IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GENO and RACHEL BRAGALONE, Plaintiffs	:	NO. 13 – 02,551
	:	CIVIL ACTION - LAW
vs.	:	
AQUA VANTAGE POOLS & SPAS, WILKES POOL OF MIFFLIN, POOL TECH OF MIFFLIN, INC., JOHN BARRERA, MARY PRICE, and POOL TECH, INC., Individually and t/a AQUA VANTAGE, Defendants	:	Non-jury Trial

OPINION AND VERDICT

Before the Court is Plaintiffs' request for a judgment in connection with their allegations that Defendants' installation of an in-ground swimming pool at their home was "sub-standard". A trial was held on October 12, 2015. From the evidence presented, the Court makes the following:

FINDINGS OF FACT

1. On July 27, 2011, Plaintiffs and Defendants[1] entered a "Pool Installation Contract" whereby Defendants agreed to install an in-ground swimming pool at Plaintiffs' home in exchange for payment of $32,780.

2. The pool was excavated and installed in September 2011 and then the filter pump was installed and the pool was "opened up" in May 2012. Delay in

[1] Although the contract was entered between Plaintiffs and only Defendant Aqua Vantage Pools & Spas, a fictitious name of Pool Tech of Mifflin, Inc., as the individual defendants (John Barrera and Mary Price) had no involvement in the execution of the contract or the or performance of the work, for ease of reference, the court will simply refer to the company defendants as "Defendants".

installing the filter pump was due to Plaintiffs not yet having installed the cement pad for such until spring 2012.

3. Full payment under the Pool Installation Contract was completed in the fall of 2011.

4. Plaintiffs executed an "Additional Work Authorization" in November 2011, for some additional labor and materials and also for the purchase and installation of a pool safety cover. All but $1,300 of the amount due under this authorization was paid.

5. On May 30, 2012, Plaintiff Rachel Bragalone sent an email to Defendants advising of numerous concerns regarding the pool installation. Relevant here, she complained that the concrete work was "sub-standard". John J. Barrera, the construction manager for the corporate defendants, returned to Plaintiffs' home and attempted to address Plaintiffs' concerns. Relevant here, he informed Mrs. Bragalone that he did not believe the concrete work was defective.

6. In the summer of 2012, Plaintiff Geno Bragalone advised Defendants that the sides of the pool at the bottom had subsided, or "caved-in". John J. Barrera inspected the pool and agreed that repairs were needed. He proposed such repairs to be made later in the year.

7. The proposed repairs were never undertaken. At first, the weather and Defendants' availability intervened and, then, at some point, Defendant John Barrera instructed John J. Barrera to *not* perform the repairs because Plaintiffs still owed $1,300 for the safety cover.

8. The $1,300 final payment was withheld by Plaintiffs in an effort to induce Defendants to perform the needed repairs. That payment has to this date not been

made and Defendants have claimed this amount as a set-off to any award against them.

9. The safety cover for the pool was not itself defective or of poor quality.[2]

10. The concrete work around the pool is indeed "sub-standard". The court finds it to be below what would be considered "workmanlike". There are numerous cracks and holes and areas where aggregate is exposed, and the surface is far too rough. The concrete work needs to be replaced and cannot be repaired.

11. The subsidence of the pool liner was due to improper installation, and has caused the liner to stretch. The subsidence must be repaired, and the liner must be replaced and cannot be reused.

12. The cost to replace the concrete work, repair the bottom of the pool and replace the liner is $25,750.

13. The salt system installed by Defendants never functioned. The cost to replace the salt system is $2,000.

14. Plaintiffs have incurred attorney's fees of $7,317.20. This figure comprises $5,780 for time prior to trial, $1,000 for time to participate in trial, and $537.20 in costs. These fees and costs are reasonable in light of the extensive litigation involved.

DISCUSSION

Much time at trial was spent addressing the issue of the contract's warranty, and whether such applied in light of the withholding of the $1,300 final payment because the contract provides, in paragraph B, that the warranty "shall

[2] The court notes that Plaintiffs complained that the cover was improperly installed, but that does not make the cover itself defective. There was no evidence the installation could not be corrected using the same cover, and replacement of the concrete will necessarily involve re-installation of the pool safety cover.

not be available to the Owners unless the entire amount of the contract, together with any extras, shall have been paid by the Owners in full". Defendants seek to apply this provision to avoid liability and Plaintiffs argue that the provision is unconscionable. The court finds it unnecessary to decide the issue, however, because the sub-standard work, both with respect to the concrete work and the installation of the pool and liner, constitutes a breach of the contract itself, rather than the warranty. The contract provides: "The Contractor agrees that all materials used in completing the pool installation shall be of good quality and that all work will be done in a good workmanlike manner".

It is clear to the court that the concrete work was not done in a "good workmanlike manner". Plaintiffs' expert witness testified that the work was not performed properly, and the photos introduced into evidence themselves show poor quality work. According to Plaintiffs, the cracks appeared almost immediately,[3] and according to their expert, the concrete was not "finished" properly, which resulted in the cracks and the holes and the very rough surface.[4]

Further, the installation of the pool was also performed improperly as the liner was installed when the surface of the ground was very wet. Plaintiff Geno Bragalone testified that the excavation was performed just before heavy rains descended upon the area, and there were ten inches of water in the hole the night before the liner was installed.[5] According to Plaintiffs' expert witness, "muddy

[3] The court notes Defendants' argument based on Paragraph O of the Contract, which provides: "Cracks in stone and masonry are not the responsibility of the Contractor." Although the court would interpret this clause to refer to cracks which may arise following successful completion, as those could be caused by any number of things, and not to cracks which arise immediately following improper work, it is not necessary to make any such determination because the concrete work must be replaced in any event due to the improper finish.

[4] It is not necessary to discuss Plaintiffs' complaints regarding the slope of the concrete, the extra drilled holes in the concrete, the loose handrail or the unevenness of the railing pipe receptacles (imbedded in the concrete) because replacement of the concrete will eliminate these issues.

[5] The court takes judicial notice of Tropical Storm Lee, which caused extensive flooding in this area in early September 2011.

ground" at the time of installation caused the subsidence of the bottom around the edges. By not installing the liner on a dry base, Defendants installed the pool in an unworkmanlike manner.[6]

With respect to the salt system, Plaintiffs' testimony that such "never worked" and appeared to be "used" evidences sub-standard materials. By supplying such a system, Defendants failed to use "materials of good quality".

Therefore, the court will find Defendants liable to Plaintiffs for breach of contract.

Plaintiffs have also asked the court to find that Defendants violated the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S. Section 201-1, et seq. That Law includes as a deceptive or unfair act or practice "[m]aking repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed in writing". Id., Section 201-2(4)(xvi). Section 3 of the Law makes such an act "unlawful", Id., Section 201-3, and Section 9.2 provides for the bringing of private actions by "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of" the unlawful act. Id., Section 201-9.2. That section also allows for the awarding, in the court's discretion, of "up to three times the actual damages sustained" and "costs and reasonable attorney fees." Id.

Inasmuch as Defendants "agreed in writing" to make improvements to Plaintiffs' real property by using materials "of good quality" and performing the

[6] The court need not discuss Plaintiffs' complaints that there were rocks under the liner at the bottom of the pool, that saw marks were made into the coping, that the coping clips did not stay in place, that there were air bubbles behind the liner and that the filter intake vents were not level because replacement of the liner will eliminate these issues.

work in a "good workmanlike manner", but actually used materials and performed work below that standard, Defendants have violated the UTPCPL. *See* Commonwealth v. Burns, 663 A.2d 308 (Pa. Commw. 1995)(Where a contractor agreed in writing to perform a contract with workmanship of good quality but is shown to have performed with substandard and inferior work, the Section 2(4)(xvi) violation is established.). Plaintiffs are thus entitled to additional compensation, in the court's discretion, which will be limited to attorney's fees and costs as the court finds the violation was not intentional.

Finally, the court will address Plaintiffs' request to hold Defendant John Barrera personally responsible for Defendants' breaches. This request is based on the fact that John Barrera, who is president of the corporate defendants, instructed John J. Barrera to not complete any repairs to the pool because the balance owed on the pool safety cover remained outstanding. Plaintiffs assert that such action constitutes a refusal to comply with the contract's warranty, in violation of Section 2(4)(xiv) of the UTPCPL, and by directing that no repairs be made, John Barrera may be held personally responsible under the "participation theory".

The "participation theory" allows for the imposition of personal liability on an officer of a corporation who takes part in the commission of a tort by the corporation or directs a particular tortious act to be done. Wicks v. Milzoco Builders, Inc., 470 A.2d 86 (Pa. 1983). Moreover, personal liability may attach for participation in the commission of a violation of the UTPCPL. *See* Commonwealth v. Manson, 903 A.2d 69 (Pa. Commw. 2006). In the instant case, however, the court found a breach of contract for failure to perform the work in a good and workmanlike manner, and *not* a breach of warranty. John Barrera did not personally participate in the work, nor did he direct the quality of such. His

actions in directing the withholding of repairs does not implicate the performance of the contract outside the warranty provision and therefore the court cannot find that he personally participated in the acts for which Defendants are being held responsible. Therefore, the court will not impose personal liability on John Barrera.

Accordingly, the Court draws the following:

CONCLUSIONS OF LAW

1. Defendants breached the Pool Installation Contract by performing sub-standard work and supplying inferior quality materials and are therefore liable to Plaintiffs for the costs of repair and/or replacement.
2. The warranty provision of the contract was not implicated by the circumstances of this matter.
3. Defendants' sub-standard performance violated Section 2(4)(xvi) of the UTPCPL.
4. John Barrera is not personally liable in this matter.
5. Defendants are entitled to set-off for the outstanding balance on the pool safety cover.

VERDICT

AND NOW, this 20th day of October 2015, for the foregoing reasons, the Court finds in favor of Plaintiffs and against Defendants Aqua Vantage Pools & Spas, Wilkes Pool of Mifflin, Pool Tech of Mifflin, Inc., and Pool Tech, Inc., jointly and severally, in the amount of $33,767.20, plus legal interest from this date.

The claims as to Defendant John Barrera only are DISMISSED.[7]

BY THE COURT,

Dudley N. Anderson, Judge

cc: William Carlucci, Esq.
Gregory Moro, Esq.
105 East Market Street, Danville, PA 17821
Gary Weber, Esq.
Hon. Dudley Anderson

[7] At trial, Plaintiffs withdrew their claims against Defendant Mary Price and the court issued an order accordingly, dismissing the matter as against her only.