

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHRISTINE CLARK
a/k/a Christine Camm

Case No. 95-13621 K

Debtor

CHRISTINE CLARK
a/k/a Christine Camm

Plaintiff

-vs-

AP 97-1364 K

KENSINGTON BAILEY NEIGHBORHOOD
HOUSING SERVICES

Defendant

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DECISION AFTER TRIAL

This is a case in which a good and valuable not-for-profit agency misled one of its clients (despite all good intentions) to her injury, and must respond in damages. This is a tale of the tangled web that results from an important lie.

Both the facts of this case and its procedural posture are unique. The procedural posture cannot be understood without some factual background. Formal findings of fact are set forth later in this decision. This is a summary, in order that the Court may make clear what it views the issue before it to be.

Ms. Camm is a Chapter 7 debtor, and is the Plaintiff in this Adversary Proceeding. She owns and resides in a “duplex” or “double” - a home that is set up as two separate living units. This is a two-story home with one kitchen on the first floor and one on the second floor. Kensington Bailey Neighborhood Housing Services (“KBNHS”) is the Defendant. It is a not-for-profit organization that obtains funds from governmental grants and makes home improvement loans in the neighborhood. In 1992, Ms. Camm sought a loan with which to replace two furnaces, one to heat the first floor and one to heat the second floor. She also sought to do some general repairs and improvements. At KBNHS’ instruction, she solicited bids from contractors who were on KBNHS’ “approved” list, and entered into a contract with Big Four Industries, Inc. for \$10,000. All of the documentation was approved or provided by KBNHS. It was executed at a “closing” and KBNHS’ mortgage was recorded though no loan proceeds had yet been disbursed. \$10,000 was apparently escrowed. The work commenced.

For reasons to be set forth later in this decision, work halted mid-stream and Big Four was barred from the job by Ms. Camm because what she considered to be an illegal entry by a Big Four worker or subcontractor capped a short but intensive period of disputes between Ms. Camm and Big Four. Those disputes were “arbitrated” (so to speak) by KBNHS. Big Four sued Ms. Camm, and despite the fact that she had assistance of counsel, she suffered the entry of a judgment of approximately \$5100 for the work that had been done by Big Four, plus attorneys’ fees, costs, etc., a total of over \$7000.¹

Ms. Camm had filed her Chapter 7 proceeding in 1995. In 1997, she commenced this Adversary Proceeding against KBNHS seeking to vacate the mortgage they had filed and seeking money damages for what she alleged to be damage to her home caused by Big Four Contractors.

At all relevant times, and even as of the date of the first pre-trial in this Adversary Proceeding, KBNHS was still holding funds in escrow. Because as of 1997 it had not disbursed any monies, it was not owed anything. Having been sued by Ms. Clark, however, KBNHS filed a third party complaint here against Big Four.

At a pre-trial conference that occurred in chambers off the record, this writer informed counsel that because the judgment that Big Four obtained against Ms. Camm was a final judgment, this Court could not revisit that matter. (See *Kelleran v. Andrijevic*, 825 F.2d 692, 694-96 (2d Cir. 1982)). And when it was represented to the Court that KBNHS was holding

¹As explained later, Ms. Camm defended and lost the lawsuit after she was discharged in bankruptcy, and without asserting any violation of either the 11 U.S.C. § 362 stay or the 11 U.S.C. § 524 injunction.

funds “in escrow” for the satisfaction of that judgment, the Court suggested that the judgment be compromised by KBNHS, without prejudice to the Debtor’s arguments that KBNHS should not be entitled to a mortgage lien to secure those amounts. (But for the odd fact of her post-bankruptcy defending of the Big Four suit on its merits, her bankruptcy discharge would theoretically discharge any unsecured debt to KBNHS or Big Four.) KBNHS paid \$7,000, and began the interest “clock” ticking.

Importantly, the work contract was only between Ms. Camm and Big Four. But at least as important is the fact that there were substantial, detailed agreements only between KBNHS and Big Four, not just relating to all KBNHS projects in general, but also to this job in particular. The gravamen of Ms. Camm’s claim against KBNHS is that KBNHS had a duty to her to insure that Big Four observed all of the terms and conditions that were included in the agreements between KBNHS and Big Four: If those terms and conditions had been observed, the work would have been properly done, and, additionally, there would have been no collateral damage to her property.

Pre-trial proceedings in this Adversary Proceeding were hotly contested, and in the midst thereof (in 1999) Ms. Camm was able to obtain mortgage re-financing sufficient to give her monies with which to complete the work and correct the problems that had existed, she claims, since Big Four was barred from her house in 1992. The Court was not aware of this refinancing. And also unbeknownst to the Court, Ms. Camm agreed to let the new mortgage lender pay off KBNHS to extinguish its prior mortgage.

Thus, by the time this Adversary Proceeding came to trial on May 12, 2000, what

had started out as an effort by Ms. Camm to set aside KBNHS' mortgage on her property and to obtain money judgment for damages she claims were occasioned by KBNHS' failure to adequately oversee the work of Big Four, had become simply an action for money damages.

Using the new mortgage financing, she has hired others to complete the work that she claims Big Four was to have done, and to correct the problems that she claims Big Four created. And although there is no longer a KBNHS mortgage on her property, over \$7,000 of what she borrowed from the new mortgage lender was paid to extinguish the KBNHS mortgage.

KBNHS claims that it does not know why it is here. From its perspective, the issue of the quality and quantity of Big Four's work was laid to rest in state court in a fashion that binds Ms. Camm. It paid \$7,000 to Big Four from the escrowed funds. She should not, it argues, now be heard to complain further of the work that Big Four did. As this Court's first conclusion of law in this matter (and somewhat out of the sequence in which these matters are usually set forth in such decisions), the Court sets that argument to rest. What was found in state court was that Big Four had a contract right to receive approximately \$5100 (plus interest) for work it completed, and attorney's fees and costs as well. Some of the theories advanced by Ms. Camm impermissibly attack that judgment, but others of her theories clearly do not. In the "Amended Complaint" that she filed on July 15, 1999, the following can be seen: the first cause of action is moot, in that it sought to vacate the mortgage that no longer exists; the second cause of action clearly alleges violations of what Ms. Camm believes was KBNHS' duty to her, regardless of what turned out to be her contract liability to Big Four; the third cause of action addresses the failure of KBNHS timely to pay Big Four, causing Ms. Camm to be unable to

obtain new financing to complete the work and resulting in further damage to her residence; the fourth cause of action - seeking to hold KBNHS liable for the “improper workmanship” of its “agent” Big Four - clearly has been precluded by the prior state court judgment; and the fifth cause of action asserts that KBNHS engaged in unfair and deceptive activities and practices, and is thus sustainable (if proven) regardless of what Ms. Camm’s contract liability was found to be to Big Four.

Just as this Court earlier denied KBNHS’ motion to dismiss the complaint, the Court now rules that the second, third,² and fifth causes of action stated in the Amended Complaint are not precluded by the judgment obtained by Big Four.

To clearly focus the issue before the Court, this writer considers the matter as a hypothetical roll-back to the point in time that KBNHS paid Big Four as it was obliged to do by its escrow in favor of Big Four, and in light of the Big Four judgment against Ms. Camm. Must KBNHS now repay what Ms. Camm had to pay to satisfy KBNHS’S mortgage lien.³

FINDINGS OF FACT

²There is no evidence that Ms. Camm ever demanded that KBNHS pay Big Four. Indeed, even as of 1997, her attorney demanded that KBNHS NOT pay Big Four. However, the Court’s interpretation of the Amended Complaint, in light of the evidence adduced at trial, is that the third cause of action is a “subset” of the second and fifth. - - if KBNHS had a duty to protect Ms. Camm and to ensure that she got what she came to it for, then it should have mitigated the damages that Big Four was eventually able to prove against her. Again, out of the usual order of findings, this Court finds that KBNHS never failed to obey any request or demand by Ms. Camm or her counsel, to pay Big Four. Indeed, Ms. Camm’s lament on the witness stand at trial, that “if only [KBNHS] had paid Big Four \$3500 back in 1992, we wouldn’t be here today,” cannot be viewed as anything more than hindsight. As evidence, it is irrelevant.

³The subsequent satisfaction of the KBNHS mortgage to obtain refinancing cannot be allowed to muddle the analysis.

With two refinements, the above recitation of the occurrences up to the time when Big Four was hired and the mortgage was executed suffices as “findings of fact” for that period. One refinement is to add the fact that Ms. Camm had one prior experience with KBNHS. It was a successful experience, fixing in her mind the way that such a transaction with KBNHS was supposed to proceed. After the work was completed by the contractor in that prior instance, both she and a representative of KBNHS examined the work, and only when she pronounced it satisfactory was the contractor paid by KBNHS.

The other refinement is the matter of the documents used in the transaction here at issue. They are important for two reasons. First is the fact that there is no document at all that describes the role that KBNHS was to play, if any, in assisting the homeowner to obtain satisfactory work from the contractor. The absence of such a document is the reason that this matter has come before the Court.⁴

The documents executed only by KBNHS and Big Four were prolific as to the manner in which work was to be conducted on the homeowner’s premises, the quality of workmanship and materials, the duty of the contractor to guarantee and to re-do work that failed to conform to the requirements of the contract, the duty of the contractor to remedy defects, to clean the homeowner’s premises and leave it in a condition satisfactory to the homeowner, etc., etc. Ms. Camm’s claim against KBNHS here is that KBNHS failed to enforce against Big Four all of those provisions that were there not just to assure the value of KBNHS’ collateral, but

⁴The only document signed by Ms. Camm and KBNHS other than the documents evidencing the debt and mortgage is a simple agreement that says nothing material for today’s purposes. See Appendix 1 to this decision.

obviously and unambiguously existed for her protection as well.

Findings of fact regarding the contents of these documents need not be made. They speak for themselves. The documents will be appended to this decision and are hereby found to be the documents that governed the relationship among the debtor, KBNHS, and Big Four, as of the time that Big Four began work under the contract.

The Court makes the following further findings:

1. The work commenced in June, 1992.
2. The contract manager for KBNHS was Bruce Simmons, who had been involved in the transaction for KBNHS from the time that Ms. Camm came to it requesting a loan to replace two furnaces. He knew that Ms. Camm came to KBNHS for financing to replace two furnaces and to do other repairs.
3. Promptly after Big Four began work, Simmons was informed by Big Four that it had underbid the job and could not profitably provide two furnaces.
4. Simmons hid this fact from Ms. Camm. Here was the lie. He told her (and subsequently his own supervisor in a memo) a material untruth: instead of telling her that the contractor had underbid the job, he said (according to Ms. Camm) that Ms. Camm “could not” have two new furnaces, and blamed it on engineering problems in replacing the old style furnaces with contemporary furnaces. When asked by the Court itself at trial why he did not simply instruct Big Four to perform the contract that they had entered into, he responded that he believed that the best assistance that he could provide to the homeowner was to try and get a modified job done, rather than to have the contractor who underbid the job walk off the job. There is no

evidence that Big Four could not or would not have performed the contract at a loss to Big Four. And if Big Four had walked off the job, it is highly unlikely that Ms. Camm would ever have owed Big Four anything. Indeed, she might have recovered against Big Four.

5. Simmons told Ms. Camm that she “couldn’t have” the two new furnaces, but that she “could have” one new furnace installed, as well as improved duct work to provide adequate heating to the second floor, and he offered to let her amend the contract to provide for any other things (not in her initial contract⁵) that she might like done around the house in order to fully take advantage of the loan that was being offered.

6. The Court finds her testimony credible that the way Simmons explained it to her, she had “no choice” but to accept other work, work that she had not previously sought.

7. Thus deceived, she “agreed” to forgo the second furnace replacement (for a contract credit of \$3,000) and to accept the installation of (1) only one new furnace, (2) new duct work and returns, and (3) repair of an existing furnace, all for an offsetting \$3,000 “extra” to the contract. In exchange for this concession she was permitted to substitute the installation of a chain link fence on her premises.

8. She “agreed” to have the chain link fence installed around her entire property, front and back, so that it would serve to protect her grandchildren, but this was only after KBNHS led her to believe that Big Four could not be forced to perform the original contract at a loss, and could not have been “defaulted” on the contract and sued by Ms. Camm.

⁵The evidence is clear that Ms. Camm desired many improvements, and that she probed the possibility of getting some of them at various times after the work began. But there is no evidence of any ambiguity as to what Ms. Camm went to KBNHS for \$10,000.

9. The written “change orders” had signature lines for, and were signed only by, Bruce Simmons for KBNHS and a representative of the contractor, and those change orders called for the chain link fence to go around her front yard only, not around her entire property. There is no credible evidence that she agreed to this lesser fencing, nor any credible evidence that Simmons had authority to agree to lesser fencing for her.

10. Although the “time line” introduced into evidence in the form of a memorandum from Bruce Simmons to his supervisor is not completely consistent therewith, the Court specifically finds that the installation of the chain link fence was a contemporaneously agreed-upon *quid pro quo* for Ms. Camm’s willingness to accept only one rather than two furnaces. (The time line indicated Ms. Camm was inquiring about a chain link fence before it was learned that the subcontractor “could not” provide two furnaces. The two change orders, however, were executed contemporaneously, one day after it was so learned.)

11. During the period of a couple of weeks that Big Four or its subs were working on the premises, there were numerous complaints by Ms. Camm to Mr. Simmons about the work, as well as a number of inquiries made by Ms. Camm about possible other changes she would like made. Simmons was actively involved in these matters. It is possible that Ms. Camm’s demands seemed unreasonable, but it is and was then clear that she remained unhappy about not getting the second new furnace.

12. The evidence is clear that by approximately July 10, 1992, Ms. Camm was frustrated and aggravated by what she considered to be work not correctly done, work not timely done, the fact that she had been told she had “no choice” but to forego one furnace, work that

was done that was not part of the contract and that she had not asked to be done, concerns about whether some of the work that was within the specs was going to solve the problems they were intended to solve, etc. There was a meeting on that day among Big Four's representative, Simmons, and Ms. Camm, on the premises, and it was Simmons' impression that a number of trade-offs had been agreed to. These were not reduced to writing, and the Court finds that Simmons' supposed belief that everything had been worked out with Ms. Camm was wishful thinking, at best, and disingenuous, at worst.

13. This Court finds that it was the next day (and not on July 1 as had been misstated in a written complaint that Ms. Camm had filed with the State Attorney General's Office), that a Big Four employee or subcontractor entered the dwelling under circumstances which Ms. Camm believed to be an illegal entry, inciting her to file a criminal complaint against Big Four and to bar Big Four and any of its subs from the job. The entry was subsequently found not to be criminal. Ms. Camm's reaction to it may have been pretext, seeking to get rid of this whole undertaking that had gone wretchedly awry. (Again, she did not know that KBNHS was concealing a dispositive fact from her.) That was on a Saturday.

14. Simmons was notified of this on Monday.

15. Simmons attempted to "arbitrate" a conclusion of the contract work and a price reduction, but Ms. Camm rejected any proposals that would permit Big Four to complete the work.

16. Big Four sued Ms. Camm and she actively defended that lawsuit with assistance of counsel, but without benefit of the knowledge, possessed by Bruce Simmons, that

Ms. Camm had been duped into accepting substitute performance.

17. In 1996, a judgment was taken against her in the principal amount of \$5,642, with \$1,943.48 in interest, plus attorneys fees and costs, the judgment totaling \$8,225.98.

18. Ms. Camm participated in that suit even after she filed her bankruptcy petition and was discharged, in bankruptcy, from any *in personam* liability to Big Four.

19. On the same day that judgment was taken against her by Big Four, her attorney wrote to KBNHS demanding that they not pay any money to Big Four, and that they either pay the monies they were holding to Ms. Camm or cancel the mortgage they had taken on her properties (See Exhibit 1 in KBNHS' Motion to Dismiss filed July 20, 1999.)

20. This Adversary Proceeding against KBNHS was commenced on November 19, 1997.

I. DISCUSSION

A. INTRODUCTION

KBNHS argues that because Ms. Camm was fully prepared and obligated to pay \$10,000 for the performance of the contract work, she should not be heard to complain of any "damages" at all, if in fact she has not expended more than \$10,000 in ultimately getting the work done.

This argument necessitates the rendering of further findings of fact as follows.

21. Under *Kelleran v. Andrijevic*, Ms. Camm is bound by the judgment that declared that Big Four performed \$5,642 worth of contract work on her premises. (It is merely a

curiosity to note that although Ms. Camm testified that Bruce Simmons told her that as of the time Big Four was barred from the job, Big Four had performed \$3500 worth of work in Simmons' opinion, and Bruce Simmons testified at trial that he told Ms. Camm that Big Four had performed \$7500 worth of work, the arbitrator's report, adopted by the state court, was almost precisely in the middle.)

22. There is some evidence that Ms. Camm paid \$900 to a contractor to perform some of the work in September of 1999.

23. There is some evidence that she paid \$505.89 for materials to be used by that contractor.

24. There is some evidence that Ms. Camm paid \$1,193.60 to replace a rug that she claims was damaged by Big Four or its subcontractors.

25. There is some evidence that Ms. Camm paid \$2,196 to replace the furnace that Big Four repaired (in lieu of replacement), which repairs failed shortly thereafter leaving one floor of the house without heat for a number of years. (She attests that she used her oven as a primary heat source during that period.)

26. There is some evidence that Ms. Camm paid an additional \$100 to the contractor, referred to in #2 above.

27. The above amounts total \$4,895.49.

28. Ms. Camm presented an expert who presented some evidence to corroborate the value of some of the work that was accomplished through these \$4,895.49 worth of expenditures.

29. That expert also offered some evidence of what the cost would be to perform some work which Ms. Camm claims Big Four either (1) was required to perform and did not perform, or (2) was necessary to repair damages which Ms. Camm claims was caused by improper work by Big Four.

30. By his testimony, those two types of work remaining to be done would cost \$412.40 in the living room, \$400.60 in the dining room, and \$675.00 outside, for an aggregate total of \$1,491.00 worth of work remaining to be done, based on Ms. Camm's belief as to what Big Four had been responsible for.

31. If all of Ms. Camm's testimony were credited, as well as all of her views regarding Big Four's liability to her (but including the \$5642 judgment that she disagrees with), one would find that it would cost her a total of \$12,028 to perform the \$10,000 worth of work, plus approximately \$1700 additional that she paid in interest owed to Big Four on the judgment and attorney's fees and costs, as well as interest on the \$7,000 that KBNHS paid to Big Four, but LESS the interest that she would have paid on a \$10,000 mortgage if all the work had been properly completed for \$10,000 in 1992. She may have paid her own attorney fees and costs as well.

32. Certainly, not everything that Ms. Camm believes that Big Four owed her fell within the written contract, as supposedly modified. Moreover, not everything that Ms. Camm claimed were damages caused by Big Four were conclusively shown to have been so caused, as opposed to conditions that arose (e.g. cracked walls) between 1992 and 1999.

33. But there also can be no doubt that Ms. Camm went to KBNHS in 1992 with

a very specific object in mind, and KBNHS promised to help her obtain the work in a prompt fashion. But she was deceived into accepting a different result, and it was only after much aggravation, great discomfort and the passage of many years, that she might end up with a substituted result. She did not receive any help from KBNHS at all after the moment that she barred Big Four from the job, and KBNHS' casual offer of assistance to her attorney was meaningless while still hiding from her and her attorney the fact that she had been duped by KBNHS.

B. VIOLATION OF IMPLIED COVENANT OF GOOD FAITH DEALING

Without ever using the phrase "third party beneficiary," Ms. Camm's pleaded arguments all stem from a failure of KBNHS to use, in her favor, the many contract powers that it had in its agreements with Big Four. The doctrine of "third party beneficiary contract" is one that has meaning only in the context of the beneficiary suing in her own right to enforce the contract to which she is not a party. The time and place to present herself as a third party beneficiary was in the state court litigation, not here.

Apparently recognizing this, she simply argues that KBNHS, having entered into a contract with Big Four for her benefit, had a duty to enforce that contract against Big Four for her benefit, and having failed to do so, should be liable for her losses. No legal theory is cited for this proposition. No contract between Ms. Camm and KBNHS so provided. (Indeed, as indicated above, it is the very absence of any contract articulating the relationship between the borrower and KBNHS with regard to management of the construction contract, that brings the

matter before the Court now.) No doctrine relating to duties of trust is cited. Nor can it be said that there has been any “windfall” or “unjust enrichment” of KBNHS; KBNHS has received nothing more than what it paid out in satisfaction of the Big Four judgment against the plaintiff.

The statutory “unfair and deceptive practices” claim alleges unfair and deceptive activities and practices in violation of § 349 of the New York State General Business Law. There is a procedural defect in the record in this regard. The GBL claim was raised for the first time in an Amended Complaint. KBNHS never filed an Answer to the Amended Complaint. Rather, it made a motion to dismiss, which motion was denied by the Court, and instead of directing KBNHS to answer the Court set a discovery deadline and a date for a status report. At the status report, both sides reported the matter ready for trial. No one (this writer included) realized that there had never been an Answer to the Amended Complaint. This has been brought to attention of the parties now. KBNHS predictably denies liability under the statute and raises affirmative defenses. The Court agrees with those defenses for the reasons cited by KBNHS, and dismisses that cause of action.

But it is found above that Bruce Simmons intentionally deceived Ms. Camm when he told her that she “could not” have two replacement furnaces. (Indeed, he made the same misrepresentation to his supervisor in a memo.) As he testified at trial, the truth was that the contractor had underbid the job. We have no way of knowing what the result would have been had he communicated that knowledge to Ms. Camm. She might have agreed to let the contractor out of the contract. She might have insisted that the contractor perform the contract at a loss, in which event the contractor might have done so, or might simply have breached, giving Ms.

Camm an opportunity to “cover” and sue Big Four for damages. She might have agreed to the very same substitutions and modifications that she “agreed” to when she was falsely given the impression that replacing the two furnaces was not possible.

Of course, “damages cannot be awarded on the basis of conjecture and guesswork. . . . Damages which are uncertain, contingent, or speculative, or which are remote and cannot be directly traced the breach or wrong complained of, or which are not reasonably capable of computation, are not recoverable. . . .”⁶ However, “a distinction is drawn between the certainty required in establishing the fact that the plaintiff has sustained some damage and the certainty necessary in fixing the amount. . . . [It] is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to the amount of damage, and where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.”⁷

“The law requires only such reasonable certainty as serves as a basis for the ordinary conduct of human affairs. There is usually some element of uncertainty or contingency in unliquidated damages, yet one is not to be denied recovery on that account; in such cases, the law makes the best possible approximation.”⁸

“Where a wrong has been done from which pecuniary injury results, and the injury complained of is the natural or probable result of a wrong, the [fact finder] in such a case may fix

⁶36 N.Y.Jur.2d, Damages § 14 (1984).

⁷36 N.Y.Jur.2d, Damages § 16 (1984).

⁸36 N.Y.Jur.2d, Damages § 15 (1984).

the damages within reasonable limits, as best they may, although the expense of the injury is not capable of precise proof. The fact that it is difficult to prove the exact amount of damage will not release the wrongdoer from responsibility. And when his own tortious acts are of a nature which preclude precise ascertainment of damages, the jury may make a just and reasonable assessment of the damage based on relative data and render its verdict accordingly.⁹ And it does not matter that KBNHS itself presumably did not benefit from the deceit. Rather, “it is well settled that in order to render one liable for damages in an action of deceit, it is not necessary that the defrauder shall have derived any benefit or advantage from the deception or have colluded with the person who was so benefitted.”¹⁰

Though this Court concludes that the essential elements for an action for fraud and deceit under New York law have been made out, no such cause was pleaded. Nonetheless, in the context of the “Homeowner/KBNHS Agreement,” a representation was made by Bruce Simmons as a statement of fact, which was untrue, and known to be untrue by Bruce Simmons; it was made with intent to deceive and for the purpose of inducing Ms. Camm to act upon it; and she did in fact rely on it and was induced thereby to act or refrain from acting to her injury or damage.¹¹ And it is this Court’s view that the matter rests on the second cause of action. It alleged breach of contract rising out of the failure of KBNHS to enforce various of what plaintiff perceives to be duties that were owed by KBNHS to her, contained in KBNHS’ contract with Big

⁹36 N.Y.Jur.2d, Damages § 17 (1984) (emphasis added)..

¹⁰60 N.Y.Jur.2d, Fraud and Deceit § 15.

¹¹60 N.Y.Jur.2d, Fraud and Deceit § 11.

Four. It appears to the Court that Bruce Simmons' testimony at trial (that he had lied to Ms. Camm) was surprise testimony, contrary to the "time line" memorandum, prepared by Bruce Simmons and introduced into evidence. In alleging that KBNHS had breached the agreement between Ms. Camm and KBNHS when KBNHS failed to "insure" that Big Four performed in accordance with the contract, and (more specifically) in failing "to terminate the contract with Big Four Industries once [KBNHS] had knowledge that Big Four Industries had failed to conform to the terms of the agreement in violation of General Condition Q of the agreement," (paragraph 14(i) of the amended complaint), the Plaintiff adequately pled a breach of the implied covenant of fair dealing in connection with her agreement with KBNHS. It is not clear, as a matter of law, that Ms. Camm may obtain damages from KBNHS for a failure to assert rights that KBNHS had against Big Four. But there can be no doubt that the "Homeowner/KBNHS Agreement" contains an implied covenant that KBNHS will not lie to her about (1) the fact that there are grounds for termination, and (2) her rights under the contract that KBNHS managed and funded.¹²

DAMAGES

Again, Simmons' admission that he lied to Ms. Camm appears to have been a surprise, given the fact that in fact-intensive pre-trial proceedings in the case (a contested motion

¹²"As a general rule, there is an implied covenant of good faith and fair dealing in every contract." 17A Am.Jur. 2d, Contracts § 380.

to amend the Complaint, and a contested Motion to Dismiss) there was no hint of any such evidence. On the other hand, the Plaintiff did not claim surprise or otherwise seek to continue the trial or refocus her theories and damages claims.

The difficulty for the Court is that as noted above, there is no evidence of what Ms. Camm would have done had she been told the truth.

But it was KBNHS' own conduct that created this problem. There are some rough, but useful, analogies. The contractor who builds on the wrong owner's vacant lot or paints the wrong house has certainly improved the value of the lot or house, but has not furthered any intention or expectation or desire of the person benefitted. The surgeon who bypasses the wrong artery may have helped the patient, but the correct artery still needs bypass. The issue of damages in such cases is difficult indeed. But here a closer analogy would be the contractor knowingly and falsely telling the "neighbor" that the house he was building would not encroach on the neighbor's property, when in fact it would and he knew it would. Or the physician telling the patient that the artery needed bypass anyway, when in fact that was not true at all.

There has been benefit conferred on Ms. Camm, but is anything that Big Four did for her something that she would have wanted performed by anyone if she had been told that \$10,000 was an underbid? How much of what she has done through other contractors was based on the misinformation provided by KBNHS in connection with a fight with Big Four that should have ended up with Ms. Camm sitting in the driver's seat having "locked" Big Four into a "bargain" deal for her?

It is this Court's view that everything that Ms. Camm had to pay Big Four (which

is to say everything that KBNHS paid Big Four from escrow on her behalf) is a consequence of KBNHS' breach of the implied covenant to deal with her in good faith. In response to *prima facie* proof of same, KBNHS has introduced no reliable evidence of benefit conferred on Ms. Camm. What Ms. Camm was found to owe Big four is irrelevant to this question - - one may owe a contractor tens of thousands of dollars for "improvements" that improve the value of the home only minimally. It is well known that many improvements will not pay for themselves in an immediate resale. The state court action sounded in contract, not *quantum meruit*.

On the other hand, what Ms. Camm has expended on her own has not been proved by her to have been a misguided result of KBNHS' breach.

The judgment of the Court is that Ms. Camm recover what she paid to KBNHS, representing the Big Four judgment plus interest, and that she also recover the interest she has paid on that amount to her refinancing mortgagee. Her counsel shall by motion practice submit an affidavit of amount due, so that the Court may order the amount of the judgment to be entered.

SO ORDERED.

Dated: Buffalo, New York
June 29, 2000

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.