspection from the inside and since it was not raining, he saw no leakage on that date.

The defendant's workman testified that the ridge vent installation was done properly and that he read the instructions for the installation of the roof vent itself and that he adhered to the instructions for locating and fastening the roof vent to the roof. It was his opinion that the roof vent was not leaking.

Based upon the court's observation of all of the testimony of the witnesses and the exhibits assessing the credibility of the witness and the facts presented, the court concludes that there were difficulties with the installation of the ridge vent and that the difficulties with the installation resulted in leakage and water seepage to the ceiling of the residence.

The plaintiff submitted three estimates for repairs.

There was no testimony concerning the need to flash around the chimney to correct the defendant's work. Furthermore, the court is not inclined to require the defendant to replace all of the insulation in the ceiling. With respect to that, although the plaintiff would like to have a mold-free attic, it was testified that the fiberglass pink insulation was placed on top of blown-in insulation and there is no proof that the mold arose only as a result of the wetting of the fiberglass insulation. The mold could have arisen from the older blown-in insulation which had been in there for longer than the fiberglass and was covered over by the fiberglass. Furthermore, the court determines that the water dripping in from the holes in the roof would not soak portions of the fiberglass insulation distant from the location where the dripping occurred. The court concludes from the testimony that the water dripped in through the ceiling through the fiberglass insulation and onto the ceiling below in a generally localized area.

The duty of the court is to do substantial justice between the parties. Based upon the evidence, the testimony and the estimates submitted, the court has determined that the most appropriate estimates to use in calculating damages for the plaintiff are the estimates of TAS Construction which shows a complete job price of \$2890 and the estimate of Barner Remodeling and Home Repair showing an estimate of \$2890.79. Because the Barner remodeling estimate has the materials broken down for it's estimate and the TAS does not, the court will use the estimate of Barner Remodeling and Home Repair to determine the amount of damages.

The court disallows the claim for damages for one-half of the insulation for the roll of flashing and for the six roof vents. Accordingly from the \$2890 amount the court deduct the following sums:

\$319.00 representing one-half of the insulation
\$ 90.00 representing the roof vents
\$ 26.95 representing the roll of flashing

The total deductions equal \$435.95. Also deducted would be the New York State Sales Tax on that amount which is \$30.51 for a total material and sales tax deduction of \$466.46.

Neither of the bills allocate the labor hours per item of work to be done. Accordingly, in an effort to do substantial justice between the parties, the court will determine the relative percentages of labor and material for the entire contract and apply that same ratio between labor and material cost to the \$435 cost of deducted materials to determine the amount of the deduction for labor. Associated with the non-installation of those materials, there being no other method for approximating the reduction in labor cost that should be made.

In the Barner Remodeling contract overall the total amount for materials is \$1075.50 and the total amount for labor is \$1440 for a total for labor and materials of \$2515.50. Of that total materials represent 42.75%. Applying that same ratio to materials value of \$435 one obtains a total for labor and materials of \$1017.54. Subtracting the materials from the \$1017.54 figure, it is determined that the labor deduction associated with the material deduction is \$582.54.

Accordingly, the plaintiff is entitled to judgment against the defendant the sum of \$1873.22.

Dated: December 9, 1998


Michael C. Crowe, Village Justice

VILLAGE JUSTICE COURT

MUNICIPAL BUILDING
CANTON, NEW YORK 13617

TELEPHONE: 315-379-0844

Reply to Justice Michael C. Crowe

December 11, 1998

James O'Neill
3740 U.S. Hwy. 11
DeKalb Jct., NY 13630

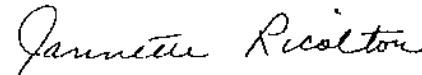
Cynthia Deleel
752 Co. Rt. 38
Norfolk, NY 13667

re: Deleel v. O'Neill - #98110043

Dear Mr. O'Neill and Ms. Deleel:

Enclosed please find copy of the Court's Decision in the above matter.

Very truly yours,



Jannette Ricalton, Clerk

jlr

Enc.

Management Services in the sum of \$7,151.60, with interest from September 10, 1997, to January 14, 2002 in the sum of \$2,797.95 and the costs and disbursements of the Plaintiff having been taxed in the sum of \$4,569.15.

NOW, on the motion of Case & Leader, L.L.P., Henry J. Leader, Esq. of Counsel Attorney for the Plaintiff it is

ADJUDGED:


1. That the Plaintiffs, Frederick E. Biggs and Patricia M. Biggs, residing at 206 County Route 29, Canton, New York 13617 recover of the Defendant, James A. O'Neill, residing at 3470 U.S. Highway 11, DeKalb Junction, New York 13630 the sum of \$7,151.60 with interest from September 10, 1997.

2. The Defendant's, James A. O'Neill, Individually and d/b/a Construction Management Services and C.W. Augustine, Inc., Counter Claims are dismissed with prejudice.

3. Plaintiffs, Frederick E. Biggs and Patricia M. Biggs shall recover of the Defendant ~~\$4,569.15~~ ^{\$1,926.73} costs and disbursements as taxed, and \$7,151.60 with interest of \$2,797.95 ^{\$11,876.28} for a total Judgment of ~~\$14,518.70~~ as of January 14, 2002.

4. The Plaintiff shall have execution for this amount.

DATED: APR. 12, 2002

ENTER

David Demarest
Justice, Supreme Court
St. Lawrence County

Judgment entered this 23 day of May, 2002

CASE & LEADER LLP
ATTORNEYS AT LAW
7 EAST MAIN STREET
P.O. BOX 13
GOVERNEUR,
NEW YORK 13842-0013
(518) 287-2000

DUPLICATE
ORIGINAL
FILED

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ST. LAWRENCE

Court's
EXHIBIT 5
1-14-02

FREDERICK E. BIGGS and PATRICIA M. BIGGS,

Index No. 104598

Plaintiffs,

- against -

IAS# 44-1-1999-630

JAMES A. O'NEILL, Individually and d/b/a
CONSTRUCTION MANAGEMENT SERVICES,

Defendants.

1. What was the business entity that undertook to construct the shell home for Mr. and Mrs. Biggs?

(a) James A. O'Neill, individually, as a sole proprietor.

(b) James A. O'Neill, individually, as a sole proprietor, doing business under the assumed name "Construction Management Services."

✓

(c) C.W. Augustine, Inc., doing business under the assumed name "Construction Management Services."

(d) C.W. Augustine, Inc.

Dissent _____

RECEIVED
JAN 15 2002
CLERK OF COURT
ST. LAWRENCE COUNTY

(At least five jurors must agree on this answer. Go to Question #2.)

2. Was the shell home constructed for Mr. and Mrs. Biggs constructed in a skillful manner?

YES _____

NO

Dissent _____

(At least five jurors must agree on this answer. Go to Question #3.)

3. Were the plumbing, electrical, heating and ventilation systems installed in a skillful manner?

YES _____

NO

Dissent _____

(At least five jurors must agree on this answer. Go to Question #4.)

4. Was the shell home constructed for Mr. and Mrs. Biggs free from material defects?

YES _____

NO _____

Dissent _____

(At least five jurors must agree on this answer. If your answer is "No," go to question #5. If "Yes," go to question #6.)

5. Was any material defect caused by the work of James O'Neill, his business or corporation?

YES _____

NO _____

Dissent _____

(At least five jurors must agree on this answer. (If your answer to both question #4 and question #5 is "No," go to question #7. If your answer is "Yes" to either question #4 and/or question #5, go to Question #6.)

6. Which of the following expenses paid by the Biggs were incurred as a result of failure of James O'Neill or his corporation to construct or install in a skillful manner or due to material defect?

(a) \$1,001.51 to Barner Remodeling for replacing headers. (Exhibit 36A)

YES ✓ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(b) \$257.90 to Barner Remodeling to install pocket door and frame in closet in master bedroom. (Exhibit 36B)

YES ✓ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(c) \$37.50 to Barner Remodeling for rebuilding headers for kitchen windows. (Exhibit 36C)

YES ✓ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(d) \$2,835 to replace entire leach field.

YES _____ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(e) \$318.69 to Barner Remodeling to repair plumbing leaks. (Exhibit 36E)

YES _____ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(f) \$126.00 to Barner Remodeling for reframing a whole house fan. (Exhibit 36F)

YES _____ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(g) \$731.36 to Barner Remodeling to rebuild rough openings. (Exhibit 36G)

YES _____ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(h) \$800.00 to Dennis Sharlow to repair foundation of entryway. (Exhibit 36P)

YES _____ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(i) \$329.64 to Bronson Services for finding and repairing leaks. (Exhibit 36Q)

YES _____ NO _____

Dissent _____

_____	_____
_____	_____
_____	_____

(At least five jurors must agree on each of these answers. Go to Question #7.)

7. Was there an agreement between the parties to construct a shell building for a firm price of \$79,995.00?

YES ✓ NO _____

Dissent _____

(At least five jurors must agree on this answer. If your answer is "No," go no further but report your verdict. If your answer is "Yes," go to Question #8.)


8. Should the Biggs be given a net credit of \$714.00 for the replacement of a stainless steel chimney with a power vent?

YES ✓ NO _____

Dissent _____

(At least five jurors must agree on this answer. Report your verdict.)

Dated: January 14, 2002


Foreperson

1 A. No.

2 Q. So you were not employed by anyone else from
3 that point to the present time?

4 A. Correct.

5 Q. What did you do between the early 1970s on to
6 the early 1990s?

7 A. Grew a big garden.

8 Q. Where?

9 A. Shot deer and sold drugs.

10 Q. Where did you grow a big garden?

11 A. In DeKalb Junction.

12 Q. Where did you shoot deer?

13 A. In DeKalb Junction.

14 Q. Where did you sell drugs?

15 A. I was being facetious, sir.

16 Q. So you didn't sell drugs then?

17 A. That is correct.

18 Q. How did you support yourself between the early
19 1970s and the early 1990s?

20 A. I had a dairy farm in DeKalb Junction and I did
21 the occasional building projects in Dutchess County.

22 Q. Did you own the dairy farm?

23 A. That is correct.

24 Q. What was the address of the farm?

25 A. I have lived at the same address since 1955.

10 May 2007

Mr Fred Biggs

H

Fred:

Thank you for forwarding to me a copy of the letter from Jim O'Neill dated 30 April 2002 discussing in review certain aspects of the litigation between yourselves and himself.

To comment briefly on the aspects of the letter concerning the construction of the Biggs residence, I offer the following:

- 1 Independently of the project delivery method and the terms of payment between and Owner and a Contractor, work constructed by a Contractor is generally complete and correct at the time that increment of work is performed. It is the basis of progress payment that workmanship and materials in place are correctly installed. It is illogical and usually not even possible to go back in the construction sequence and modify work already in place, as well as more costly. The list of construction defects alleged could be reviewed against this argument to make a reasonable determination that correction for each item is not possible, probable, or cost effective for the Contractor.
- 2 The assertion by Jim O'Neill that the alleged defects were intended to be correct at the point that the construction project was complete, which point was never reached, is not logical. As noted above, work and materials in place at each step of the job are expected to be correct, as a basis for continued construction and continued payment. Changes in materials specifications and building element dimensions and assemblies would not normally be considered something to complete or correct at a later time.

I would be pleased to review each item to express an opinion as to the logic of the claim that alleged defects and deviations exist due to the assertion that the project never reached a completion point agreed to by both parties.

If you have any questions or need additional information, please do not hesitate to contact me.

Thank you.

Sincerely,

Brooks Washburn, AIA

1 Q. What was the address?

2 A. It was an RD. I don't even recall. RD Box 4,
3 Bangor, Pennsylvania was the mailing address or
4 something like that.

5 Q. Was a Rick Golden the principal in the construction
6 company?

7 A. You did your homework well. Yes.

8 Q. And at the time did you not have a dispute with Mr.
9 Golden over the cost and the construction of your
10 house?

11 MR. LEADER: Object to the form. Go ahead
12 and answer.

13 THE WITNESS: No dispute.

14 BY MR. MILITELLO:

15 Q. No dispute? You didn't have a claim between you
16 that eventually was settled?

17 MR. LEADER: Object to the form of the
18 question. Answer if you can.

19 THE WITNESS: Not that I recall. No.

20 BY MR. MILITELLO:

21 Q. There wasn't a controversy between you concerning
22 cost of construction or quality of construction?

23 A. We had no problems with Rick Golden of Westwood
24 Construction and his job.

25 Q. And was there a subcontractor on the job by the