

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 647-800

DIVISION "I"

BANNER PROPERTY MANAGEMENT, INC.

VERSUS

SHERIL LOUGE WIFE/OF AND DAVID LOUGE

FILED

DEPUTY CLERK

POST-TRIAL MEMORANDUM

NOW HERE COMES Plaintiff, Banner Property Management, Inc., through undersigned counsel, who respectfully submits the following memorandum as requested by Your Honor during the trial of this matter on February 19, 2009.

I. Introduction

It is undisputed that there is a contract between the parties, and that the Plaintiff performed work at the Defendant's property. There is some factual disagreement, however, as to the amount Defendants agreed to pay Plaintiff for its services, and the degree of work completed.

Based on the evidence and testimony presented, therefore, this Court is being called upon to make two primary determinations:

- (1) What work was completed by Plaintiff on the Defendant's property; and
- (2) What did Plaintiff and Defendant agree would be compensation for the work.

II. Degree of Work Completed by Banner Property Management

During the trial of this matter, Plaintiff, Banner Property Management, Inc. (BPM) introduced testimony from Mr. Marc Banner, a member of BPM, Roy Moloncon, an employee of BPM and supervisor on the Defendant's property, and Mr. Marshall Taylor, a subcontractor of BPM who performed the electrical work at the Defendant's property.

Mr. Banner and Mr. Moloncon each testified that BPM performed certain work at the Defendant's property, including: (i) the gutting of the home; (ii) treating the home for

mold; (iii) installation, hanging, taping and floating of all sheetrock and insulation; (iv) wiring throughout the home; (v) installation of a new electrical panel; (vi) installation of kitchen cabinets in full; (vii) installation of crown molding, baseboards, door frames, interior doors and other trim; (viii) texturing and priming of all walls and ceilings; (ix) installation of a new jacuzzi tub in the hall bath; (x) movement of walls and re-arranging of the master bathroom as per the “change order;” and (xi) heating, venting and A/C duct and air supply work.

Mr. Marshall Taylor testified that he was hired and paid to perform certain electrical work at the property and that he (i) did install wiring and switches throughout the property; (ii) did install a new electrical panel; (iii) did complete the electrical rough-in at the property; and (iv) did complete the work reflected on the invoices introduced into evidence.

In large part, the Defendant did not dispute the above-assertions. Instead, the Defendant went through various line items within “stick estimates” and complained of their incompleteness. Despite general agreement as to the scope of the work completed by BPM, the Defendant argued that roughly only 25% of the work was completed by BPM. Defendant also testified, however, that two weeks prior to BPM’s termination from the jobsite, Countrywide inspected the property and noted it 70% complete.

The inspection by Countrywide supports the testimony of Marc Banner and Roy Maloncon that the property was approximately 60-65% complete.

In addition to the introduced testimony, the Plaintiff introduced the following exhibits at trial to demonstrate the amount of work completed by it:

- (a) Plaintiff 2: “Stick” estimate #1. As testified by Mr. Banner, this was an estimate created by BPM of the repairs required to restore Defendant’s property to its pre-flood condition. Mr. Banner testified that he delivered this document to Allstate Insurance Company in January 2006;
- (b) Plaintiff 1: “Stick” estimate #2. As testified by Mr. Banner, this document was sent to Defendants as BPM’s bill, and purported to list the work actually performed by Banner Property Management. See also Plaintiff 5, correspondence from BPM to Defendants.

- (c) Plaintiff 9 is a calendar kept by Defendant Louge. The entry for January 29th reflects that the country-wide inspection noted work as 70% complete.
- (d) Plaintiff 11 and 12 are invoices and accounting reports that demonstrates the amount spent by Banner Property Management on crew and subcontractors. It does not reflect BPM's overhead, the cost of the project supervisor and BPM's markup and profit.

Plaintiffs assert that based on the evidence, this Court should find that the following work was completed:

Description of Work	% of Completion
\$5,000 "Change Order" for all modifications and rough carpentry	100%
Demolition of insulation, drywall, ceramic flooring, baseboards, appliances, cabinetry	100%
Dehumidifying and Fanning Property	100%
Installation of insulation	100%
Installation of drywall, including hanging, taping and floating of drywall (4')	100%
Installation and repair of drywall above 4' mark in miscellaneous rooms	100%
Electrical rough-in work and installation of additional electrical panel	100%
Installation of kitchen cabinets	100%
Installation of hall Jacuzzi tub, and purchase of tub	100%
Prime and Texturing of all walls and ceilings	100%
Painting one coat on walls	15%
Installation of crown molding, door frames, interior doors, finish carpentry and trim work	100%
HVAC work, duct work and air supply work	100%
Rough Plumbing	100%

III. The Agreed Amount of Compensation

In addition to making a determination as to the amount of work completed by Plaintiff, this Court is called upon to decide how the parties agreed the Plaintiff would be compensated for the work.

During the trial of this matter, Plaintiff introduced the testimony of Marc Banner, a member of BPM, who testified that the Defendant agreed to compensated Plaintiff for its work in the amount equal to what Defendant recovered from its insurance company,

Allstate, for the work. The Plaintiff introduced testimony by Marc Banner and Roy Maloncon that this arrangement was made with other customers on the same street.

During cross, the Defendant agreed that the Plaintiff was to be compensated, but would not agree to any amount or recognize any agreement. During the deposition of Mr. Louge¹, Mr. Louge agreed that the prices in Plaintiff's Exhibit 1 (Stick No. 2) would be fair compensation for Plaintiff's work. However, during his trial testimony, he refuted the same. Moreover, the Defendant complaint of differences in price between the Stick No. 1 (Plaintiff 2) and Stick No. 2 (Plaintiff 1).

For ease of viewing, the Plaintiff's have prepared the following chart from adding relevant line items within Plaintiff 1, Plaintiff 2 and Plaintiff 3 (Allstate's Flood Payment and Adjustment).

(This section intentionally left blank. Chart on following page).

¹ Deposition of Mr. Louge introduced as Plaintiff 14. Also, excerpts of the deposition is contained within the Plaintiff's Trial Memorandum.

Work	Stick 1 (Jan '06)	Stick 2 (Mar '06)	Allstate
"Change Order" - rough carpentry and wall modifications	N/A: \$5,000.00	N/A: \$5,000.00	N/A: \$5,000.00
Demolition of insulation, drywall, ceramic flooring, baseboards, appliances, cabinetry	\$8,300.69	\$4,225.65	\$6,123.17 ²
Dehumidifying and Fanning Property	2,632.00	2,632.00	\$2,632.00
Installation of insulation	\$0.00	\$0.00 ³	\$1,599.94
Installation of drywall (4')	\$7,352.77	\$13,100.53	\$13,475.48 ⁴
Installation and repair of drywall above 4' mark in miscellaneous rooms	\$0.00	\$2,070.00	\$0
Electrical rough-in work and installation of additional electrical panel	\$2,685.62	\$2,999.26 ⁵	\$108.05 ⁶
Installation of kitchen cabinets ⁷	\$3,287.57	\$1,637.50	\$6,021.40
Prime and Texturing of all walls and ceilings	<u>\$12,245.92⁸</u>	\$8,178.53	\$5,589.80 ⁹
Painting one coat on walls		\$1,696.00 ¹⁰	
Installation of crown molding, door frames, interior doors, finish carpentry and trim work	\$765.22	\$3,571.78	Unknown
Rough Plumbing	\$1,161.47	\$2,679.08 ¹¹	\$0.00
Mold Treatment of Property	\$2,967.21	\$2,967.21	\$2,194.54
Additional Misc. – Cabinets: BPM testified that it paid Cambell Cabinets after discontinuing work at Louge property b/c Louge's did not pay balance	\$650.00	\$650.00	\$650.00
Additional Misc. – Doors. BPM testified that it was charged by Amazing Windows and Doors for external doors delivered and accepted by Defendants on Plaintiff's account	\$1,331.56	\$1,331.56	\$1,331.56
HVAC work, duct work and air supply work	\$725.00	\$725.00	\$1012.61 ¹²
Installation of hall Jacuzzi tub, and purchase of tub	\$0.00	\$847.91	\$0.00
Totals:	\$49,105.03	\$52,861.64	\$45,738.55
Overhead & Profit (10 and 10)	\$9,821.00	\$10,572.33	\$9,147.71
Subtotal:	\$58,926.03	\$63,433.97	\$54,886.26
Total Judgment Requested (Minus \$15k Paid)	\$43,926.03	\$48,443.97	\$39,886.26

² This figure includes does not include line items for tearing out carpet and carpet pads, which Plaintiff and Defendant agree Plaintiff did not do. It does, however, include tearing out ceramic flooring and baseboards, which Plaintiff contends it did perform and Defendants contend it did not.

³ While it is undisputed that Plaintiff installed insulation at the property, the Stick 1 and Stick 2 did not allocate amounts for this. Plaintiff represents that this was a mistake, and left off the "stick" estimates. It was included in Allstate's adjustment.

⁴ This figure does not include drywall repairs made beyond the 4' drywall replacement, or any drywall work associated with repairs made above and beyond flood restoration work ("upgrades").

⁵ Plaintiff paid Taylor Works (as per testimony from Marshall Taylor) \$3,971.87.

⁶ Allstate did not compensate Defendants for a new electrical breaker b/c this was part of their property "upgrade," however, BPM did perform the work. Also, Allstate did not pay to have electrical work roughed-in, although work was required and performed.

⁷ Kitchen cabinets installed by Plaintiff were an upgrade from Defendant's previous cabinets. Defendant Mr. Louge testified that the new cabinets were over \$14,000.00, whereby old cabinets were just \$4,855.00 to replace. The Defendants

⁸ Stick 1 did not separate priming from painting, and included prime + 3 coats of paint.

⁹ Allstate did not pay for sealing and painting of ceilings, nor for texturing of all walls and ceilings – all work undisputedly performed by Plaintiff. Allstate did not separate priming from painting, and included "seal and 2 coats" of paint.

¹⁰ Plaintiff concedes that only one room, or 15% of the house, had one coat of paint. Therefore, they are only entitled to 15% of the amount allocated for painting the house. This Stick 2 figure of \$1696.00 is the amount charged for 1 coat of paint only.

¹¹ Stick 2 is greater than Stick 1 b/c of extra work required for upgrades (jet tub, double sink, etc.)

¹² Payment for Condensor not within Stick 1 or Stick 2. As per Plaintiff's Exhibit 11 and 12, and testimony, HVAC work was paid for and completed for \$725.00, excluding O&P

The Plaintiff contends that the evidence demonstrates that the Defendant retained the Plaintiff to provide construction services on two fronts: (1) To restore the property to its pre-flood condition; and (2) To make certain upgrades to the property.

The Plaintiff contends that the evidence demonstrates that the Defendants agreed to compensate Plaintiff \$5,000.00 for one certain change order, an amount equal to what Allstate paid for damages on items that would be covered by insurance, and an amount equal to the “stick” prices on items that were not covered by insurance.

During Mr. Louge’s deposition, as read at trial and introduced as evidence, Mr. Louge agreed that the prices of Stick 2 (Plaintiff’s Exhibit 1) would be “fair compensation” for Banner Property Management’s work.

The Plaintiff prays for a judgment finding that the amounts set forth in the column titled “Stick 2 (March 06)” - \$48,443.97 - be accepted as the agreed upon compensated for the associated items.¹³

IV. Other Damages

A. The Defendants Failed to Perform Under the Contract, and are in Breach

Louisiana Civil Code Article 1994 provides as follows:

Art. 1994. Obligor liable for failure to perform
An obligor is liable for the damages caused by his failure to perform a conventional obligation.
A failure to perform results from nonperformance, defective performance, or delay in performance.

It is well established under Louisiana jurisprudence that if the owner denies the builder access to the work site, or otherwise interferes with the performance of the contract, or refuses to pay the contractor when payment is due, the contractor may be discharged from liability and excused from further performance. *See* La. C.C. Art. 1772. *Olympic Ins. Co. v. H.D. Harrison, Inc.*, 463 F.2d 1049 (5th Cir. 1972); *Gibbs Constr. Co.*

¹³ Incidentally, Plaintiff and Defendant testified that the Stick 1 / Plaintiff 2 encompasses all the work to be performed at the property, with additional upgrades, etc. The total amount on the Stick 1 / Plaintiff 2 is \$78,062.83. Upgrades included (i) the undisputed \$5,000.00 change order; (ii) the undisputed jet tub \$847.91; and (iii) additional sheetrock work \$2,070.00. Considering a rough total of work of \$85,980.74 – the sum of these figures plus overhead and profit – the totals requested by Plaintiff in Judgment is 51%, 56% and 46% respectively. These numbers are much closer to the 60-70% estimates of completion by Countrywide, Mr. Banner and Mr. Marolcon, than Mr. Louge’s 20-25% estimated completion amount.

v. Thomas, 500 So.2d 764 (La. 1987).

In the case of *Giddens v. Alpine Constr. Specialties, Inc.*, the court held that a contractor was entitled to refuse to perform a contract based on the other party's failure to pay amounts due. 401 So.2d 1026 (La. App. 2d Cir. 1981).

Similar to the facts in *Giddens*, and in accordance with Art. 1772, in this case Banner Property Management's failure to continue work under the contract with the Defendants should be excused in light of the Defendants clear failure to pay it amounts that were due.

In calculating the damages owed to Banner Property Management, this Court can be guided by Louisiana C.C. Art. 1995, which provides that "Damages are measured by the loss sustained by the obligee and the profit which he has been deprived."

The obligee (Plaintiff) has been deprived its overhead and profit on this project (\$9,871.02 – as per Plaintiff trial exhibit 1), and has sustained loss in the amount of \$15,288.55 (The amount expended by Plaintiff as per Plaintiff exhibit 11, subtracted by the amount paid by Defendants).

Similar cases before Louisiana courts include *White v. Rimmer & Garrett, Inc.* wherein the court held that damages due a subcontractor for being deprived of its right to perform a contract consisted of profits for which the subcontractor was deprived of. 328 So.2d 686 (La. App. 3rd Cir. 1976). See also *Tom Black & Associates, Inc. v. Thibaut Constr. Co.*, where a subcontractor terminated prior to completion of a contract was allowed to recover the cost of what it had put into the work, plus the loss of potential profits.

B. BPM Has Substantially Performed Under Contract

In addition to the above-argument, the Plaintiff avers that it has substantially performed on its contract with the Louges and is therefore entitled to recover the full amount of the contract price, less the cost of necessary repairs and remedial work. *E.G. Schafer Constr. Co. v. Gallagher Transfer & Storage Co.*, 495 So.2d 348 (La. App. 4th Cir. 1986).

The Plaintiff avers that it will show at trial that it has substantially performed under

the contract, and therefore, the burden should shift to the owner to demonstrate defects and omissions on the part of the contractor and the cost of repairing these items in order to obtain an offset from the contract price. *Pete's Plumbing & Heating, Inc. v. Geissert*, 413 So.2d 554 (La. App. 4th Cir. 1982).

The Plaintiff requests damages in the amount of the contract price of \$59,226.12, minus amounts spent by the defendant that entitle it to an offset.

C. Damages Requested

As per footnote 15 herein, the estimated total contract price is \$85,980.74. This would include \$14,594.06 of overhead and profit payable to Banner Property Management.

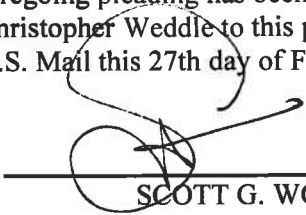
As damages for lost profits, Banner Property Management prays for the difference between \$14,594.06 and the overhead and profit awarded as per the above-drawn chart.

If, for example, this Court awards Banner Property Management damages equivalent to the Stick 2 numbers, the overhead and profit awarded therein would equal \$10,572.33. The difference between the overhead and profit awarded, and the amount "lost" by Banner Property Management, would be \$4,023.73.

Banner Property Management, Inc. also avers that the Defendants' non-performance under the contract was in bad faith, and prays for attorneys' fees under La. C.C. art. 1997. Banner Property Management requests attorneys fees in the amount of \$7,500.00.

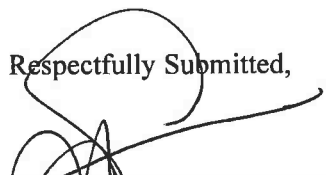
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on Christopher Weddle to this proceeding via U.S. Mail this 27th day of February, 2009.



SCOTT G. WOLFE

Respectfully Submitted,



Scott G. Wolfe, Jr. (Bar Roll 30122)
WOLFE LAW GROUP, L.L.C.
4821 Prytania Street
New Orleans, LA 70115
P: 504-894-9653
F: 866-761-8934
Attorney for Plaintiffs
Banner Property Management, Inc.