

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT
STATE OF MISSOURI

MICHAEL KUNDERMAN, et al.)	
Plaintiffs,)	Cause No.: 1422-SC00091-01
)	
vs.)	Division No. 29
)	
MICHAEL LAUER, et al.,)	
Defendants.)	

JUDGMENT AND ORDER

This matter comes before this Court on Defendants’ Trial de Novo from a Small Claims Matter heard in Division 27; wherein, the Small Claims Court found in favor of Plaintiffs and rendered a judgment in Plaintiffs’ behalf in the amount of \$4, 905.00. On May 29, 2014, parties appeared in person and by counsel for the Trial de Novo, evidence was adduced, Defendants sought a Directed Verdict at the Close of All the Evidence and/with a Memorandum in Support of, Plaintiffs requested 14 additional days to respond. The Court took the matter under submission on May 29, 2014. Plaintiffs filed their Response on June 12, 2014.

The Court now rules as follows: The Plaintiffs’ cause of action arises from an Agreement executed by Plaintiffs and Defendants prior to a sale/closing of a residential property located at 6345 Lansdowne in the City of St. Louis, hereinafter referred to as “residential property.” On May 1, 2012 Plaintiffs and Defendants participated in a pre-closing walk through of the residential property. During the walk through, Plaintiff found a significant amount of water on the basement flooring. Plaintiff immediately notified the Defendant of the conditions in the basement. To which, the Defendant believed the water was due to a defrosting refrigerator; however, Plaintiff and Plaintiff’s

realtor, due to the amount of water on the basement flooring, wanted to investigate the cause of the water/basement problem. To that end, Plaintiff sought assistance from a number of contractors later on the day of May 1, 2012, to inspect and provide estimates to rectify and repair the basement water issue. As the closing of the sale on the residential property was to take place the next day, on May 2, 2012, the parties agreed to address the defect – the water/basement issue in the residential property by a separate agreement outside of and apart from the closing of the sale of the residential property. Accordingly, the parties drafted and signed an Agreement stating in pertinent part “ We the Sellers ...have provided a cashier’s check in the amount of \$5, 000.00 to the Buyers ... We agree to provide the remaining balance of \$8,200.00 in the form of an additional cashier’s check within 2 business days... These dollar amounts were effective of estimates, totaling \$13, 200.00, received by contractors, vendors, and retailers to cover costs of rectifying the situation discovered in the basement and related areas around the property during the pre-closing walk through on May 1, 2012.”

In addition, as the parties have indicated that the dollar amount set out in the Agreement was based on estimates they had received on May 1 and May 2, 2012 from contractors/vendors/retailers, the parties, further, agreed that the Sellers would pay the additional cost if the actual invoice cost exceeded the estimated dollar amounts. To that end, the Agreement states in pertinent part the following: “... the Sellers agree to pay the additional costs if the actual invoice cost exceeded the estimated dollar amounts, thereby exceeding the amount received in the cashier’s check. To cover the potential addition costs, the Sellers will provide another cashier’s check to the buyers within 7 days of notice.” (See Exhibit 1)

The Court received exhibits of the estimated repairs and the invoiced repairs. In a number of instances the invoiced repairs were less than the estimated repairs.

Waterproofing/plumbing was estimated at \$6,600.00; the actual invoice for repairs was \$6,367.00 a difference of \$233.00 in favor of the defendant; mold remediation the estimated and actual repairs were the same at \$1,200.00; flooring estimated repairs was \$3,500.00 and the actual invoice was \$3,207.00 with a difference in favor of defendants of \$293.00. The significant discrepancy in the estimated repairs and the invoice repairs is attributed to the walls, trim, and electrical work; the estimated repairs was \$1,900.00 and the actual repairs were \$7,331.00 a difference of \$5,431.00. Therefore, a total of the estimated repairs was \$13,200 where the actual invoice repairs was \$18,105.00 a difference of \$4,905.00.

Defendant testified that it was his belief that the intentions of the parties in the contract was to place the property back into the condition that it was at the time of the original inspection, namely a water free basement. Defendant disagreed with the installation of drains and tiles and sump pumps as these were not on the property at the time of the Plaintiffs' intention to purchase the property.¹

Defendants failed to offer any evidence as to the cause of the water infiltration in the basement on May 1, 2012 nor any evidence as to the appropriate cost or work necessary to remediate the condition of the basement. Lastly, Defendants maintain in their Motion for Judgment upon Close of Evidence that the Agreement is not an

¹ Sump pump and waterproofing amounts were contained in the original estimate of \$6,600.00 and the sump pump and tiles and drains are not the source of the difference between the estimated repairs and invoice repairs.

enforceable and valid contract as the nature and the extent of obligations were not readily ascertainable. Particularly, Defendants maintain since the obligation, particularly the amount of the invoiced repairs were not known at the time of executing the agreement, the parties could not have a valid offer and acceptance citing *Around the World Importing Inc. v. Mercantile Trust Co., N.A.*, 795 S.W.2d 85, 90 (E.D., 1990) and *Manley v. Athan*, 915 S.W.2d 792 (W.D., 1996)

To establish a submissible case of breach of contract, Plaintiff must first establish existence of an agreement. *Viacom Outdoor Inc., v. Taouil*, 254 S.W.3d, 234, 238 (Mo. App. E.D. 2008). To form a contract the parties must mutually assent to the terms. *Id.* In other words, the parties must have a distinct intention, common to both, and without doubt or difference and the minds of the contracting parties must meet upon and assent the same thing, at the same sense, at the same time. *Id* at 238. In determining whether there has been a meeting of the minds, the Court can look to the intentions of the party as expressed or manifested in their acts or words. *Building Erection Services, Co. v. Plastics Sales and Manufacturing, Co. Inc.*, 163 S.W. 3d, 472, 477 (Mo. App. W.D. 2005). The nature and extent of the contract's essential terms must be certain or capable of certain interpretation. *Id.* In other words, the terms must be sufficiently definite to enable the Court to give at the exact meaning. *Property Assessment Review, Inc. v. Greater Missouri Builders, Inc.*, 260 S.W. 3d, 842,846 (Mo. App. E.D. 2008). A contract is sufficiently definite if it contains matter which would enable the Court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence. *Id*

No contract is formed when the terms of the agreement are duly uncertain or indefinite. Building Election Services, 163 S.W.3d at 477. Uncertainty and indefinites are matter of degree. *Id.* In determining whether a term is too uncertain to be enforced, the Court is guided by the general principals of law applied with common sense and in a light of experience. Property Assessment Review, 260 S.W.3d at 846. While a contract is not formed if the terms of the assented agreements are too uncertain when the parties have written down an agreement in terms in which they both have acceded the Courts are reluctant to hold the agreement ineffectual for indefiniteness. Property Assessment Review, 260 S.W.3d, 845, 846. The cardinal rule of contract interpretation is to ascertain the intent of the parties and give effect to that intent. Dunn Industries Group Inc., v. City of Sugarcreek, 112 S.W. 3d, 421, 428 (Mo. Banc 2003). The terms of the contract are read as a whole to determine the intention of the parties and are given a plain, ordinary, usual meaning. *Id* Additionally, each term is construed to avoid rendering other terms meaningless. *Id* A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense. *Id*

The Court believes that the terms of this agreement are certain and capable of interpretation. It is clear the intention of the parties that the Defendants (the Sellers) provide to the Plaintiffs (the Buyers) a water free basement. More particularly, for the Defendants to pay the cost “rectifying the situation discovered in the basement and related areas around the property during the pre-closing walk through on May 1, 2012.” Due to the nature of the condition and the timeliness of its discovery in relation to the closing on the residential property, it was in the interest of both parties to resolve the

defect in the property in order that the sale of the residential property be consummated. Accordingly, both parties understood, appreciated and anticipated by way of their agreement and their conduct that the invoice cost of repair may exceed the estimated cost and that the Defendants (the Sellers) would be responsible for the difference.

The Court finds that the agreement sufficiently defines the terms and thus is a valid, enforceable agreement. Furthermore, to the extent that this Agreement is indefinite because there is a future determination of the invoice cost, the Court finds that the extrinsic evidence, specifically the conduct of the parties and the ongoing nature of the parties' relationship establishes that the parties intended to create a binding contract for payment for repairs necessary to "... to cover costs of rectifying the situation discovered in the basement and related areas around the property during the pre-closing walk through on May 1, 2012." Property Assessment Review v. Greater Missouri Builders, Inc., 260 S.W.3d, 841, 848 (Mo. App. E.D. 2008).

IT IS THE ORDER AND JUDGMENT of this Court in favor of Plaintiffs and against Defendants in the amount of \$4905.00. Costs assessed against Defendants.

SO ORDERED:

Date: _____

The Honorable Christopher E. McGraugh
Division 29

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was mailed, postage pre-paid this ____ day of _____, 2014 to: Brian T. McCarthy, Attorney for Defendants, 2 Park Place Professional Centre, Belleville, Illinois 62226 and James P. Sanders, Attorney for Plaintiffs, 120 S. Central Avenue, Suite 700, St. Louis, MO 63105-1794.

Clerk of the Circuit Court.