IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

RICHARD and DEBRA KAY JANSEN,

Plaintiffs,

v.

MEMORANDUM AND ORDER
04-C-344-S

NORTHERN VISIONS, INC.,

Defendant.

Plaintiffs Richard and Debra Kay Jansen commenced this breach of contract and negligence action alleging that defendant Northern Visions, Inc. overcharged them for the construction of a log home and breached warranties relating to roof construction. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. The matter is presently before the Court on defendant's motion for summary judgment. The following is a summary of the facts viewed most favorably to plaintiffs.

FACTS

Defendant is a construction contractor and a representative of Town and Country Cedar Homes Company. Town and Country is in the business of selling materials and designs for the construction of log homes. On October 30, 1997 plaintiffs and defendant entered into a Purchase and Sale Agreement which included the following provisions:

> Seller is an independent contractor expressly authorized to sell products manufactured by Town & Country Cedar Homes Company. The materials contracted for by the Purchaser are being sold to the Purchaser by the Seller and not by Town & Country Cedar Homes Company. Town & Country Cedar Homes Company is a party to this Agreement only with respect to the warranties it makes to Paragraph 1 as set forth hereinafter.
>
> DESCRIPTION OF TOWN & COUNTY CEDAR HOME MATERIALS
>
> The Purchaser agrees to purchase from Seller and the Seller agrees to sell to Purchaser the below described Town & Country Cedar Home Company materials which shall be supplied in accordance with the Town & County Cedar Homes Company specifications published and dated 1997.
>
> . . .
>
> PRICE AND PAYMENT TERMS
>
> This is an Agreement for the purchase and sale of materials as specified herein and does not include the furnishing of construction services or labor. . .

The agreement included Town and Country's express warranty of the materials. The agreement further included a complete contract provision which disclaimed all additional representations and warranties and required that modifications be in writing.

The parties understood that defendant was to construct the home from the Town & Country materials in accordance with the design created by Town & Country in cooperation with defendant and approved by plaintiffs. Plaintiffs told defendant that they intended to spend approximately $600,000 for the completed home. Defendant represented that the total home cost would be about 2 to 2.2 times the cost of materials. On July 3, 1998 defendant sent plaintiffs an e-mail which stated in part:

> T & C portion of costs can be reduced by $95,569 by incorporating changes discussed at our 6/25 meeting. Without getting into micro management, the total cost delivered to jobsite and including Wisconsin tax is $306,430. Based on the finished studio (bonus room) and the building code requirements for an attached garage, the T & C cost is $55.05 per square foot. Multiply package cost by a factor of 2 to arrive at completion cost of $110.00 per square foot. This is being very creative considering the national average for the T & C log product is $125 per square foot.

Defendant began construction in fall 1998 on a lot owned by plaintiffs. Pursuant to an understanding of the parties defendant sent plaintiffs monthly draw requests for materials and labor. The draw requests were not detailed but stated how much was requested for materials and labor. Plaintiffs sometimes asked questions about the requests before payment, but paid the draws when requested until fall of 1999, when the draws to date were approaching $600,000 and the project appeared to be far from completion. Plaintiffs expressed concern that there were cost overruns and asked for an accounting of expenses to date from defendant. After defendant failed to provide an accounting for several months plaintiffs refused to pay additional draws. In response, defendant told the subcontractors to discontinue work on the house.

After plaintiffs agreed to resume paying the draws defendant resumed work on the house. Plaintiffs refused to pay a $3500 landscaping charge which exceeded the quoted landscaping cost. Plaintiffs paid all other draw requests through the completion of

the house in fall of 2000, by which time they had paid a total of about $981,000. Thereafter plaintiffs renewed their request for and received an accounting of building costs from defendant which revealed the overcharges which are the basis for their claim. During the construction plaintiff's approved additions not in the original plan which cost about $65,000.

Each winter since the completion of the home ice dams have formed on the roof. Plaintiffs complained to defendant about the ice dams but defendant was unable to correct the problem. During construction defendant used blown-in cellulose attic insulation rather than insulation batting as specified in the original plan. Defendant represented to plaintiffs that the blown in insulation would be superior to the batting. The insulation choice may have contributed to the ice damming problem. No damage to the house or to other personal property has occurred as a result of the ice damming.

MEMORANDUM

Defendant moves for summary judgment on all claims on the basis that any tort claim is barred by the economic loss doctrine, the contract claim for overpayment is barred by the voluntary payment rule and there is no warranty which would encompass the claim relating to the ice damming. Plaintiffs oppose each of these positions.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Negligent Construction and the Economic Loss Doctrine

The economic loss doctrine generally precludes the purchaser of a product from recovering economic loss caused by product defects under a negligence theory. Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). The premise of the doctrine is that such disputes are better resolved under the law of contracts and warranties. Id. However, the doctrine applies only to the purchase of products and is

inapplicable to the negligent provision of services. Insurance Co. of North America v. Cease Electric Inc., 2004 WI 139, ¶52, 688 N.W.2d 462. Plaintiffs' sole basis for avoiding the limitations of the economic loss doctrine is that the construction contract with defendant was a contract for services rather than the sale of a product. Accordingly, resolution of the motion depends on the characterization of the relevant agreement as one for a product or services.

To determine whether a contract is one for goods or services Wisconsin courts apply the predominant purpose test:

> "whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of a service, with goods incidentally involved (e.g., contract with an artist for a painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)." If the predominant purpose of the contract is for a product, the economic loss doctrine applies.

Linden v. Cascade Stone Co., 2004 WI App 184, ¶9, 687 N.W.2d 823 (quoting Biese v. Parker Coatings, Inc., 223 Wis. 2d 18, 25, 588 N.W.2d 312 (Wis. Ct. App. 1998)).

Plaintiff seeks to characterize the home construction contract as distinct from the materials purchase contract thereby rendering the construction contract one for services which is outside the economic loss doctrine. Such an approach is expressly rejected by Linden which holds that regardless of the existence of subcontracts, the correct approach is to determine the dominant purpose of the entire underlying transaction. Id. at ¶11.

> At its core, the Linden's complaint is that the house they received is not the house for which they contracted. Groveland's decision to subcontract portions of the house construction to subcontractors should not permit the Linden's to make an "end around" their contract and the economic loss doctrine.

Id. at ¶14. There is no meaningful way to distinguish Linden from this case. The underlying transaction between plaintiffs and defendant was for the construction of a house. The fact that the transaction was represented by separate contracts between the parties for materials and labor is irrelevant. Plaintiffs' tort claim is precluded.

Breach of Contract – Overcharges

Plaintiffs claim that defendant charged them more than was permitted under the terms of their agreement. For purposes of this motion defendant concedes that it overcharged plaintiffs in violation of the contract but contends that any such claim is barred by the voluntary payment rule.

The voluntary payment rule provides that when money is paid voluntarily, with knowledge of all the facts, and without fraud or duress, the payor cannot sue to recover it. Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership, 2002 WI 108, ¶13, 649 N.W.2d 626. "Voluntariness in the doctrine goes to the willingness of a person to pay a bill without protest as to its correctness or legality." Id. at ¶15. Considering the facts presently before the Court, defendant is not entitled to a

determination that the payment was voluntary in this sense.

Plaintiffs complained that they believed they were being overcharged and demanded an accounting. Although they knew the facts concerning the terms of the contract and the total billings to date, they could not have known without an accounting the extent to which their current payments were funding costs under the original contract or later requested additions to the contract. Plaintiff's insistence on an accounting at one point leading to the refusal to pay certainly put defendant on notice that they challenged the correctness of the billings. "All that a payor has to do to sidestep the voluntary payment doctrine is to make some form of protest over the fee prior to, or contemporaneous with payment." Id. at ¶33.

In any event, it appears likely that payment was not made with knowledge of all the facts as required by the doctrine. The lack of knowledge in this case is distinguishable from plaintiff's lack of knowledge in Putnam. Putnam refused to find lack of knowledge because the plaintiffs "failed to exercise any diligence to inquire into or contest the cost-accounting basis of [defendant's] late fee" and "the customers failed to argue that [defendant] had a duty to reveal this cost-accounting information..." Id. at ¶¶19-20. Plaintiffs, in contrast, repeatedly and emphatically demanded the unknown accounting information and which was refused by defendant. It is surely inconsistent with the purpose of the doctrine for

defendant to withhold requested relevant facts from plaintiffs and then assert that the payment was voluntarily made with full knowledge of the facts. Accordingly, defendant's motion for summary judgment on the basis of the voluntary payment rule must be denied.

Breach of Contract – Warranties

Plaintiffs claim that defendant breached both implied and express warranties by improperly insulating so as to create ice damming on the roof. Defendant denies the existence of implied or express warranties in the contract and alternatively asserts that any such warranties were disclaimed in the written agreement.

Defendant's contract with plaintiffs for the construction of the home included an implied warranty to perform with skill and due care. Brooks v. Hayes, 133 Wis. 2d 228, 234-35, 395 N.W.2d 167 (1986). Defendant argues to the contrary that because Wis. Stat. § 706.10(7) expressly creates such an implied warranty for sales of homes on land owned by the seller, by implication there is no such warranty where the land is owned by the purchaser. Defendant's argument is directly contradicted by Brooks which acknowledged § 706.10(7) at the same time it affirmed a common law implied warranty for home purchasers in plaintiff's circumstances. Id. at 234-235, n.3. The facts may permit a finding that defendant

breached its implied warranty to perform with due care by insulating improperly.

It also cannot be determined as a matter of law that defendant made no express warranty concerning the blown-in insulation. Drawing inferences most favorably to plaintiffs, defendant represented that blown-in insulation would perform better than the batting insulation previously specified and plaintiffs acquiesced in its use based on this representation. An express warranty can be any representation of fact "respecting the quality of the article or the efficiency of the property sold" which is relied upon by the purchaser. Wis. Civil JI 3220. It cannot be determined as a matter of law whether defendant's statements to plaintiffs concerning the asserted superior performance of the substituted insulation satisfied the requirements for an express warranty under the circumstances or whether that warranty was breached by the choice and installation of the insulation.

The remaining question is whether the defendant effectively disclaimed any implied or express warranty. It did not. The written agreement between the parties, as evidenced by the excerpts set forth above, is an agreement for the purchase of materials only. It expressly does not include a contract for construction of the home and therefore does not speak to any warranties that apply to construction or disclaimers of construction warranties. Accordingly, plaintiffs are not precluded from pursuing their

claims that defendant installed insulation without due care and skill and that the result was contrary to defendant's express representation of superior performance, and that the faulty insulating caused the ice damming.

ORDER

IT IS ORDERED that Defendant's motion for summary judgment is GRANTED as it concerns plaintiffs' tort claim and is in all other respects DENIED.

Entered this 1st day of February, 2005.

BY THE COURT:

JOHN C. SHABAZ
District Judge