STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

OLAX, INC., et al.,

Plaintiffs,

Case No. 23-201525-CB
v **Hon. Michael Warren**

WINWARD BAY CONDOMINIUM ASSOCIATION,

Defendant.
_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW, & JUDGMENT

At a session of said Court, held in the
County of Oakland, State of Michigan
September 23, 2024

PRESENT: HON. MICHAEL WARREN
_____/

OVERVIEW

This dispute centers on two contracts between the Plaintiffs Olax, Inc. ("Olax Siding") and Olax Master Roofing, LLC ("Olax Roofing") and Defendant Windward Bay Condominium Association ("Windward") for siding and roofing services. In particular, Windward contracted with Olax Siding to install siding and gutters on seven residential buildings (the "Siding Contract") and with Olax Roofing to replace roofing on three residential buildings (the "Roofing Contract").

At stake is whether Olax Siding can recover damages for the Siding Contract when it has failed to credibly substantiate the damages arising from such a breach? Because the answer is "no," this breach of contract claim is dismissed.

Also at stake is whether Windward can assert a claim for conversion in connection with a deposit for materials for the Siding Contract when it was the first breaching party and the funds at issue were provided to the Plaintiffs voluntarily? Because the answer is "no," this counterclaim is dismissed.

Also at stake is whether Olax Roofing can recover damages for the Roofing Contract, or whether Windward is entitled to recovery for breach of contract, when Olax Roofing fully performed its obligations under the Roofing Contract and Windward has failed to fully pay under the contract? Because Windward breached the Roofing Contract by failing to pay, Olax Roofing is entitled to full payment.

FINDINGS OF FACT

The Court makes the following general findings regarding the credibility, demeanor, veracity, vocal tone and expression, tonality, honesty, motivations and perceptions of the witnesses:

- *Alan Marchio.* His testimony was straightforward, genuine, consistent, persuasive, and authentic. Unless otherwise indicated by the Findings of Fact, his testimony is afforded great weight and credibility.

- *Ian Konnie.* His testimony was straightforward, genuine, consistent, persuasive, and authentic. Unless otherwise indicated by the Findings of Fact, his testimony is afforded great weight and credibility.

- *Anton Rozhanskiy.* Generally, his testimony was straightforward, genuine, consistent, persuasive, and authentic in connection with the Plaintiffs' performance under the Roofing Contract and the Siding Contract. Unless otherwise indicated by the Findings of Fact, his testimony is afforded great weight and credibility with regard to the breach of contract claims and the conversion claim. His testimony with regard to damages involved in the Roofing Contract was also credible and afforded great weight. However, his testimony with regard to any damages arising from the breach of the Siding Contract was unconvincing and conjecture, unbacked by documentation or meaningful analysis. As such, his testimony with regard to damages under the Siding Contract is afforded no weight or credibility.

- *Matthew Brown.* His testimony was on occasion credible, but his testimony with regard to who breached the agreements and why they were breached was unpersuasive. His testimony is given little weight with regard to those issues.

- *Michael Whitbeck.* Like Brown, his testimony was on occasion credible, but his testimony with regard to who breached the agreements and why was unpersuasive. His testimony is given little weight with regard to those issues.

The Court makes the specific Findings of Fact based on the Court's assessment of the credibility, demeanor, veracity, vocal tone and expression, tonality, and honesty of the witnesses and the exhibits before it by a preponderance of evidence (unless otherwise indicated):

- Windward is a condominium association which recognized the need to replace roofing on three residential buildings as well as siding and gutters for seven residential buildings. In a true feat of due diligence, as a member of Windward's Board of Directors, Brown contacted over twenty contractors and obtained at least seven bids. In late 2021, the Plaintiffs and Brown began preliminary discussions. In February 2022 there was a sales meeting with the Plaintiffs and extensive pre-meeting and post-meeting

discussions. Over the course of these discussions, the Plaintiffs informed Windward that any siding job could not begin for about three months after a contract was signed and materials were chosen because of the lag-time from the siding manufacturer and the need to schedule work crews. An estimate for the jobs was prepared by the Plaintiffs in February 2022. The Plaintiffs informed Windward that if Windward wanted the job to start in the summer, it should sign an agreement immediately or quickly thereafter. The siding project would take six months to complete, using two crews of five people, which would be a large commitment of the Plaintiffs' business, which would push out other customers for such a time. The plan was to complete two buildings at a time.

- Although Windward was anxious to move forward, it needed to require lender approval to finance the projects. Once the approval was obtained, the Plaintiffs executed the Siding Contract and Roofing Contract on D-Day (June 6), 2022 and Windward counter-signed the agreements on Flag Day (June 14), 2022.

- Under the Siding Contract, Windward agreed "to pay a 10% deposit ($51,734) to hold my position in the job queue. When the time is nearing to start the job, I agree to pay an additional 15% deposit ($77,600) to order material. For every 2 buildings complete, I agree to pay an additional 25% ($120,334) to order additional material for the next buildings. The final 25% will be due upon completion of the project." Under the Roofing Contract, Windward agreed to pay "a deposit of 25% ($18,525) to order material and have it delivered to the property. Once the job is complete, I agree to pay the balance due of $55,575."

- On Flag Day, the Plaintiffs picked up a check from Windward in the amount of $147,859, which was a deposit under both the Roofing Contract and the Siding Contract. Although there were two separate contracts, all the parties agreed that the single check would work. With regard to the Siding Contract, the Plaintiffs received a $51,734 deposit (10% of the overall job price) and $77,600 for siding material (an additional 15% to order material for "When the time is nearing to start the job . . . ."). With regard to the Roofing Contract, the Plaintiffs received $18,525 (a deposit of 25%). These funds were voluntarily tendered by Windward. At the time the funds were tendered, all parties were under the hope and expectation that "the time is nearing to start the job" so long as certain decisions were swiftly achieved, such as choosing the siding materials.

- Although not required by the Siding Contract, the Plaintiffs offered and provided professionally prepared renderings of the siding, illustrating with

some precision the appearance of a completed residential building. Prepared by Konnie, three sets of renderings were prepared. The final rendering (choosing a quite nice nautical design and the type of siding) was delivered and approved in September 2022 (other than awnings). The Plaintiffs never offered (and there was never an understanding to the effect) that all seven buildings would require separate renderings. Some of the buildings have identical formats, so there are actually 3 different building types. Nevertheless, a single rendering is all that is necessary for all 7 buildings, especially in light of a final "walk through" where building specific issues would be identified before work commenced. Konnie billed the Plaintiffs $5,500 for the work performed on the renderings.

- The revised rendering included options for awnings. The Siding Agreement provides that awnings were to be re-clad with siding, but other options were presented by Konnie which intrigued Windward's Board of Directors. A physical sample of a potential awning was requested by Windward, which agreed to pay for it in November. The ordering of the sample was delayed for 2 weeks while Rozhanskiy was out of the country, and the awning was on back order, but it was eventually sent by the manufacturer, constructed in mid-December by the Plaintiffs and delivered to Windward.

- The amount of siding to be ordered was dependent on the awning selection. There are 51 awnings. Of course, ordering siding was dependent on the color chosen.

- By December 9, 2022, Olax Roofing had completed its services under the Roofing Contract. It asked for a final payment of $57,575 (this included an adjustment for additional materials).

- On December 12, 2022, Windward asked the Plaintiffs to apply the deposit made under the Siding Contract to the outstanding payment under the Roofing Contract, and a return of the remainder of the Siding Contract deposit while the project was in a "holding pattern." Windward stated it would pay the deposit again when the project continued.

- At a virtual meeting on December 14, 2022, three awning options were still under consideration. On December 18, 2022, via an email, Windward confirmed the color selection for the siding and rejected one type of awning type (prefabricated), wanted to discuss alternative options, and wanted to continue to consider and consult on a final awning choice. Windward conveyed it was "narrowing" decisions about light fixtures, which were dependent on determining the awning. It also confirmed an April Fool's Day (April 1), 2023 start date for the siding.

- Windward never selected the type of awning.

- The Plaintiffs asked the supplier of the siding to hold what material it had in its storage yard, but an additional quantity would need to be ordered. Depending on the awning decision, the amount of the siding would change.

- The siding would require a facade approval (separate from a general work permit), but this would have been perfunctory with this project. The Plaintiffs were responsible for obtaining such approval. In late December 2022, the Plaintiffs were willing to move forward with the project and agreed to bear the financial responsibility if the facade approval was denied.

- At some point Windward asked for pricing information for the siding, but the Plaintiffs declined to provide it as the Siding Contract was not a "cost plus" contract but a set price.

- Windward refused to sign an application for a work permit because the Plaintiffs would not accept an addendum to the Siding Contract.

- The Plaintiffs were ready to perform (once a decision on the awnings was made), but Windward terminated the siding project. However, the siding was never purchased (even though the Plaintiffs represented on December 12 that it would order the next day). The Plaintiffs never paid for any siding materials and have retained the deposit of $77,600 for materials.

- With regard to the roofing, Windward demanded that several changes be made as recommended by a combination of their independently hired inspector and an inspector for the City of Troy. The Plaintiffs performed such work as was necessary, including swapping out ridge vents with cam vents. In addition, Olax Roofing performed additional work required by Windward, but which was unnecessary. Olax Roofing billed Windward $3,200 for the additional repairs via a January 16, 2023 invoice. Windward's complaints about the additional $3,200 invoice are not credible.

- Afterwards, Windward paid $42,525 toward the roofing work, holding back $15,050 dependent upon the approval of the city's inspector. The inspector confirmed via a phone conversation with the Plaintiffs that the roof work was sufficient.

- In short, Windward owes Olax Roofing $15,050 under the original Roofing Contract plus an $3,200 for additional work, for a total of $18,250.

- On January 23, 2023, Windward sent an email to Olax informing it that "we have begun consulting with our attorney to review the existing terms of the contract and understand how we can improve. He will be sending a proposal sometime early next week, outlining next steps."

- Windward's attorney sent a letter dated February 3, 2023 asserting various complaints about the progress of the siding project and the performance of the Roofing Project. The letter asserted that "the Association is not seeking to renegotiate the agreed upon price and scope of the work reflected in the estimates. Rather, the Association is looking to add an addendum to the siding estimate to fully define the parties' agreement." The letter demanded a response within 14 days that the Plaintiffs were willing to negotiate an addendum. "If, on the other hand, Olax is unwilling to fully define its agreement with the Association for the siding project, please consider this letter to a termination of the siding estimate and a demand for a full refund of the $129,334 paid to Olax."

- Hoping the Siding Contract would continue, the Plaintiffs applied for a work permit on April 1, 2023.

- On April 6, 2023, Windward's attorney sent a demand letter to the Plaintiffs' lawyer. It provided, "We write to inform you that the Association is terminating its relationship with Olax, Inc. on both the siding and the and [sic] roofing project." It declares that "the parties will never reach an agreement for reasonable terms controlling" the roofing project, and that "Olax's unwillingness or inability to commit to a completion schedule alone illustrates that the scope of the siding project is beyond its abilities. The Association therefor demands a refund of the $129,334.00 ($51,734.00 deposit and the $77,600 payment for materials) that has been paid to Olax to date for the siding project." It also announced that Windward would "pay no additional amount of the roofing contract. The remaining $15,050 will first be applied to the inspection costs incurred by the Association in identifying problems with the Olax roofing work and next to another contractor to make the required repairs."

- The Plaintiffs failed to prove the amount of damages in connection with the Siding Contract. They provided no meaningful analysis or credible documentation to support their claims. In addition, the Plaintiffs did not lose work or pause jobs for the siding project as it was terminated by Windward before materials were ordered, work crews were assigned, or the project was even slotted in the work schedule.

- There was some delay and concern related to the repaving of a parking lot at Windward, but it in the end it is entirely immaterial.

CONCLUSIONS OF LAW

I
The Arguments

In sum, the Plaintiffs argue that the Siding Contract was violated because Windward impermissibly terminated it, while Windward argues the Plaintiffs violated the contract by failing to diligently follow through with its obligations under the contract.

Windward also claims that Plaintiffs converted the deposit for the siding project by retaining the funds but never started the work and never ordered the materials. The Plaintiffs counter that Windward voluntarily paid the funds and the Plaintiffs cannot be found liable for conversion because Windward was the first breaching party.

The Plaintiffs also argue that the Roofing Contract was violated because Windward never paid the outstanding $15,050 and failed to pay the additional $3,200 invoice for unnecessary work. Windward argues that the Roofing Contract was violated because the Plaintiffs never satisfactorily completed the roofing work.

II
The Law

A
Breach of Contract & First Breach

A claim for breach of contract lies when the following elements are established: "(1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422 (1991). The cardinal rule when interpreting contracts is to ascertain and give effect to the intention of the parties. *Zurich Ins Co v CCR & Co*, (on rehearing), 226 Mich App 599, 603 (1997); *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343 (1995). When interpreting a contract, the court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *Phillips v Homer*, 480 Mich 19, 24 (2008). In addition, "a contract is to be construed as a whole;. . . all its parts are to be harmonized so far as reasonably possible;. . . every word in it is to be given effect, if possible; and . . . no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable. *Roberts v Titan Ins Co (On Reconsideration),* 282 Mich App 339, 358; 764 NW2d 304 (2009) (quotation marks and citation omitted).

If the language of the contract is clear and unambiguous, it must be enforced as written. *Terrien v Zwit,* 469 Mich 41, 51-52 (2003); *Rory v Cont'l Ins Co,* 473 Mich 457, 468 (2005) (internal footnotes and quotation marks omitted) ("A fundamental tenet of our

jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract"); *Phillips*, 480 Mich at 24; *Coates v Bastian Bros, Inc*, 276 Mich App 498, 512 n 7 (2007).

"[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613 (2010) (quotation marks and citation omitted). See also *Flamm v Scherer*, 40 Mich App 1, 8-9 (1972), citing 5 Callaghan's Michigan Civil Jurisprudence, Sec. 249, pp 820-821 ("one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform"); *Verran v Blacklock*, 60 Mich App 763, 768 (1975); *Hanley v Seymour*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket No. 355033), p 4 (affirming this Court's ruling that no substantial first breach occurred). But this rule only applies if the initial breach was substantial, which requires the trial court to consider whether the nonbreaching party received the expected benefit. *Able Demolition v Pontiac*, 275 Mich App 577, 585 (2007). See also *Michaels v Amway Corp*, 206 Mich App 644, 650 (1994) (citation omitted); *Hanley*, slip opin. at 4. Other authorities characterize a substantial breach as occurring "where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby

rendered ineffective or impossible, such as the causing of a complete failure of consideration." *McCarty v Mercury Metal Co*, 372 Mich 567, 574 (1964).

B
The Law of Conversion

The Counterclaim asserts both common law and statutory conversion. Common law conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with the rights therein." *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc,* 497 Mich 337, 351-352 (2015), quoting *Nelson & Witt v Texas Co,* 256 Mich 65, 70 (1931) (citation and quotation marks omitted). See also *Lawsuit Financial v Curry,* 261 Mich App 579, 591 (2004) (citation omitted). "To establish a claim for common-law conversion, a plaintiff must show (1) an ownership interest, absolute or qualified, in identifiable personal property; (2) that he or she had the right to immediate possession of the property; (3) that the defendant wrongfully exerted dominion over the property inconsistent with the plaintiff's rights, and (4) actual damages." *In re Ralph A Siddell Living Trust*, unpublished per curiam opinion of the Court of Appeals, issued May 11 2023 (Docket Nos. 359979, 359991, 362535), p 7 (internal citations omitted).

Statutory conversion under MCL 600.2919a(1)(a), as amended in 2005, creates a remedy against a person who "steal[s] or embezzl[es] property or convert[s] property to the other person's own use." MCL 600.2919a. MCL 600.2919a states as follows:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.
>
> [MCL 600.2919a.]

"[T]he Legislature intended to create a separate statutory cause of action for conversion 'in addition to any other right or remedy' a victim of conversion could obtain at common law." *Aroma Wines*, 491 Mich at 340, quoting MCL 600.2919a. The statute does not define the term "conversion." "When a statute does not define a term, [Michigan courts] will construe the term according to its common and approved usage." *Nelson v Grays,* 209 Mich App 661, 664 (1995). Because the term "conversion" has acquired a peculiar meaning under Michigan common law, the common law defines the term for both common-law and statutory purposes. *Victory Estates LLC v NPB Mortg LLC,* unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 307457); p 2, quoting *Id.* (concluding that the common-law definition defines both common-law and statutory conversion under Michigan law). See also *Bronson Methodist Hosp v Allstate Ins Co,* 286 Mich App 219, 223 (2009) ("Because the role of the

judiciary is to interpret rather than to write law, courts lack authority to venture beyond a statute's unambiguous text. Undefined statutory terms are generally given their plain and ordinary meanings. Where words 'have acquired a peculiar and appropriate meaning in the law,' they should be construed according to that meaning'" [footnotes omitted]).

III
Analysis

A
The Siding Contract

The parties do not dispute that the elements of a contract exist in connection with the Siding Contract and the Roofing Contract, i.e., (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Thomas*, 187 Mich App at 422. In light of the Findings of Fact, Windward committed the first substantial and material breach of the Siding Contract. Windward first breached it by impermissibly terminating the agreement. Windward utterly refused to meet its additional obligations under the Siding Contract. However, as the Findings of Fact also reveal, the Plaintiffs failed to prove their damages. This claim is dismissed.

Because Windward committed the first substantial and material breach, it cannot enforce the Siding Contract and is not entitled to a refund of the deposit.

B
The Roofing Contract

In light of the Findings of Fact, Olax Roofing fully complied with the Roofing Contract and Windward breached it by failing to pay the full original invoice (i.e., by refusing to pay $15,050 under the original Roofing Contract) along with the additional $3,200 for additional work requested by Windward but which was unnecessary under the original Roofing Contract. Windward's complaints about the Plaintiffs' performance were not credible. Plaintiff Olax Roofing has suffered damages totaling $18,250.

C
Conversion

Windward voluntarily paid the Siding Contract deposit and it breached both contracts. The Plaintiffs have not exercised wrongful dominion over the deposit. As a deposit in connection with contracts it committed the first material breach, Windward has no ownership interest over the deposit - it cannot seek its return. Nor does Winward have the right to immediate possession of the property. See, e.g., *Chupra v Wayne Oakland Agency*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2008 (Docket No. 277585), p 4 ("Plaintiff also argues that there were questions of fact concerning his tortious interference, common law conversion, and statutory conversion claims. However, a review of the complaint reveals that these claims were all based on defendants' alleged breach of contract. Accordingly, the trial court properly dismissed them under the 'first breach' doctrine"). Moreover, "Michigan law holds that a voluntary

payment cannot be recovered when it is made with 'full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the part of the payer. . . .'" *Montgomery Ward & Co v Williams*, 330 Mich 275, 284 (1951), quoting *Pingree v Mutual Gas Co*, 170 Mich 156, 157 (1895).

JUDGMENT

In light of the Foregoing Findings of Fact and Conclusions of Law, a judgment in favor of Olax Master Roofing, LLC against Windward Bay Condominium Association is hereby awarded in the amount of $18,250, plus applicable interest.

All other claims and relief are hereby denied.

This Findings of Fact, Conclusions of Law, and Judgment resolve the last pending claim and close the case.

/s/ Michael Warren

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HON. MICHAEL WARREN
CIRCUIT COURT JUDGE