

D.E. HALL BUILDER, INC.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-01,859
	:	
GERARD J. MAIOLA and	:	
BABETTE A. MAIOLO, his wife,	:	
	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

***Date: October 3, 2003***

**OPINION and ORDER**

***Facts/Procedural Background***

The case *sub judice* arises out of a contract entered into by Plaintiff D.E. Hall Builder, Inc. (D.E. Hall) and Defendants Gerard and Babette Maiolo (Maiolos) for the construction of a new two-story home. A dispute arose as to whether Maiolos were obligated to make the fifth and final payment under the contract. D.E. Hall filed a Complaint on October 11, 2002 alleging that the fifth payment was due when the house was complete, and since the house was complete the payment was due. Maiolos filed an Answer, New Matter, and Counterclaim denying that the home was completed and lodged counterclaims of breach of implied warranty, breach of contract, breach of covenant of good faith and fair dealing, and violation of Pennsylvania's unfair trade practices and consumer protection law.

Before the Court for determination is Maiolos' Motion for Summary Judgment filed May 29, 2003.

It is undisputed that, on May 9, 2001, Maiolos and D.E. Hall entered into a contract whereby D.E. Hall agreed to construct a new home for Maiolos. In turn, Maiolos

agreed to pay the sum of \$141,207.82 as the base price. Payment was to be made in five installments following completion of the enumerated type of work set forth in the contract's Payment Schedule. The contract states that the fifth payment was due "when house is completed." Defendants' Answer, New Matter, and Counterclaim, Exhibit A, ***D.E. Builder, Inc. v. Maiolo***, No. 02-01,859 (Lycoming Cty.).

Maiolos have made the first four payments. The fifth payment has not been made and is the center of the dispute in the case *sub judice*. There are various items that have not been completed (ex. – cracked drywall). Maiolos characterize those items as contract completion items necessary for the home to be completed and the contract fulfilled. D.E. Hall characterizes the remaining items as touch up items that are to be completed after final payment.

Maiolos contend that they are entitled to summary judgment because D.E. Hall is not entitled to the fifth payment. Maiolos argue that the obligation to pay the fifth installment arises when the house is completed and that the house was not completed under the terms of the contract. Maiolos argue that the house was not completed because there is popping or cracking with the drywall; doors and cabinets were never installed; a damaged pantry was not repaired; a light was never moved over the furnace area; five screens were never supplied; a door in the master bath where the frame sags was not corrected; drywall in the area where a pipe was repaired was not fixed; drywall around switches and receptacles was not fixed; a door in the children's bathroom that would not close was not repaired; a radon mitigation pipe was not capped; and a kitchen cabinet that was falling off was not fixed.

D.E. Hall contends that Maiolos are not entitled to summary judgment because there are genuine issues of fact still at issue. D.E. Hall agrees that the fifth payment was due when the house was completed. D.E. Hall argues that the house was completed when Maiolos were able to move into the house. D.E. Hall contends that while there may be some touch up work that remains to be completed, this type of work is typically addressed after completion. D.E. Hall argues that there is a genuine issue of fact as to what the contract term “completed” meant, as evidenced by the parties different interpretations. As such, D.E. Hall contends that summary judgment is inappropriate.

It is clear that, under the contract, the fifth payment was not due until the house was complete. In deciding the motion for summary judgment, the Court is confronted with the question of what constitutes a completed home under the contract. The Court cannot answer this question because it is a genuine issue of fact. Therefore, the Court denies Maiolos’ motion for summary judgment.

A party may move for summary judgment after the pleadings are closed. Pa.R.C.P. 1035.2. Summary judgment may be properly granted “when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law.” *Rauch v. Mike-Mayer*, 783 A.2d 815, 821 (Pa. Super. 2001); *Godlewski v. Pars Mfg. Co.*, 597 A.2d 106, 107 (Pa. Super. 1991). The moving party has the burden of proving that there is no genuine issue of material fact. *Rauch*, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record “ ‘in the light most favorable to the non-moving party accepting as true all well pleaded

facts in its pleading and giving that party the benefit of all reasonable inferences.” *Godlewski*, 597 A.2d at 107 (quoting *Hower v. Whitmak Assoc.*, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that are “free and clear from doubt” and any “doubt must be resolved against the moving party.” *Garcia v. Savage*, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Parties are free to write their own contracts, and it is the function of the courts to interpret and enforce those contracts. *Ambridge Water Auth. v. Columbia*, 328 A.2d 498, 500 (Pa. 1974). When a contract is clear and unambiguous, its meaning must be determined from the document itself. *Seven Springs Farm v. Croker*, 801 A.2d 1212, 1215 (Pa. 2002); *Mace v. Atlantic Refining Marketing Corp.*, 785 A.2d 491 (Pa. 2001). Absent an ambiguity, the plain meaning of the contract will be enforced. *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 430 (Pa. 2001).

A contract is ambiguous if it is “reasonably susceptible [to] different constructions and capable of being understood in more than one sense.” *Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1986). The court must decide as a matter of law whether there exists an ambiguity. *Ibid*; *Osiel v. Cook*, 803 A.2d 209, 213 (Pa. Super. 2002). If there is an ambiguity, then the trier of fact must determine what the parties intended by the ambiguous provision. *Hutchinson*, 519 A.2d at 390; *Herr v. Grier*, 671 A.2d 224, 226 (Pa. Super. 1995).

The Court finds that the contract term “5<sup>th</sup> payment – due when house is completed” is ambiguous. There is no explicit definition of “completed” contained within the document. Without such a definition, the plain meaning of the term must be determined.

The term “completed” is susceptible to at least two constructions. One being that the home is complete when all the work listed in the contract is finished. The contract delineated what type of work needed to be done, as well as, the necessary materials. This outline would serve as the framework for the construction of the home. For example, paragraph 10 of the contract states, “Siding. A. Mastic vinyl siding, Brentwood. Based on this paragraph, the new home would have vinyl siding. It would be reasonable to conclude that the home would consist of the items spelled out in the contract. Therefore, it is reasonable to conclude that a completed home would have all these areas of work finished.

A second possible interpretation is that the home is completed when Maiolos can move in and live there. It is reasonable to believe that a home is complete once it can provide shelter with some level of comfort. Once the framework is complete, the structure enclosed, and all necessary utilities are or can be hooked up, the house is complete. Minor touch-up items that do not affect the habitability of the home do not render it incomplete. Even with such problems, the home still serves its function of providing shelter with a level of comfort. Therefore, it is reasonable to conclude that a home was completed once the Maiolos could move in and live there.

These are the two interpretations advanced by the parties. While not determinative of ambiguity,<sup>1</sup> the Court concludes that the interpretations were reasonable. As such, the contract contains an ambiguity that the trier of fact must determine.

---

<sup>1</sup> The mere fact that the parties disagree on the construction of a contract does not render it ambiguous. *Baney v. Eoute*, 784 A.2d 132, 136 (Pa. Super. 2001); *Tuthill v. Tuthill*, 763 A.2d 417, 420 (Pa. Super. 2000), *appeal denied*, 775 A.2d 808 (Pa. 2000).

However, Maiolos argue that there is no issue of fact for the jury to decide, since Dale Hall has admitted in his deposition that the items, which were not completed, were contract completion items and, as such, the home was not complete until those items were finished. The general rule is that “summary judgment may not be held where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact.” *Bowe v. Allied Signal, Inc.*, 806 A.2d 435, 440 (Pa. Super. 2002). However, the rule of *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932) does not prevent the entry of summary judgment where the moving party uses the admissions of the opposing party. *Ibid*; *Winwood v. Bregman*, 788 A.2d 983, 985 (Pa. Super. 2001). In this situation, the court does not have to determine the credibility of the testimony, since it is an “ ‘unconditional surrender’ ” by the opposing party. *Bowe*, 806 A.2d at 440.

The deposition testimony offered by Maiolos in support of their motion for summary judgment is not as clear-cut an admission as they would argue. Reading the cited excerpts in context with the rest of the testimony, it is not definitively clear that Dale Hall is admitting that the house was not complete until the remaining work items were finished. While he may call the items contract completion items at one point, he also classifies these items as touch-up items. Since the testimony is not a definitive admission, there is a genuine issue of fact as to what the parties intended “completed” to mean.

### **Conclusion**

The contract is ambiguous insofar as the meaning of a completed home. There is a genuine issue of fact concerning what the parties intended the term “completed” to mean

that the trier of fact must determine. Therefore, the Court must deny the motion for summary judgment.

**ORDER**

It is hereby ORDERED that Defendants Gerard and Babette Maiolo's Motion for Summary Judgment filed May 29, 2003 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Marc F. Lovecchio, Esquire  
Ryan M. Tira, Esquire  
Judges  
Christian J. Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)