NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RACHEL SHAPIRO Appellant v. KOENIG CONTRACTING, INC., A PENNSYLVANIA CORPORATION Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 679 EDA 2011

Appeal from the Order Entered February 24, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): February Term, 2009 No. 1274

BEFORE: GANTMAN, J.*, ALLEN, J., and OTT, J.

MEMORANDUM BY OTT, J. **FILED JULY 26, 2013**

Rachel Shapiro ("Shapiro") appeals from the order entered in the Court of Common Pleas of Philadelphia County entering judgment against her and in favor of the Koenig Contracting, Inc. ("Koenig") following a non-jury trial regarding a contractual dispute between the parties.[1] Koenig was a general contractor in charge of renovating a home purchased by Shapiro. The trial court awarded Koenig a total of $7,199.50, representing labor costs

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* Judge Gantman did not participate in the consideration or decision of this case.

[1] "[A]t a bench trial, it is the trial court's duty to judge credibility and weigh testimony and its findings will not be disturbed absent error of law or abuse of discretion." ***Palmer v. Soloe***, 601 A.2d 1250, 1252 (Pa. Super. 1992) (citation omitted).

for two weeks' work and costs for debris removal. Shapiro has filed this timely appeal in which she claims eight instances of trial court error.[2] Following a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

The facts as developed by the trial of this matter were related by the court in its Pa.R.A.P. 1925(a) Opinion and are quoted herein.

> [Shapiro] entered into an agreement to purchase a house on 705 Manton Street in July 2008 for investment purposes. Def. Ex. 1. [Shapiro] worked on this project with a realtor, Mr. David Sneeringer, who had previously bought and sold investment properties for her. Sneeringer Dep. pp. 26:17-30:2, July 28, 2009. The two set out to determine how to remodel the Manton Street house for greater re-sale value. Id. In fact, [Shapiro's] loan application stated that the property was to be used as a financial investment and that [Shapiro] never intended on living in the house herself. Def. Ex. 1-5.
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> On August 27, 2008, Koenig Contracting, who had done prior work for [Shapiro], agreed to begin construction work on the Manton Street property. N.T. September 21, 2011 Vol. 2, pp. 8:20-25. Under the terms of the contract, Koenig Contracting was to conduct demolition work, install sheet rock, a roof deck, kitchen cabinets, [and] a new shower, toilet and vanity in the existing bathroom. Pls. Ex. 9. In addition, Koenig Contracting was to conduct various electrical, plumbing, and flooring work. Id. The estimated time and cost for the construction of the house was 16 weeks at a total of $53,088.00. Ms. Shapiro was to pay Koenig Contracting $6,636.00 every two weeks. Id.

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[2] The Table of Contents in Shapiro's brief lists six claims of error that contain an additional 26 sub-claims. However, the Statement of Questions Involved lists eight issues.

> Both parties agreed to the multiple changes that were made to the contract during the 16 weeks of work. [Shapiro] requested major changes to the contract such as: installing a Heating Ventilation and Air Circulation ("HVAC") system, expanding the bathroom, and putting in a hot tub. Def. Ex. 10-11. Additionally, an original plan to install a roof deck on the house was removed, and [Shapiro] was to have another contractor install the kitchen cabinets. Id. In an email dated September 5, 2008, Dina Koenig, who does the billing for Koenig Contracting, stated that because of the changes in labor, a change in cost would take effect at the end of the project. Def. Ex. 8. The evidence at trial also established that the house, especially the paneled walls and drop ceiling, had concealed problems unforeseen when the estimate was given. Def. Ex. 11. Dina Koenig explained in an e-mail to [Shapiro] that the estimated price given at the beginning of the project could fluctuate based on both unforeseen circumstances and changes to the contract by [Shapiro]. Def. Ex. 10. [Shapiro] agreed that she would pay for the additional charges that would take effect at the end of the estimated work time period. Def. Ex. 13.
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> On January 20, 2009, [Koenig] ceased working on the Manton Street property because [Shapiro] refused to pay [Koenig] for the previous two weeks' worth of work and therefore, breached the contract with [Koenig]. In March 2010, [Shapiro] changed her mailing address and moved into the Manton Street property. Def. Ex. 25; N.T. September 22, 2011 Vol. 3, pp. 29:11-30:6.

Trial Court Pa.R.A.P. 1925(a) Opinion, 5/31/12, at 2-3.

Shapiro, acting *pro se*,[3] filed an action against Koenig charging breach of contract and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Koenig filed a counterclaim seeking payment for the two unpaid weeks of work and for additional debris removal

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[3] Shapiro attended the University of San Francisco School of Law and is an inactive member of the California State Bar.

costs. As noted, the trial court found against Shapiro on her claims and for Koenig Contracting on its counterclaim.

Shapiro's eight claims of error are as follows:

> 1) Did the Trial Court commit an error of law when it failed to invalidate the portion of the contract in which Koenig contracted to performed [sic] several weeks worth of electrical installation work on Shapiro's house, despite the admitted fact that it did not possess the requisite license to do so, in clear violation of the governing codes in Philadelphia?
>
> 2) Did the Trial Court commit an error of law when it failed to find any ambiguity in the Contract, including, but not limited to the fact that the essential term of the *quantity*, of labor that the corporate defendant promised to provide to [Shapiro] every two weeks at the price of $6,636.00, was missing from the Contract?
>
> 3) Did the Trial Court commit an error of law, when it did not allow [Shapiro] to introduce extrinsic evidence that would have clarified any and all ambiguities in the Contract?
>
> 4) Did the Trial Court commit and error of law when it ruled that [Koenig] did not breach the Contract, despite the fact that it admitted that it failed to complete several of the items of work that are patently stated on the face of the Contract?
>
> 5) Did the Trial Court commit an error of law when it allowed [Koenig] to recover on a theory of *quantum meruit*, despite the fact that *quantum meruit* was not pled as a separate count in [Koenig's] counter-claim against [Shapiro], nor was it even alluded to in its Answer to [Shapiro's] Complaint?
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> 6) Did the Trial Court commit an abuse of discretion in applying the weight of the evidence in [sic] when it issued a verdict in favor of [Koenig] as part of its breach of Contract counter-claim against [Shapiro] for $300 for a "check that was $300 short", and for a $263 "debris removal fee" without any evidentiary support?
>
> 7) Did the Trial Court commit an error of law when it held that [Koenig] had proven that there were oral changes agreed to

> between the parties allowed for the performance of any additional work that would result in any additional expense to [Shapiro], despite the fact that [Koenig] could not remember having *any* conversations with [Shapiro] regarding any *terms* of any oral agreements that would alter any terms of the written Contract.
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> 8) Did the Trial Court commit an error of law when it failed to issue a verdict in favor of [Shapiro] in regard to her allegation that [Koenig] violated the Pennsylvania Unfair Trade Practices and Consumer Protection Laws, even though she established the elements of the claim with proof at trial.

Appellant's Brief, at 4-5 (emphasis in original).

In her first issue, Shapiro claims Brad Koenig,[4] was not licensed to perform electrical contracting and despite this fact, Koenig undertook the rewiring of the home. Philadelphia Code Section E-102 forbids any person not properly licensed from installing systems, or parts of systems, used to transmit, generate of distribute electricity.[5] Because his work on the electrical wiring was illegal under the code, Shapiro argues that portion of

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[4] Brad Koenig was the president of Koenig Contracting and, more importantly, was the person performing much of the work at the Shapiro property.

[5] As quoted by Shapiro, Section E-102 states: "No person shall engage in the business of installing systems, or parts of systems, used to transmit, generate or distribute electricity, nor engage in the business of electrical contracting, unless that person obtained a license from the code official." The Electrical Code is not to be found online on the official Philadelphia Code website. Section E-102 is noted as being reserved. However, all concerned parties agreed to the code provision.

the contract[6] concerning Koenig's electric work is void as against public policy. Shapiro relies upon the Restatement (Second) of Contracts, Section 178 to support her claim.

The trial court agreed that Koenig was not licensed to perform electric work, but determined that Shapiro was estopped from challenging its validity because she knew that Koenig was not licensed and yet she ordered Koenig to do the electric work in order to save money.[7]

Shapiro is correct that as a general proposition an illegal contract is unenforceable and the fact that the parties agreed to an illegal contract is of no matter. Therefore, we must examine whether the agreement for Koenig to perform certain electric work without a license represents an illegal contract.

Restatement Section 178 states, "A promise or other terms of an agreement is unenforceable on the grounds of public policy if legislation provides it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement

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[6] The contract was a written estimate provided by Koenig and initialed and returned to Koenig by Shapiro. ***See*** Plaintiff's Exhibit 10.

[7] Although we affirm the trial court's holding on this issue, we do so for other reasons. ***See Lilliquist v. Copes-Vulcan, Inc.***, 21 A.3d 1233 (Pa. Super. 2011) (appellate court may affirm a decision on any grounds supported by the record on appeal). We note the trial court's factual determination that Shapiro agreed to have Koenig perform the electrical work, knowing he was not a licensed electrician, is supported by the record.

of such terms." The commentary notes that "occasionally, on the grounds of public policy, legislation provides that specified kinds of promises or other terms are unenforceable."

17 Am. Jur. 2d Contracts, § 229, notes that a violation of a statute that is merely *malum prohibitum*, that is a wrong because it is prohibited, will not necessarily render a contract illegal and unenforceable. Further, although a contract is in violation of a statute, it will not be declared void unless such was the intention of the legislature.

The specific language of the relevant code section does not indicate that a violation of the section will void a contract. Shapiro has supplied no authority for a claim that the Philadelphia Electric Code intended that violation of the Code renders any such action taken unenforceable.[8]

Because there was: (1) no evidence that the work performed by Koenig was unacceptable or required replacement, (2) no evidence that the

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[8] In addition, Shapiro failed to prove she suffered any damages resulting from Koenig's electric work. John Doherty, an inspector from Philadelphia Licenses and Inspection ("L & I"), the department charged with code enforcement, testified on behalf of Shapiro that the home did not pass inspection only because the required hard-wired fire alarms were not working properly. Richard Clements, the licensed electrician who installed the panel, testified his work was in addition to Koenig's wiring and that he did not rewire the property. If Koenig's workmanship was the cause of the fire alarms' failure to operate, it was incumbent on Shapiro to prove that. She did not. Furthermore, Inspector Doherty did not testify that the work performed by Koenig was substandard or needed to be redone because Koenig was not properly licensed, nor does the record indicate why the alarms did not function.

L & I initial refusal to issue a passing final inspection was due to Koenig not being a licensed electrician and (3) no specific evidence that a contract in violation of the electric code is necessarily unenforceable, we decline to find that portion of the contract regarding Koenig's electric work was automatically illegal and unenforceable.

In light of the foregoing, we also decline to find the contract void as against public policy. Shapiro provided no evidence that Koenig's work product was dangerous or violated any other aspect of public policy. Based upon the certified record, licensed electric contractors simply finished the job that Koenig began. Therefore, we decline to find that the contract regarding electric work was illegal, void and unenforceable.[9]

Shapiro's second and third claims both address a purported ambiguity in the contract. Therefore, we will address these claims together.

Shapiro argues that the contract, ***see*** Plaintiff's Exhibit 10, was silent as to the quantity of work to be provided for the $6,636.00 bi-weekly payments. Therefore the contract was ambiguous and unenforceable. Because of the claimed ambiguity, Shapiro sought to introduce extrinsic

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[9] As noted, the trial court determined Shapiro was estopped from challenging the illegality of the contract. We do not need to address that assertion because of our conclusion the contract was not illegal. We wish to further note that we are not stating that a contract in violation of the electric code can never be illegal. Our finding in this matter is based upon the record as presented to us.

evidence, ***see*** Plaintiff's Exhibit 9,[10] of a different estimate that provided for three payments totaling $53,088.00 rather than in eight payments as ultimately agreed. ***See*** N.T. Trial, 9/21/11, at 21-24.

> When interpreting the language of a contract, the intention of the parties is a paramount consideration. In determining the intent of the parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language of the contract was chosen carelessly.
>
> When interpreting agreements containing clear and unambiguous terms, we need only examine the writing itself to give effect to the parties' intent. The language of a contract is unambiguous if we can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. When terms in a contract are not defined, we must construe the words in accordance with their natural, plain, and ordinary meaning. As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used.
>
> On the contrary, the terms of a contract are ambiguous if the terms are reasonably or fairly susceptible of different constructions and are capable of being understood in more than one sense. Additionally, we will determine that the language is ambiguous if the language is obscure in meaning through indefiniteness of expression or has a double meaning. Where the language of the contract is ambiguous, the provision is to be construed against the drafter.

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[10] Plaintiff's Exhibit 9 has also been included in the certified record. The only difference between the two exhibits is the term of payment. In Exhibit 9, payment is listed as "1/3 Down, 1/3 at Start Date, and the Final 1/3 upon Completion." It is unclear why Shapiro believed these terms of payment represent a fixed sum.

In re Jerome Markowitz Trust, ___ A.3d ___, 2013 PA Super 128, 5/32/13, at *11.

Plaintiff's Exhibit 10 was an estimate prepared by Koenig Contracting. Shapiro initialed the estimate and returned it to Koenig, thereby forming the contract. The contract provided for nine types of work to be performed and each of the nine provided an estimate for the length of time it would take to perform that work.[11] The contract provided for 16 weeks of work totaling $53,088.00 and an additional $41,000.00 in materials. The contract therefore provided for a total of $94,088.00. The terms of payments were for Shapiro to pay $6,636.00 every two weeks.

We agree with the trial court that this document is not ambiguous. The terms of labor and materials are based upon *estimates* of what work and materials will be required to complete the rehabilitation of the property. These estimates were accepted by Shapiro and based upon that acceptance, Koenig Contracting began work at the 705 Manton Street location. We do not believe that the fact that Shapiro and Koenig agreed to work based upon estimates rendered the contract ambiguous. Rather, it reflects the fact

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[11] For example, Number 1 was for demolition in preparation for reconstruction, which would take an estimated two weeks to complete. Additionally, Koenig estimated there would be another $2,500.00 needed for materials to complete the demolition, representing a total estimated cost of $9,136.00 for that aspect of the job.

common to construction projects that there are unanticipated occurrences and changes to the work to be performed as well as their prior experience of having worked together.

Because we agree that the contract is unambiguous, we find no error in the trial judge's ruling that it did not need to consider extrinsic evidence to interpret the contract.

The trial judge has provided a comprehensive analysis of the remaining issues.[12] Therefore, we rely on that portion of the trial court opinion[13] for our determination of those issues. The parties are directed to attach a copy of the relevant portion of Judge Lynn's opinion in the event of further proceedings.

Because we find no abuse of discretion or errors of law in the trial court's findings, we affirm.

Order entering judgment affirmed.

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[12] We note, additionally, the trial court did not specifically mention *quantum meruit* in addressing Shapiro's fifth claim. However, the trial court did not find in Koenig's favor based on *quantum meruit*, but on breach of contract.

[13] ***See*** Trial Court Opinion, 5/31/12, at 8-12. We note that Shapiro raised two issues regarding her UTPCPL claim before the trial court, but only one on appeal. Nevertheless, the trial court's opinion provides clear reasoning why Shapiro's UTPCPL claim failed, thereby answering the issue raised before this Court.

Judgment Entered.

Prothonotary

Date: 7/26/2013

IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

RACHEL SHAPIRO	:	COURT OF COMMON PLEAS
Plaintiff	:	PHILADELPHIA COUNTY
	:	
v.	:	
	:	FEBRUARY TERM, 2009
KOENIG CONTRACTING, Inc.	:	NO. 01274
	:	
Defendant	:	

OPINION

LYNN, J.

I. FACTS AND PROCEDURAL HISTORY

On September 20, 2011, the above matter was tried before the undersigned, sitting without a jury. Plaintiff, Rachel Shapiro, pro se[1], filed an action against the Defendant, Koenig Contracting, Inc. for breach of contract and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). This Court found against the Plaintiff's breach of contract claim and in favor of the Defendant's breach of contract counterclaim and $ 7,199.59 was awarded to the Defendant. Of this, $6,636.00 was due to the Plaintiff's failure to pay the Defendant for two weeks of work performed by the Defendant; $300 still owed on for debris removal and an additional $263.59 for further debris removal. Additionally, this Court found against Plaintiff and in favor of Defendant on Plaintiff's "UTPCPL" claim. Plaintiff filed post trial motions and they were denied by this Court. This instant appeal followed.

[1] Plaintiff attended the University of San Francisco School of Law and is an inactive member of the California State Bar.

Plaintiff entered into an agreement to purchase a house on 705 Manton Street in July 2008 for investment purposes. Def. Ex. 1. Plaintiff worked on this project with a realtor, Mr. David Sneeringer, who had previously bought and sold investment properties for her. Sneeringer Dep. pp. 26:17-30:2, July 28, 2009. The two set out to determine how to remodel the Manton Street house for greater re-sale value. Id. In fact, Plaintiff's loan application stated that the property was to be used as a financial investment and that Plaintiff never intended on living in the house herself. Def. Ex. 1-5.

On August 27, 2008, Koenig Contracting, who had done prior work for Plaintiff, agreed to begin construction work on the Manton Street property. N.T. September 21, 2011 Vol. 2, pp. 8:20-25. Under the terms of the contract, Koenig Contracting was to conduct demolition work, install sheet rock, a roof deck, kitchen cabinets, a new shower, toilet, and vanity in the existing bathroom. Pls. E x. 9. In addition, Koenig Contracting was to conduct various electrical, plumbing, and flooring work. Id. The estimated time and cost for the construction of the house was 16 weeks at a total of $53,088.00. Ms. Shapiro was to pay Koenig Contracting $6,636.00 every two weeks. Id.

Both parties agreed to the multiple changes that were made to the contract during the 16 weeks of work. Plaintiff requested major changes to the contract such as: installing an Heating Ventilation and Air Circulation ("HVAC") system, expanding the bathroom, and putting in a hot tub. Def. Ex. 10-11. Additionally, an original plan to install a roof deck on the house was removed, and Plaintiff was to have another contractor install the kitchen cabinets. Id. In an email dated September 5, 2008, Dina Koenig, who does the billing for Koenig Contracting, stated that because of the changes in labor, a change in cost would take effect at the end of the project. Def. Ex. 8. The evidence at trial also established that the house, especially the paneled

walls and drop ceiling, had concealed problems unforeseen when the estimate was given. Def. Ex. 11. Dina Koenig explained in an e-mail to the Plaintiff that the estimated price given at the beginning of the project could fluctuate based on both unforeseen circumstances and changes to the contract by the Plaintiff. Def. Ex. 10. Plaintiff agreed that she would pay for the additional charges that would take effect at the end of the estimated work time period. Def. Ex. 13.

On January 20, 2009, Defendant ceased working on the Manton Street property because Plaintiff refused to pay Defendant for the previous two weeks' worth of work and therefore, breached the contract with Defendant. In March 2010, the Plaintiff changed her mailing address and moved into the Manton Street property. Def. Ex. 25; N.T. September 22, 2011 Vol. 3, pp. 29:11-30:6.

II. ISSUES

Plaintiff raises the following issues on appeal:

1. The trial court committed an error of law in refusing to grant a Judgment Notwithstanding the Verdict ("JNOV") and refusing to vacate its judgment for the defense, or in alternative grant a new trial, when it failed to invalidate the portion of the contract in which Defendant performed several weeks worth of electrical installation work on Plaintiff's house and accepted money for the work, despite the admitted fact that it did not possess the requisite license to do so, in clear violation of the governing codes in Philadelphia.
2. The trial court committed an error of law in refusing to grant a JNOV and in refusing to vacate its judgment for the defense, or in the alternative grant a new trial, when it failed to find to find any ambiguity in the Contract, including, but not limited to the fact that

alternative grant a new trial, when it decided that Defendant had proven that there were oral changes agreed to between the parties that changed the scope of work agreed to under the Contract, or allowed for the performance of any additional work that would result in any additional expenses to Plaintiff, despite the fact that Defendant could not remember having had *any* conversations with Plaintiff regarding any *terms* of any oral agreements that would alter any terms of the written Contract.

8. The trial court committed an error of law when it failed to issue a verdict for the cause of action for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Laws that was properly pled as a separate count in Plaintiff's Complaint and was litigated at trial.

9. The Court committed an error of law when it failed to issue a verdict in favor of Plaintiff in regard to the allegation in her Complaint that Defendant violated the Pennsylvania Unfair Trade Practices and Consumer Protection Laws, even though she established the elements of the claim with proof at trial.

10. The trial court exhibited bias, prejudice, and ill-will towards the Plaintiff by repeatedly refusing to allow her to examine the witnesses regarding relevant evidence, and refusing to allow her to elicit relevant testimony from the witnesses in a legally appropriate manner, and by exhibiting impatience with her throughout the trial.

III. DISCUSSION

The question of whether or not to grant a new trial lies within the discretion of the Trial Court. Cocker v. S.M. Flickinger, Co. Inc., 625 A.2d 1181, 1182 (Pa. 1993). "The proper test for whether a motion for a new trial should be granted is whether there exists an abuse of discretion or a clear error of law." Chanda v. Pa. State Police, 485 A.2d 867, 868 (Pa. 1984). The standard

essential term of the *quantity*, of labor that the corporate defendant promised to provide to Plaintiff every two weeks at the price of $6636.00, was missing from the Contract.

3. The trial court committed an error of law in refusing to grant a JNOV and in refusing to vacate its judgment for the defense, or in the alternative grant a new trial, when it did not allow Plaintiff to introduce extrinsic evidence that would have clarified any and all ambiguities in the Contract.

4. The trial court committed an error of law in refusing to grant a JNOV and in refusing to vacate its judgment for the defense, or in the alternative grant a new trial, when it ruled that Defendant did not breach the Contract, despite the fact it admitted that it failed to complete several of the items of work that are patently stated on the face of the Contract.

5. The trial court committed an error of law in refusing to grant a JNOV and in refusing to vacate its judgment for the defense, or in the alternative grant a new trial, when it allowed Defendant to recover on a theory of *quantum meruit*, despite the fact that *quantum meruit* was not pled as a separate count in Defendant's counter-claim against Plaintiff, nor was it even alluded to in its Answer to Plaintiff's Complaint.

6. The trial court committed an abuse discretion in applying the weight of the evidence in refusing to grant a JNOV and to vacate its judgment for the defense, or in the alternative grant a new trial, when it issued a verdict in favor of Defendant as part of its breach of contract counter-claim against Plaintiff for $300 for a "check that was $300 short", and for a $263 "debris removal fee" despite the fact that Defendant did not offer the Court *any* evidence to support either claim.

7. The trial court committed an abuse of discretion in applying the weight of the evidence in refusing to grant a JNOV and in refusing to vacate its judgment for the defense, or in the

of review is limited to whether the Trial Court committed an error of law which controlled the outcome of the case. Adamski v. Miller, 643 A2d 680, 682 (Pa. Super. 1994), rev'd on other grounds 681 A.2d 171 (Pa. 1996). Based on the evidence presented at trial and the motions and case law that followed, the Court did not err and a new trial or a JNOV should not be granted.

1. The Trial Court was correct in refusing to invalidate the electrical portion of the contract.

Plaintiff argues that this Court committed an error when it did not invalidate the electrical portion of the contract because Brad Koenig lacked an electrical license. Plaintiff is estopped from raising this issue.

> "An estoppel may be raised by acquiescence, where a party aware of his own rights, sees the other party acting upon a mistaken notion of his rights.
> "The rule is well recognized that when a party with ***full knowledge***, or with sufficient notice or means of knowledge of his rights and of all the material facts, ***remains inactive for a considerable time*** or abstains from impeaching the transaction, so that the other party is induced to suppose that it is recognized, this is acquiescence, and the transaction, although originally impeachable, ***becomes unimpeachable.***'"

In re Kennedy's Estate, 183 A. 798, 801 (Pa. 1936)(citing Phila. & Reading Coal & Iron Co. v Schmidt, 98 A. 964, 966 (Pa. 1916))(emphasis added). Defendant, Brad Koenig, was not licensed as an electrician. This fact was known to the Plaintiff. Plaintiff, a law trained inactive member of the California bar, conducted the cross-examination of the Defendant, Brad Koenig, herself. During cross-examination of the Defendant, he testified the Plaintiff requested the Defendant to do the "rough in" electrical work even though Plaintiff knew Defendant was not licensed to do so. N.T. September 21, 2011 Vol. 2, pp. 47:17-22; 50:22-52:25. Defendant credibly testified that he suggested that Plaintiff hire a licensed electrician to do this work. Id. at 52:14-21. Plaintiff rejected that proposal in order to save money and requested the Defendant do the work instead.

Id. The testimony by the Defendant was not challenged or rebutted by Plaintiff during her own testimony. N.T. September 22, 2011 Vol. 3, pp. 4:10-70:10. Plaintiff had full knowledge that Brad Koenig lacked an electrical permit but still requested that he perform electrical wiring work. Plaintiff never objected to Defendant's lack of an electrician's license. Plaintiff raised this issue for the first time when she filed this lawsuit in February 2009. Therefore, Plaintiff is estopped by acquiescence from raising this issue. See In re Kennedy's Estate, 183 A. at 801.

2,3. The Trial Court properly found that the contract was not ambiguous and therefore did not admit extrinsic evidence.

Plaintiff argues that this Court committed an error when it did not find ambiguity in the contract between Plaintiff Koenig Contracting, Inc and refused to admit extrinsic evidence. The standard in Pennsylvania is:

> "The question of whether an ambiguity exists is to be determined by the Court as a question of law. A contract is ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions...A contract is not ambiguous if the court can determine its meaning without any guide other than knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction."

Commonwealth, State Highway & Bridge Authority v. E.J. Albrecht Company, 430 A.2d 328, 330 (Commw. Ct. 1981)(citing 8 P.L.E. *Contracts* § 146 (1971)).

Plaintiff's contends that the contract is ambiguous because it lacks a "quantity" term. Pls. Concise Statement of the Errors Complained of on Appeal p. 2. Plaintiff's argument fails under this standard. This Court reviewed the estimate sent from Koenig Construction and signed by Plaintiff and found it to be clear and not ambiguous. The contract was for bi-weekly payments of $6,636.00 for labor to complete the areas of work outlined in the Estimate. The work had an estimated length of 16 weeks and an estimated

total of $53,088.00. This Court was able to determine the meaning of the contract "without any guide other than knowledge of the simple facts" and therefore the contract was not ambiguous. Id. at 330.

"Where the intention of the parties is clear, there is no need to resort to extrinsic aids and evidence." Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982)(internal citation omitted). The Court found there was no ambiguity in the contract for work at 705 Manton Street and therefore, did not admit extrinsic evidence. See Id.

4,5. The Trial Court found Plaintiff breached the contract which excused the Defendant from performance and properly awarded damages to the Defendant.

This Court found there was a contract between the parties where Koenig Contracting would provide labor for $6,636.00 bi-weekly to complete renovations at 705 Manton Street which was estimated to take 16 weeks but was extended by the Plaintiff's modifications and unforeseen problems behind the paneled walls and drop ceilings. N.T. September 22, 2011 Vol. 4, pp. 13:6-17; 18:2-21:2; September 21, 2011 Vol. 2, p. 78:5-19. Plaintiff paid the first eight installments but on January 20, 2009 Plaintiff refused to pay Koenig Construction for the previous two weeks of work. Id. at p. 15:13-14. Plaintiff's failure to pay was a material breach of the contract and excused Koenig Construction from further performance under the contract. See Berkowitz v. Mayflower Secur., Inc., 317 A.2d 584, 586 (Pa. 1973); Widmer Eng'g, Inc. v. Dufalla, 837 A.2d 459, 467 (Pa. Super. 2003).

"The purpose of damages in contract actions is the return the parties to the position they would have been in but for the breach." Birth Center v. St. Paul Co., 787 A.2d 376, 400 (Pa. 2001). Plaintiff breached the contract in the amount of $7,199.59 by refusing to pay for two weeks of work at $6,636.00 and the additional expenses of $563.59 for debris removal. N.T.

September 22, 2011 Vol. 4, pp. 35:9-36:12. Therefore, this Court properly awarded damages to the Defendant Koenig Construction in the amount of $7,199.59. See Birth Center, 787 A.2d at 400.

6,7. The Trial Court properly applied the weight of evidence in finding for the Defendant.

In a bench trial, the Judge is the sole finder of fact. "Findings of fact by a trial judge are accorded the same weight as a jury verdict." Jenks v. Avco Corp., 490 A.2d 912, 915 (Pa. Super Ct. 1985). Accordingly, a judge's findings of fact will not be reversed unless there was an abuse of discretion by the trial judge, or a lack of evidentiary support. Brenna v. Nationwide, 440 A.2d 609, 611 (Pa. Super Ct. 1982). In reviewing the trial judge's findings, "the victorious party is entitled to have the evidence viewed in the light most favorable to him and all the evidence and proper inferences favorable to successful party must be taken as true and all unfavorable inferences rejected." Id.

Plaintiff argues that this Court abused its discretion in finding against the Plaintiff for a "check that was $300 short" and $263.59 for debris removal. Dina Koenig testified that Plaintiff had sent a check that was $300 short for debris removal and owed another $263.99 for more debris removal. N.T. September 22, 2011 Vol. 4, p. 35:14-17; p. 36:9-12. This Court, sitting as finder of fact, found the testimony of Dina Koenig to be credible and the Plaintiff's testimony incredible, and therefore, did not abuse its discretion in awarding damages to Koenig Construction. Brenna, 440 A.2d at 611.

Plaintiff also argues that this Court abused its discretion in finding that the Plaintiff made oral modifications to the contract during the course of renovations to 705 Manton Street. Oral agreements modifying a prior written contract must be proven by "clear, precise and convincing evidence." Somerset Community Hosp. v. Allan B. Mitchell & Assocs., 685 A.2d 141, 146 (Pa.

Super. 1996)(citing Pellegrene v. Luther, 169 A.2d 298, 299 (Pa. 1961)). Multiple witnesses, including the Plaintiff, testified that changes were made to the initial scope of the contract. N.T. September 22, 2011 Vol. 4, pp. 29:17-32:3 (Dina Koenig); N.T. September 22, 2011 Vol. 3, pp. 53:6-54:7 (Rachel Shapiro); N.T. September 21, 2011 Vol. 2, pp. 81:19-92:6 (Brad Koenig). In addition, e-mail traffic between Plaintiff and Dina Koenig is clear, precise, and convincing evidence of a modification to a prior written contract, particularly one e-mail dated December 12, 2008. There, Plaintiff consented to pay for additional work performed beyond the estimate. See Somerset, 685 A.2d at 146; Def. Ex. 13; N.T. September 22, 2011 Vol. 4, pp. 29:17-32:3. This Court, sitting as finder of fact, found that Plaintiff was aware and, in fact, asked for the modifications. This Court also found that Plaintiff's testimony that she was unaware that additions, such as installing a second bathroom and an "HVAC" system, would not increase the price of the contract to be incredible and disingenuous. N.T. September 22, 2011 Vol. 3, pp. 60:17-61:10. This is especially so when it is evident from the record that Plaintiff is a sophisticated investor in real property. Her realtor, David Sneeringer, testified when asked,

> "Mr. Cavaliere: How would you describe Rachel's business knowledge, is she a novice or—
> Mr. Sneeringer: She knows what she's doing.
> Mr. Cavaliere: She knows what she's doing?
> Mr. Sneeringer: She knows what she's doing."

Sneeringer Dep. 37:13-17, July 28, 2009. Therefore, this Court did not abuse its discretion in finding the Plaintiff made oral modifications to the contract that increased the length and price of the contract. Brenna, 440 A.2d at 611.

8,9. The Trial Court properly denied Plaintiff's Unfair Trade Practices and Consumer Protection Law claim.

Pennsylvania's Unfair Trade Practices and Consumer Protection Clam "UTPCPL" applies only when the property is purchased for personal, family, or household use. See 73 P.S.

§201-9.2; Growall v. Maietta, 931 A.2d 667, 676 (Pa. Super. Ct. 2007). In Growell, the buyer of residential real property for investment purposes sued the seller under UTPCPL for water leakage in the basement. Id. at 670. The Superior Court held that while UTPCPL applied to residential real property, it did not apply to residential real property that was purchased for investment purposes. Id. at 676.

In the documents provided by Plaintiff to Defendant during discovery and admitted at trial, Plaintiff marked her Uniform Residential Loan Application for 705 Manton Street as "Property will be: Investment." Def. Ex. 1. Plaintiff also secured "Family Rider" of which Section F deleted the Loan Application's requirement that Plaintiff occupy the home. Def. Ex. 3. Plaintiff's Occupancy Statement indicated the home will be used as an investment property and Plaintiff acquired Commercial Property Insurance for the property. Def. Ex. 4 & 5. Finally, Plaintiff's realtor, David Sneeringer, testified at his deposition that Plaintiff was a knowledgeable businesswoman for whom he had conducted five real estate transactions. Sneeringer Dep. 27:13-29:8, July 28, 2009. Sneeringer also testified on direct examination by the Plaintiff that she asked him to accompany her and the Defendant to 705 Manton Street because she "wanted my ideas on what to do on certain areas of the house for—because your plan was to rehab the house and sell it." Sneeringer Dep. 9:7-9, July 28, 2009. On April 14, 2009, three months after Plaintiff breached her contract with Defendant; a heating and cooling contractor worked on 705 Manton Street and marked it as "Investment Property." Def. Ex. 6. This Court, sitting as finder of fact, found that Plaintiff's previous real estate history and business knowledge, the deposition testimony of David Sneeringer, and the documents for the purchase of 705 Manton Street all prove that Plaintiff brought the home for investment purposes and belie her self-serving testimony that she purchased it for residential reasons. Sneeringer Dep. 9:7-9 & 15:1-16, July 28,

2009; Def. Ex. 1-6; N.T. September 22, 2011 Vol. 3, pp. 51:19-52:3. That Plaintiff later moved into the house, for the sole purpose of being able to bring a claim under the Act, does not change this Court's analysis.

This Court, sitting as finder of fact, properly found the Plaintiff's claim under the UTPCPL could not be brought because Plaintiff purchased the home and contracted with Koenig Construction as an investment property. Growall, 931 A.2d at 676.

10. The Trial Court, exercising broad discretion, presided over the trial in a fair, unbiased, and impartial manner, allowing both sides ample opportunity to argue the merits of the case.

This Court has reviewed the entire record from this trial and the record shows that both litigants were given a fair and unbiased opportunity to present their case. See N.T. September 20, 2011 Vol. 1, pp. 4-55; September 21, 2011 Vol. 2, pp. 4-113; September 22, 2011 Vol. 3, pp. 4-70; September 22, 2011 Vol. 4, pp.4-77. Furthermore, Plaintiff's claim is so vague that this Court would have to guess as to the specific issue and conduct she is referring to and therefore it is deemed waived. See Commonwealth v. Hansley, 24 A.3d 410, 415 (Pa. Super. 2011) (holding that a 1925(b) statement which is too vague may constitute waiver).

IV. CONCLUSION

Based on the foregoing, this Court's decision should be affirmed.

BY THE COURT:

DATE: 5/31/12

JAMES MURRAY LYNN, J.

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