STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
Filed: May 7, 2002

PROVIDENCE, SC.		**SUPERIOR COURT**
R.J.P. CORPORATION	**:**	
	:	
v.	**:**	**PM 00-0408**
	:	
KEVIN MILLER AND JANET MILLER	**:**	

DECISION

GIBNEY, J. This matter is before this Court following a nonjury trial. The Plaintiff, R.J.P. Corporation (R.J.P.), seeks payment for construction work it performed on property located at 35 Brigham Farm Road, East Providence, R.I. owned by Defendants Kevin and Janet Miller (Millers). The Millers dispute the amount and ask this Court to release the property from a mechanic's lien that is currently recorded in favor of R.J.P.

Facts and Travel

During the summer of 1998, the Millers hired R.J.P. to serve as the general contractor for the construction of their new house. (See Plaintiff's Exhibits #1 and #2.) R.J.P. provided a comprehensive, ten-page written agreement that set forth the project specifications and the payment terms for the $299,588 cost. Among other things, the first line of the agreement stated that R.J.P. "shall provide all necessary labor and materials and perform all work of every nature whatsoever to be done in the erection of said project for: Kevin and Janet Miller." The agreement was signed by the Millers and by Robert J. Prohaska, president of R.J.P.

R.J.P. supervised the construction process from 1998 through the summer of 1999. Sometimes R.J.P. performed the construction work itself, and sometimes it hired subcontractors. However, no

matter who did the work, the Millers were never satisfied with the results. The Millers frequently relayed their complaints to R.J.P. (See generally Defendants' Exhibits, A through VV.) In July 1999, the Millers started to document their grievances through the use of a video camera. The product of this video project was a two-cassette compilation of complaints nearly two hours in length. (See Defendants' Exhibits FF & GG.)

In late August or early September of 1999, after more than a year of conflict, the Millers fired R.J.P. R.J.P. subsequently attempted to collect $55,591.44 from the Millers, which amount R.J.P. claimed as the outstanding balance for the work it had performed. (See Plaintiff's Exhibit #5.) The Millers refused to pay.

Subsequently, R.J.P. proceeded to secure a mechanic's lien against the property for this outstanding balance. On September 27, 1999, R.J.P. filed its "Notice of Intention" with the Clerk of the City of East Providence. (Plaintiff's Exhibit #6.) Exactly 120 days later, on January 25, 2000, R.J.P. filed its "Notice of Lis Pendens" with the City. (Plaintiff's Exhibit #7.) That same day, R.J.P. filed its Petition to Enforce Mechanic's Lien in the Superior Court. In its Petition, R.J.P. also sought recovery for reasonable costs and attorney's fees. Notice of the Superior Court action was published on February 22, 2000 and filed with the Court Clerk the following day.

The Millers objected to the enforcement of the lien against the property. They claimed that the work performed by R.J.P. was "defective and done in an unworkman like [*sic*] fashion." (See Defendants' Objection.) Further, the Millers asserted that they spent more money to remedy R.J.P.'s defective work than R.J.P. claimed in its lien petition. The Millers subsequently filed a petition to deposit a bond in the amount of $55,181.44 with the Registry of Court in order to discharge the lien pending the outcome of the proceedings. The Court, Williams, J., granted the petition.

This Court held a nonjury trial over several days in November 2001. At trial, the two key disputed issues were the quality of R.J.P.'s workmanship and the employment status of Simon Mourato (Mourato), stone mason. Prohaska testified for R.J.P., denying the bulk of the Millers' complaints of deficient work. Specifically, Prohaska denied that R.J.P.'s faulty carpentry and use of the wrong nails were reasons that an outside deck required rebuilding; denied that the house needed re-bricking at a cost exceeding the cost of the entire house; denied that the staircase failed to meet code and that the loose railing thereupon was caused by R.J.P.'s faulty workmanship as opposed to "someone doing it damage"; and denied responsibility for any water entering the basement as opposed to "whomever" installed an outside drain, which sits next to the basement, without a vent.

However, Prohaska conceded that some of the work was indeed deficient. Particularly, Prohaska claimed responsibility for an unlevel garage floor and a floor in one of the rooms. He also acknowledged that he failed to attach shutters to the house, which was his responsibility, and that he had received $500 more in payments from the Millers than he had previously reported. Prohaska concluded that the total value of these items was $4,320.

The most expensive of the Millers' complaints involved the masonry work performed by Mourato. Prohaska testified that although Mourato was originally hired as a subcontractor of R.J.P., he attempted to fire Mourato in April of 1999. (See Post Trial Memorandum of Plaintiff, page 1.) Prohaska further testified that he did not wish to give Mourato the payment due on April 6, but was instructed to do so by the homeowner.[1] After that point, Prohaska testified that Mourato was paid directly by, and reported solely to, the Millers. Therefore, Prohaska claimed that any deficiencies in the

[1] Prohaska did not specify the "homeowner" to whom he was referring: Kevin Miller, Janet Miller, or the lien-holding bank.

masonry were not R.J.P.'s responsibility as the general contractor but instead belonged to Mourato's true employers, the Millers. R.J.P.'s mason, P. Douglas Miro, testified that Mourato's brickwork, as installed, would require only $10,000 worth of repairs.

The Millers' testimony and that of their experts contradicted most, if not all, of Prohaska's testimony. Particularly, the Millers presented testimony and other evidence supporting payments that they made on twelve invoices, totaling $17,280.54,[2] they claim they had already incurred installing, repairing, or replacing R.J.P.'s substandard or omitted work. (See Defendants' Exhibits II through MM and PP through TT.) Moreover, the Millers claimed that they had paid R.J.P. $637 more than R.J.P. had stated and not the $500 figure as described by Prohaska.

To support their argument regarding the defective staircase, the Millers presented the expert testimony of Michael Rand (Rand) and L. Robert Smith (Smith). Rand is an expert in general construction with special expertise in staircase construction. He testified that the staircase constructed by R.J.P. violated several sections of the state building code, namely in regard to "riser height" and "tread depth." Rand further estimated that the cost of repairing the stairs would be $39,000. His opinions regarding the defects in the staircase were supported by a report submitted by Smith, a structural engineer. (See Defendants' Exhibit CC.) The Millers testified that numerous people had fallen on the stairs. Also, the Millers' son, Jonathan, testified that he had recently slipped, cracking the banister post as he attempted to break his fall. Jonathan further testified that it was his third such fall on the stairs.

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[2] There was an additional set of invoices submitted by the Millers that included their costs and attorney's fees. These invoices, totaling $19,228.25, will be addressed later in this Decision.

Rand and Smith also testified that much of the brickwork on the house would require replacement. As they both testified, the bricks were improperly placed directly against the wood roof without the necessary structural support. According to their testimony, this placement caused substantial cracking in the brick facade of the house, already visible after less than two years' time. Without replacement, Rand and Smith testified that this mistake could cause a complete failure of the bricks themselves. The two shared the opinion that the bricks needed to be removed so that the proper support could be added. Rand estimated the cost of repair at $142,000, while Smith estimated a cost of $100,000. Both admitted that an exact estimate would be difficult before the approval of final plans.

To support their argument regarding the defective deck, the Millers presented the testimony of Steven Shaw (Shaw), the carpenter who removed the deck built by R.J.P. and who constructed the replacement deck. Shaw testified that R.J.P. improperly used non-galvanized interior nails, which subsequently rusted and caused damage to the wood. During his testimony, Shaw provided samples of these rusted nails taken from the deck. (See Defendants' Exhibit B.) Moreover, Shaw testified that when he removed the deck, he discovered that the deck was not supported with a steel angle iron, which caused the brick above the deck to crack. Finally, Shaw testified that the lag bolts that attached the deck to the house did not secure the deck to the frame of the house. Shaw concluded that all of these factors combined caused instability in the deck, which necessitated its replacement.

In lieu of closing arguments, each side submitted a memorandum summarizing its claims. In their brief, the Millers dispute R.J.P.'s argument, supported by Prohaska's testimony, that Mourato worked directly for the Millers. The Millers point to the clear language of the signed contract, which reads: "F. Homeowner has indicated they may wish to use their own Mason. Mason will work directly for Contractor. Difference of price if any will be credited." (See Plaintiff's Exhibit #2 at page 9.) The

Millers claim that Mourato contracted with R.J.P. only, and that R.J.P. failed to demonstrate any agreement between the Millers and Mourato that may have superseded R.J.P.'s duties under the contract. Moreover, the Millers argue that they hired R.J.P. because they lacked construction experience, and that if Mourato's performance was substandard, it was R.J.P.'s duty to remove Mourato or to give both Kevin and Janet Miller sufficient notice of such deficiencies. The Millers further claim that R.J.P.'s duty to "provide all necessary labor" and to "perform all work of every nature whatsoever" was broad enough to encompass responsibility for Mourato's work. Therefore, the Millers argue that Prohaska's one-time, oral disclaimer of responsibility for Mourato's work, relayed only to Kevin Miller and after the installation of much of the defective work was already completed, should be given no effect. For this reason and for the reasons stated in their testimony, the Millers ask this Court to excuse their payment on the contract and to release their property from R.J.P.'s mechanic's lien.

In response, in its Post Trial Memorandum, R.J.P. argues that Prohaska's disclaimer, combined with the Millers' conduct towards Mourato, formed a substituted contract that extinguished R.J.P.'s responsibility for the mason. (See Plaintiff's Post Trial Memorandum at page 1.) Otherwise, in its two-page brief, R.J.P. simply recounted Prohaska's testimony and reiterated its prayer for payment on the contract.

Soon after the case was submitted by both sides for decision, R.J.P. apparently realized its mistake in failing to substantiate the dates that various goods and services were provided as required by the mechanic's lien statute and moved to reopen the case. R.J.P. sought to admit a single check into evidence in order to establish a time frame for the work it performed and the materials it provided. Over the Millers' objection, this Court granted R.J.P.'s motion.[3]

[3] This Court's Decision on Plaintiff's Motion to Reopen was made expressly conditional on the

In April 2002, over the Millers' renewed objection, this Court received additional testimony and evidence from both parties. Testifying on behalf of R.J.P., Prohaska referenced a letter from R.J.P. to Kevin Miller, dated August 1, 1999, previously admitted into evidence over Defendant's objection and labeled "RE: Final Invoice." (Plaintiffs' Ex. 4.) According to Prohaska, this Final Invoice contained a summary of the payments, charges, allowances, and outstanding balances. Specifically, Prohaska testified that according to this Final Invoice, the last payment R.J.P. received from the Millers was on May 25, 1999. (See id., "Ck. #d 2531.") After stating that he reviewed the invoices for materials purchased, bills from subcontractors, and R.J.P.'s canceled checks, Prohaska concluded that the remaining totals described in the Final Invoice constituted an accurate total of amounts due for the goods and services provided to the Millers subsequent to May 25. Again, over the Millers' objection, Plaintiff's Ex. 4 was admitted into evidence as a full exhibit.

On cross examination, Defendants' counsel employed a comprehensive, multi-pronged attack on Prohaska's testimony and the exhibit. For each project material invoice submitted by R.J.P. that Prohaska testified he used in formulating the Final Invoice, the Millers challenged: 1) its authenticity; 2) its lack of corroboration from the material suppliers, themselves; 3) its relationship to the subject construction project; and 4) whether the work was actually performed or the materials were actually used. (See generally Defendants' Ex. ZZ-GGG.) However, the most disputed issue concerned the relationship between the invoice dates and the dates of delivery or utilization on the construction project. Prohaska could not provide dates that he used materials contained in the invoices. Instead, when asked, for example, about an invoice from Greenville Seemless Gutters dated August 12, Prohaska

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Plaintiff's consent to "bear the costs of the hearing, including attorney's fees" associated with the hearing. Pursuant thereto, on April 29, 1999, Defendants' counsel submitted a request for $1,505 in attorney's fees with supporting affidavit.

testified that they were probably installed in June or July. (See Defendants' Ex. AAA; see also Defendants' Ex. KKK (Arnold Lumber invoice dated June 28, 1999.) Moreover, although Prohaska testified that he could not recall the last day that he worked at the Millers house, he included an invoice dated September 8, which was very near the time he was fired, in the calculation of the bill (See Defendants' Ex. FFF). Finally, as to each invoice, Prohaska was asked to specifically identify work done and materials provided in the construction of the deck, which the Millers claimed required demolition.

Defendant Janet Miller also presented additional testimony. She testified that despite the presentation of an invoice for window latches, no such latches were installed. (See Defendants' Ex. CCC.) Janet Miller concluded her testimony with an update on the condition of the house, which she claims has deteriorated since her previous testimony nearly five months ago. In the five-month period, she testified that a stress crack has appeared in a window and, as predicted, the bricks have continued to pull away from the house.

Standard of Review

In a nonjury trial, "the trial justice sits as a trier of fact as well as law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "Consequently, [s]he weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. "The task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury." Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981). "It is also the province of the trial justice to draw inferences from the testimony of witnesses. . . ." Id. See also Rodriques v. Santos, 466 A.2d 306, 312 (R.I. 1983) (the question of who is to be believed is one for the trier of fact).

Mechanic's Lien

Rhode Island's mechanic's lien statute provides, in pertinent part:

> "The mailing of the notice of intention and the filing of the copy in the land evidence records together with the mailing of another copy thereof . . . shall perfect, subject to other sections of this chapter, the lien of the person so mailing and filing as to work done or materials furnished by the person during the one hundred and twenty (120) days prior to the mailing and thereafter, but not as to work done or materials furnished by the person before the one hundred and twenty (120) days prior to the mailing, any lien for which shall be void and wholly lost."

R.I. Gen. Laws (1956) § 34-28-4. Because the statute is in derogation of common law, it must be strictly construed. See Frank N. Gustafson & Sons, Inc. v. Walek, 599 A.2d 730, 732 (R.I. 1991), Faraone v. Faraone, 413 A.2d 90, 91 (R.I. 1980). Inherent in the application of the mechanic's lien statute is the potential for harsh results. See Gustafson, 413 A.2d at 91.

As the party filing the petition for enforcement, it is R.J.P.'s burden to establish the dates that the subject services and materials were delivered to the Millers. Pursuant to the statute, only work done and materials provided during the 120 days prior to the mailing of the notice of intention are subject to a mechanic's lien. R.J.P. mailed its notice on September 27, 1999. Calculating 120 days backwards, this Court determines that work performed before May 30, 1999 could not be subject to a mechanic's lien pursuant to Section 34-28-4.

Before this Court, R.J.P. has not provided sufficient evidence to establish the dates wherein the subject services were performed or materials were delivered. Upon reopening the evidence, Prohaska's supplemental testimony did not provide the requisite specificity to evaluate R.J.P.'s compliance with the 120-day rule. His cross examination was particularly effective in challenging the relationship between the invoice dates and the dates that goods were used or installed. Further, in their Memorandum, the Millers raise a substantial question as to when these services were actually performed based on the dates that R.J.P. drafted checks from its own business account for items it now

claims as part of the mechanic's lien. (See Defendants' Summation Memorandum at pages 3-4). The dates on these checks suggest that many of the items R.J.P. sought to include in its lien were actually provided during or before April, prior to the 120-day limit of May 30. For these reasons, this Court finds that R.J.P. has not met its burden in establishing the dates that it provided any of the subject services and materials to the Millers. Consequently, R.J.P. has not demonstrated its compliance with the mechanic's lien statute. Thus, pursuant to the plain language of Section 34-28-4, R.J.P.'s lien "shall be void and wholly lost," its petition to enforce denied, and the Millers' bond discharged.

Mourato's Employment Status

The sole issue raised by R.J.P. in disclaiming responsibility for the acts of Mourato is that Prohaska's statements, combined with the conduct of the Millers, formed a "substituted contract" between the Millers and Mourato, thereby relieving R.J.P. from liability under the contract for the defective brickwork. A "substituted contract" arises when parties completely discharge their obligations under a contract by substituting a new agreement that "change[s], not only the work to be performed by one party, but also the price to be paid by the other." Salo Landscape & Const. Co., Inc. v. Liberty Elec. Co., 119 R.I. 269, 273, 376 A.2d 1379, 1381 (1977). The significant and essential element under a substituted contract theory is a factual determination that the original contractual rights and obligations of both parties were extinguished and new contractual rights and liabilities created for each, all by their mutual agreement. Salo, 119 R.I. 273-274, 376 A.2d at 1382; see also Priest v. Oehler, 328 Mo. 590, 602-03, 41 S.W.2d 783, 788 (1931). In Salo, the Supreme Court upheld a decision of the trial justice in favor of the contractor-plaintiff when the trial justice made such a factual determination.

However, in the case-at-bar, R.J.P. did not meet its factual burden in establishing its claim. Mourato was hired pursuant to a clause added to R.J.P.'s contract form that specified the scope and status of Mourato's employment as a subcontractor of R.J.P. In order to establish that Prohaska's oral disclaimer and the Millers' conduct created a substitute contract that shifted Mourato's employment status, at a minimum, R.J.P. would have had to clearly demonstrate that the Millers agreed to release it from responsibility for Mourato's work in exchange for a price reduction. Except for Prohaska's highly disputed testimony, there was no evidence that the relationship between the parties was altered in any way over the course of the agreement, let alone extinguished by mutual agreement. Particularly, there was neither evidence of an agreement, reached before the parties discovered that Mourato's work was defective,[4] for a price reduction nor evidence of direct payment from the Millers to Mourato.[5] Moreover, even after the alleged disclaimer, R.J.P. continued to work with the Millers, adhering to the terms contained in its original agreement that specified its responsibility for Mourato. Therefore, this Court rejects R.J.P.'s claim of a substitute contract relieving it of responsibility for the acts of Mourato.

Implied Warranty of Workmanship

"As a general rule there is implied in every contract for work or services a duty to perform it skillfully, carefully, and diligently and in a workmanlike manner, and a negligent failure to observe any of those conditions is a tort as well as a breach of contract." Nichols v. R.R. Beaufort & Associates, Inc.,

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[4] The timing of the discovery that Mourato's work was defective is important to the extent that it creates an inference that any subsequent price reduction was not the result of an agreement as opposed to something else (e.g., an attempt by R.J.P. to coax the Millers to accept the defective product or another offer in compromise).

[5] Likewise, the lack of evidence concerning direct payment creates an inference that the parties believed that the responsibility for Mourato's work had never shifted. Legally, R.J.P. is not required to prove a contract between the Millers and Mourato in order to prevail on a substituted contract claim, as the Millers had suggested in their Post Trial Memorandum.

727 A.2d 174, 179 (R.I. 1999) (quoting Davis v. New England Pest Control Co., 576 A.2d 1240 (R.I. 1990)). Specifically, when a builder-vendor sells a new house or one that is under construction, "he [or she] implicitly warrants that the construction has been or will be done in a workmanlike manner and that the dwelling will be reasonably fit for human habitation." Id. at 177 (quoting Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 32, 298 A.2d 529, 531 (1973)). In Nichols, the Rhode Island Supreme Court expounded on the reasoning behind the implied warranty applicable to home-builders. The Court stated:

> "The applicability of the implied warranty is based upon the premise that, with respect to the sale of new homes, the purchaser has little choice but to rely upon the integrity and professional competence of the builder-vendor. The public interest dictates that if the construction of a new house is defective, its repair cost should be borne by the responsible builder-vendor who created the defect and is in a better economic position to bear the loss, rather than by the ordinary purchaser who justifiably relied upon the builder's skill." Id. (quoting Sousa v. Albino, 120 R.I. 461, 388 A.2d 804 (1978)).

"It is well settled that when a builder has substantially performed, he can recover the contract price less the amount needed by the owner to remedy the defect." National Chain Co. v. Campbell, 487 A.2d 132, 135 (R.I. 1985) (quoting Ferris v. Mann, 99 R.I. 630, 636, 210 A.2d 121, 124 (1965)). In National Chain, the Rhode Island Supreme Court explained the doctrine of substantial performance and its effect on the proper assessment of damages when a purchaser claims that a contractor failed to perform in a workmanlike manner. There, the Court stated:

> "The doctrine of substantial performance recognizes that it would be unreasonable to condition recovery upon strict performance where minor defects or omissions could be remedied by repair. This formula is inappropriate, however, in situations in which the contractor's performance is worthless and the work has to be redone completely. In these situations, the contractor is liable for the cost to the owner of having the job redone. . . . To recover on an action in quantum meruit, it must be shown that the owner derived some benefit from the services and would be unjustly enriched without making compensation therefor." Id. (internal citations omitted).

In the present case, R.J.P. has not asserted and the Millers have not challenged substantial performance. The facts in this case appear to present just such an issue, though, as the Millers' lowest estimate to repair the alleged defective brickwork alone is $100,000, which is more than one-third of the entire contract price. However, despite this concern, this Court will not endeavor to engage in a complex analysis without the proper prompting from the parties. See DiMario v. Heeks, 116 R.I. 44, 351 A.2d 837 (R.I. 1976). Therefore, this Court will consider the issue of substantial performance waived.

Still, as the party seeking payment, it is R.J.P.'s burden to establish its entitlement to the disputed amount. However, at trial, it was the Millers who presented substantial evidence to demonstrate that much of R.J.P.'s work was defective, relieving them of the obligation of payment. Having reviewed and accepted R.J.P.'s admissions, this Court determines that the Millers should be allowed a deduction of $3,275 for the cost of repairing the floor in the garage and $410 for the cost of repairing the floor in the room above the garage. (Defendants' Exhibit TT.) Also, R.J.P. admitted that it was paid $500 more than it had previously calculated. This Court further finds that R.J.P. failed to provide shutters for the house, as admitted by R.J.P., even though that particular item was not included in the Millers' itemized list of expenses. Therefore, the Millers should be allowed a deduction in the amount conceded by R.J.P., $320.

By oral testimony and through trial exhibits, the Millers also established the following expenses:

Payments totaling $2,332 made to Lee Duffin for excavation which was the responsibility of R.J.P. (Defendants Exhibits II and JJ.)

Payments totaling $7,359.58 to Mark Jansen to rebuild the deck. (Defendants' Exhibit LL.)

> A payment of $800 to Perfecto to install steel supports in a portion of the brick and handrails required by the building code. (Defendants' Exhibit QQ.)
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> A payment of $350 to Mulchworks Landscape Construction for "jackhammering" services necessary for proper installation of down spouts. (Defendants' Exhibit QQ.)
>
> A payment of $1200 to ACOR Masonry to repair the brick work under the deck. (Defendants' Exhibit RR.)

To the extent that R.J.P., through Prohaska, denied responsibility for these items, this Court considers his testimony disclaiming responsibility for these items not credible. Conversely, for other items claimed by the Millers and that are not included in this list, this Court finds that the Millers failed to establish, as a matter of fact, either the need, responsibility, or the cost of repair.[6]

For the allegedly defective stairs and brick work, the Millers presented expert testimony, which this Court now accepts in large part. Rand and Smith are both experts with substantial qualifications. Except for Prohaska's denials, R.J.P. provided no reason, and thus this Court sees no reason, to discredit either the methodology or conclusions described during the testimony of Rand and Smith. To the contrary, R.J.P.'s mason himself confirmed the defects in the brick work. Therefore, this Court finds that both the stairs and the brickwork were constructed in an unworkmanlike manner, thus breaching the implied warranty. Specifically, this Court finds, as a matter of fact, that the stairs violated the building code in regard to tread depth and riser height, necessitating repair. Moreover, the brick work was improperly placed directly against the wood without the necessary structural support. Uncorrected, over time, this improper brick work could "pull away" from the wall, possibly resulting in a total collapse.

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[6] These items include the cost of a vanity mirror, bathroom tiling, and a "scratched whirlpool," as well as certain excavation charges from Michael Leonard and a bill from Providence Gas.

Nonetheless, the Millers' experts failed to establish a credible repair cost for either the brick work or the stairs. "The amount of damages sustained from a breach of contract must be proven with a reasonable degree of certainty, and the [property owner] must establish reasonably precise figures and cannot rely upon speculation." National Chain Co. v. Campbell, 487 A.2d 132, 134 (R.I. 1985) (quoting Restatement (First) of Contracts § 331(1) (1932)). The burden of proof, therefore, is on the property owner to prove, by competent evidence, the amount of damages that it suffered because of contractor's failure to perform. Id. at 135 (citing Smith v. Zepp, 173 Mont. 358, 370, 567 P.2d 923, 930 (1977)). However, property owners "will not be denied recovery merely because the damages . . . are difficult to ascertain, as long as they prove damages with reasonable certainty." Id.

In the present case, based on the evidence presented to it, this Court is unable to determine the repair costs with such reasonable certainty. The reconstruction plans endorsed by the Millers' experts are purely speculative, and may not encompass either the most cost-efficient or the actual plans of the Millers. See Kurbiec v. Trombley, 605 A.2d 1329 (R.I. 1992) (holding that in an action by a contractor to recover sums of money owed by an owner, where the owner counter-claimed for breach of the implied warranty and used repair estimates to establish damages but made no attempt to actually repair the property, the Court upheld the trial justices finding that the owner had failed to prove their damages). Also, as the Millers' two experts conceded, the cost to repair the defective brickwork would be difficult to estimate until all plans were submitted. Although Rand and Smith each offered repair cost figures greater than $100,000, neither explained why the cost to re-brick the house would be more than double Mourato's fee for the original work. (See Plaintiff's Exhibit #3, Mourato's "Acceptance Form" designating a $44,000 "total price.") Regarding the staircase, the Millers never established that the staircase required replacement as opposed to repair. Moreover, the repair figure of

$39,000 provided to this Court by Rand seems excessive, and is thus not credible. Therefore, this Court will award the amount of damages admitted by R.J.P., through its witness and employee P. Douglas Miro, in the amount of $10,000 for the defective brickwork.

Attorney's Fees and Costs

The Rhode Island Supreme Court has long held that attorney's fees may not be awarded as a separate item of damages absent contractual or statutory authorization. See, e.g., Craveiro v. Craveiro, 773 A.2d 896 (R.I. 2001). Although neither side cited any authority to support its respective claims, both sides in the present case requested costs and attorney's fees and submitted supporting affidavits.

The Rhode Island General Laws do allow for the award of costs and attorney's fees in mechanic's lien actions. Section 34-28-19 provides:

> "The costs of the proceedings shall in every instance be within the discretion of the court as between any of the parties. Costs shall include legal interest, costs of advertising, and all other reasonable expenses of proceeding with the enforcement of the action. The court, in its discretion, may also allow for the award of attorneys' fees to the prevailing party."

On the issue of the mechanic's lien, R.J.P.'s Petition to Enforce was denied after a trial. Thus, the Millers were the prevailing party. Therefore, this Court shall award the Millers those costs and attorney's fees supported by the record and which this Court finds reasonable. These include:

> $11,112.50 in attorney's fees for the services of attorney Albert E. Medici, Jr., which is supported by an affidavit (See the Defendants' Summation Memorandum);
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> $1,425 for the services of Waterman Engineering and the report of expert L. Robert Smith, which is supported by an invoice (See Defendants' Exhibit UU); and
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> $1,104 for the bond discharging the lien, provided by Starkweather & Shepley, which is supported by an invoice (See Defendants' Exhibit VV).

The fees for the Millers' other attorney, Stephen Moretti, are hereby denied because they are not supported by affidavits and because there was no apparent need in this case for the work of two attorneys. (See Defendants' Exhibit YY.) Additional costs for expert Michael Rand and Starkweather & Shepley that lack the requisite supporting evidence in the record are also denied.

Pursuant its directive in its Decision on Plaintiff's Motion to Reopen, this Court also awards the Millers $1,207.50, as supported by affidavit, which amount this Court finds to be fair and reasonable. The remaining $297.50 requested by the Defendants, representing 1.7 hours of attorney's fees for work performed on December 19, 2001 and January 29, 2002, is denied. The Court finds that these charges are not related to the hearing itself but to the Plaintiff's objection to reopening the case.

Conclusion

After hearing and reviewing all the evidence before it, this Court renders the following judgments:

R.J.P. failed to comply with the mechanic's lien statute, R.I. Gen. Laws Section 34-28-4, and thus its Petition to enforce is denied and the Millers' bond discharged;

R.J.P. remained responsible for the employment of Simon Mourato, stone mason, whose employment status was never altered or shifted by a substitute contract;

R.J.P. violated the implied warranty of workmanship in a variety of ways, as described throughout this Decision, entitling the Millers to relief from payment in the amount of $26,546.58;

Pursuant to R.I. Gen. Laws Section 34-28-19, as the party prevailing in a mechanic's lien action, the Millers are entitled to costs and attorney's fees in the amount of $14,849, which this Court finds, in its discretion, to be a reasonable amount and supported by the record; and

The Millers shall pay the balance of R.J.P.'s claim, which, by this Court's calculation, totals $14,195.86.

Counsel shall prepare an appropriate judgment in accordance with this Decision for entry.