

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
ASSOCIATE DIVISION  
STATE OF MISSOURI**

JOHN BEAL, INC.,	)	
	)	
Plaintiff,	)	Case No. 08SL-AC49547
	)	
	)	Division 33
JOHN P. McLAIN, INC., d/b/a/ J.P.	)	
McLAIN, INC.	)	

**JUDGMENT**

The above cause was called to trial on September 3, 2009. Both parties appeared and announced ready. The Plaintiff was represented by Mr. Michael Kasperek and the Defendant was represented by Mr. John Beseau. Prior to trial, the Defendant requested the Court for Findings of Fact and Conclusions of Law. Evidence was adduced on Plaintiff's Petition for Breach of Contract and leave was granted for Defendant to amend its Affirmative Defenses. The parties were given until September 17, 2009 to submit findings of fact and conclusions of law. The cause was taken under submission on September 17, 2009. Upon consideration of the evidence, the arguments of counsel, and the submissions by the parties, the Court makes the following findings. The Court assesses the credibility of the witnesses and the conflicts in the evidence.

## FINDINGS OF FACT

The parties entered into a contract (Plaintiff's Exhibit 1) to do roofing work in phase two of a construction project at 27 Maryland Place in the City of St. Louis, MO in exchange for Defendant's payment of \$11,275. Defendant paid Plaintiff \$4,775. Plaintiff is seeking the entire contract balance of \$6,500 plus interest and attorney fees. The contract was not dated, however, both parties signed the two page document and acknowledged its validity. The contract states in Part:

“We propose to furnish labor, material, tools and equipment necessary to install roofing in the following manner.

SPECIFICATIONS:

Remove present roof to deck and sweep broom clean.

Install roof as follows:...

\*\*Roof carries 5 year Material and 1 year Workmanship Warranty\*\*

We propose hereby to furnish materials and labor...for \$11,275.00.”

The word “roof” as written in the contract appears on its face to be unambiguous. It is clear from the evidence at trial that both parties agree that the contract calls for installation of more than one roof. Therefore, the issue in this case is exactly how many roofs were to be installed. The Plaintiff's witness, Mr. Reidler, testified that Plaintiff's Exhibit 1 was the contract for Phase Two of the project “for the installation of flat roofs on the garages”. No time during direct examination did Mr. Reidler say how many roofs were to be installed. On cross examination, Mr. Reidler was asked, “How many garages were to be built in phase two?” Mr. Reidler testified that, “I am not sure.” Mr. Reidler further testified that, “I don't know the number of garages or roofs on this project in phase two that were to be put on.”

On the other hand, the Defendant's witness, Mr. McClain, testified that, “ 5 garages

were to be built. Phase two called for 5 roofs. The Plaintiff built 2 roofs.” In addition, the Defendant introduced Defendant’s Exhibit A into evidence that was a “Architectural Site Plan , Town House Garage Phase II.” The Defendant testified that this Plan shows an outline of garages that were to be built. There were a total of 5 garages to be built. The boxes that are yellow show garages that were built and the boxes in green show garages that were not built. The Court notes that the Plaintiff’s witness testified that he has never seen the Defendant’s Exhibit A. The Defendant’s position is that by only performing approximately half of the work under the contract, Plaintiff did not fully or substantially perform the contract. The Defendant argues that Plaintiff has been fully compensated for the 2 roofs installed on the garage units by Defendant’s payment to the Plaintiff of \$4,775.

### **CONCLUSIONS OF LAW**

“In interpreting a contract, we are charged with ascertaining the parties’ intent and giving effect to that intention. *State ex rel. Vincent v. Schneider*, 194 S.W. 3d 853, 859 (Mo.Banc 2006). If the language is unambiguous, the parties’ intent is gathered solely from the plain meaning of the contract. If the terms are ambiguous, the court can refer to matters beyond the document itself.” *Lobo Painting, Inc., v. Lamb Construction Company*, 231 S.W. 3d 256 (Mo.App. E.D. 2007).

“Ambiguities in written instruments may be of two kinds: (1) patent, arising upon the face of the documents, and (2) latent. *Busch & Latta Painting Corp. v. State Highway Commission*, 597 S.W.2d 189, 197 (Mo.App. 1980). A “latent ambiguity” arises where a writing on its face appears clear and unambiguous, but some collateral matter makes the meaning uncertain. *Boswell v. Steel Haulers, Inc.*, 670 S.W. 2d 906, 912 (Mo.App. 1984).

Where ambiguity exists—latent or patent—the cardinal principle is to determine the intent of the parties. *Id. at 913*. In order to determine the intent of the parties a court will consider the entire contract, subsidiary agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties.” *Royal Banks of Missouri v. Fridkin*, 819 S.W. 2d 359 (Mo. 1991).

The Court finds that there is a latent ambiguity present in the contract. The contract on its face appears clear and unambiguous in that the word, “roof” is used. However, it is clear from the evidence at trial that both parties intended the word, “roofs”. The Court accepts as credible the testimony of the Defendant’s witness Mr. McClain. The Court finds the intent of the parties was to install 5 roofs on 5 garages. Furthermore, the Court finds that the Plaintiff only installed 2 roofs. In a contract case, it is plaintiff’s burden to show that it completed the contract as written. *Coale v. Rickard*, 540 S.W.2d 151, 152 (Mo.App. 1976). Plaintiff’s claim was based solely on the contract, and its right to recover the balance on that contract was dependant on its completion of that contract. *Id at 151*. By failing to complete the contract, Plaintiff has failed to establish any right to recover the full balance on the contract from the Defendant. *Id. at 151*.

### **JUDGMENT**

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED THAT JUDGMENT be entered in favor of the Defendant John P. McLain, Inc. d/b/a J.P. McLain, Inc. on Plaintiff John Beal, Inc. Petition for Breach of Contract. Court costs

assessed to the Plaintiff.

SO ORDERED

Judge Brenda Stith Loftin

---