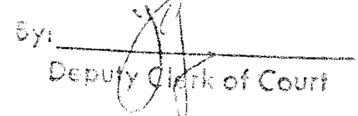

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DORA C. REYES, Plaintiff, v. DELFIN D. EBETUER, et al., Defendants.	CIVIL ACTION NO. 88-744 MEMORANDUM DECISION

FACTS

On January 17, 1986, the plaintiff and defendant[1] entered into a written contract for the construction of a concrete house. According to the contract, the house was to be built in accordance with published Farmers Home Administration (FmHA) Minimum Property Standards (MPS) and the revised plans and specifications of a Mihaville model type 3-A house. A separate document entitled, "Additional General Conditions Construction Contract" was executed by the parties and the FmHA area supervisor and made a part of the original construction contract. The provisions of this document included one that

[1] The singular is used although the complaint names an individual and two companies. It is alleged that the companies are just names under which the individual, Delfin D. Ebetuer, operates and defendant does not deny this. Thus the party being sued is, for all practical purposes, Delfin D. Ebetuer.

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required the parties to secure prior FmHA approval of any changes from the plans, specifications, and MPS.

The defendant completed construction of the house on May 30, 1986 and gave the plaintiff an executed builder's warranty. The builder's warranty was limited to any defects occurring within one year of completion and required the plaintiff to give the defendant written notice of any such defects. The warranty specifically stated that it was in addition to any other "rights and privileges" the plaintiff may be entitled to.

The plaintiff moved in on June 2, 1986. Shortly thereafter the plaintiff began experiencing problems with her new home that began with a door lock sticking and progressed to the appearance of numerous cracks in the plastered walls, beams, and ceiling. The plaintiff notified the defendant of these defects to which the defendant responded with ineffective repair attempts. The defendant also advised the plaintiff that the cracks in the walls, beams, and ceiling of her home were not serious and could be corrected with a plastering job.

There were also numerous other deficiencies in plaintiff's new home having to do with the carport, smoke alarm, interior and exterior paint, floor tiles, windows, doors, roof slope, roof beam rebars, and termite infestation. The plaintiff filed the instant action on November 2, 1988 after it became apparent that the defendant was not going to correct these deficiencies. A trial on the merits was had on

February 20, 1990. At the conclusion of the trial the court ordered the parties to submit their closing and rebuttal arguments in brief form. This Memorandum Decision followed.

PRETRIAL ADMISSIONS

In its order of January 31, 1990, the court granted the plaintiff's motion to strike the defendant's responses to plaintiff's Requests for Admission and answers to interrogatories as being untimely filed. Pursuant to Com.R.Civ.Pro., Rule 36(a), the court deemed the requests for admission as being admitted by the defendant. The admissions pertinent to the defects are summarized as follows:

- Plaintiff's witness qualified as an expert on construction matters including construction deficiencies.
- There are cracks in concrete plastered walls, ceiling, roof, roof beams, and at the corners of window and door openings.
- Exterior wall paint is chalky and easily rubbed off. Interior and exterior ceiling paint is blistering and peeling off in large sheets because there is no penetration of the paint into the concrete surface.
- The rusty spots in the carport ceiling are a sign of concrete spalling where pieces of concrete break off and fall out.
- There is no slope on the roof although the plans

and specifications called for a slope of 1/8" and 1/4" respectively. This causes water to pond on the roof which is exacerbated by downspouts not flush to the roof surface.

- The concrete roof slab is soft which is indicative of too much water in the concrete mix.
- The door openings are oversized. Grout used to fill gaps between the walls and door frames is cracked and falling out.
- The window openings are oversized. The window frames are fit to the concrete using wood strips, contrary to the plans which call for a direct mounting of the window frames to the concrete.
- The doorknobs do not work properly. The garage dead bolt is permanently stuck and the bathroom doorknob is no longer functional.
- There is termite infestation at the house.

Although the admissions do not, per se, create any liability for the defendant, if it is shown under any of the applicable theories of recovery set forth in plaintiff's complaint that the defendant caused any of the admitted defects, liability will be imposed.

MAGNUSON-MOSS WARRANTY ACT CLAIM

The plaintiff invokes the protection of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2311, and

particularly § 2310(d)[2] as one theory of recovery in her complaint. The plaintiff maintains that by giving her a written warranty, the defendant is unable to disclaim the in-,plied warranty of merchantability that is given with any sale of consumer goods.[3] 15 U.S.C. § 2308.

The applicable part of 15 U.S.C. § 2308 provides:

> "(a) No supplier may disclaim or modify ... any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product...."

The plaintiff has defined the materials used to construct her house as "consumer products" within the meaning of the Act in order to trigger its application to her cause of action. Section 2301 of the Act defines consumer product as:

> "... any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)."

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[2] Section 2310(d) provides a private cause of action for damages, costs and expenses to consumers who are damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under the Act or under an implied warranty, written warranty or service contract.

[3] 5 ~PIC§ 2314 provides that a warranty that gocds shall merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

The defendant maintains that he is not a supplier of consumer products distributed in commerce but only a builder of houses. The issue of the applicability of the Magnuson-Moss Act to the defendant's business and more specifically to the written warranty he gave the plaintiff would be a vexatious one indeed were it not for the Federal Trade Commission Regulations defining the scope of the Act's protection. These regulations make clear that the Act is restricted to "tangible personal property which is normally used for personal, family or household purposes," 16 C.F.R. § 700.1(a), and that, therefore, warranties covering real property such as a home do not fall within the scope of the Act:

> "(e) The coverage of building materials which are not separate items of equipment is based on the nature of the purchase transaction. An analysis of the transaction will determine whether the goods are real or personal property, The numerous products which go into the construction of a consumer dwelling are all consumer products when sold "over the counter," as by hardware and building supply retailers. This is also true where a consumer contracts for the purchase of such materials in connection with the improvement, repair, or modification of a home (for example, dropped ceilings, siding, roofing, storm windows, remodeling). However, where such products are at the time of sale integrated into the structure of a dwelling they are not consumer products as they cannot be practically distinguished from realty. Thus, for example, the beams, wallboard, wiring, plumbing, windows, roofing, and other structural components of a dwelling are not consumer products when they are sold as part of real estate covered by a written warranty.

> (f) In the case where a consumer contracts with a builder to construct a home, a substantial addition to a home, or other realty (such as a garage or an in-ground swimming pool) the building materials to be used are not consumer products. Although the materials are separately identifiable at the time the contract is made, it is the intention of the parties to contract for the construction of realty which will integrate the component materials. Of course, as noted above, any separate items of equipment to be attached to such realty are consumer products under the Act." 16 C.F.R. § 700.1(e)-(f) (1989).

The court concludes that as a matter of law, the Magnuson-Moss Act does not apply to the sort of warranty given by the defendant in the instant case. As a result, the plaintiff's complaint fails to state a cognizable claim with respect to the Magnuson-Moss Act.

BREACH OF CONTRACT CLAIM

When performance of a duty under a contract is due, any nonperformance is a breach. Restatement (Second) of Contracts § 235.(2) (1979).[4] The comment to this section defines nonperformance as including defective performance.

There is no question here that the parties upon entering into a valid construction contract had an obligation to each other to perform the contract requirements. The plaintiff had an obligation to pay the defendant for his

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[4] The Restatement is made applicable in the CNMI by 7 CMC § 3401.

services in the construction of her house according to the plans and MPS. It is undisputed that the plaintiff has paid the defendant. However, the existence of defects at the plaintiff's home leaves open the question of whether the defendant fulfilled his obligation to construct the plaintiff's home in accordance with the plans and MPS. In answering this question, the court shall address each of the complained of defects in turn.

Section 603.1 of the MPS requires that all concrete construction provide safe and durable support of all design loads, and be of a quality to resist deterioration due to weather or other deleterious exposure. The plaintiff's expert testified that the cracks in the concrete of plaintiff's home may have been caused by too much water in the concrete mix, a violation of § 603-3.3(a) of the MPS, or by retempering, a violation of § 603-3.3(f) of the MPS. In any event, the plaintiff's expert also testified that the cracks were a substantial departure from the generally accepted practices within the construction industry.

During direct examination, the defendant asked his expert a series of questions designed to create the suggestion that the cracks in the walls and ceiling of the plaintiff's home are merely "hairline deflection cracks" which were likely caused by an earthquake tremor. However, when shown photographs of the cracks on cross examination, the defendant's expert testified that the cracks were larger than the type of "hairline deflection crack" he had referred to during his direct

testimony. Taking this testimony into account, the court finds no basis for the defendant's claim.[5/]

Section 509-1.1 of the MPS requires that the paint used on interior and exterior surfaces to be durable with a specific provision that exterior paint be resistant to deterioration by the elements. The plaintiff's expert testified that exterior grade paint was not used on the plaintiff's house. This testimony was unrebutted.

MPS § 609-7.1(e) requires that the paint be applied in a workmanlike manner. The chalkiness of the exterior paint and the fact that it is easily rubbed off, both of which the defendant admits, are indications that water was added to the paint or that the exterior surface was inadequately prepared by the defendant according to the plaintiff's expert. This testimony was also unrebutted.

MPS §§ 509-4.3 and 509-7.5 require that interior paint provide a washable finish. Interior paint was to "be resistant to being stained or damaged by grease, water, detergents and normal household chemicals." The plaintiff's expert testified that such an interior paint was not used on the plaintiff's house. Again, there was no rebuttal of this testimony.

[5/] Even if the defendant's expert *had* not change3 his opinion regarding the cracks, the court finds no basis for the defendant's assertion as to their origin, In his answer to the plaintiff's complaint, the defendant claims that the cracks in the concrete of plaintiff's home resulted from an earthquake tremor which occurred sometime in March of 1988. The defendant has not introduced any seismic reports or any other evidence to back up its claim that such a tremor occurred.

The plaintiff's complaint alleges that the ceiling paint is peeling as a result of moisture seeping through the concrete roof slab. The plaintiff's expert testified after first-hand observation that the seepage was due to a combination of a "soft" concrete roof slab and the ponding of water on the roof of the house. See discussion, infra. The defendant attempted to discount this explanation through his expert's testimony theorizing that moisture present in the air within the plaintiff's home was causing the peeling. The faulty logic of this explanation becomes apparent when one attempts to account for the water stains on the walls an6 ceiling of the plaintiff's home as revealed in plaintiff's photographic exhibits and related testimony. The failure of the concrete roof slab to protect against the entry of water is a violation of MPS §§ 500 and 609-3.1(a).

The plaintiff's expert testified that the concrete slab was "soft" and that the surface was easily scratched. He added that this was the result of too much water in the concrete mix. This defective condition was admitted by the defendant in the pretrial admission. The plaintiff's expert also testified that this softness ~ ~ . u the roof slab to seep water and reduced its overall strength,/ The soft condition

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6/ The defendant attempted to prove at trial that the roof slab met the strength requirements of the MPS by introducing evidence of a strength test done eight days after pouring. Such evidence is meaningless unless its significance is explained by an expert witness which the defendant did not provide. See Magofna v. Demapan, Civil Action No. 81-0077 (NMI Dist. Ct. April 19, 1983).

of the concrete roof slab is a violation of MPS § 603-3.3(f).

The plaintiff's expert testimony also revealed, and the defendant admitted in the pretrial admissions, that the plaintiff's roof has no slope to it. The plans and specifications each call for different slopes. The plans call for a slope of 1/8 inch per foot and the specifications call for 1/4 inch per foot. The current roof meets neither slope requirement and is a clear deviation from the contract terms.

The defendant's admissions and the testimony at trial show that downspouts atop the roof . not flush with the roof's surface as required by the drawing in Section 5 A-2 of *the* plans. The combination of no roof slope and the raised downspout results in the ponding of the water up to the level of the downspouts before it drains off the plaintiff's roof.[7]

The defendant has admitted and the trial testimony shows that there is concrete "spalling" on the carport ceiling of the plaintiff's home. The plaintiff's expert. testified that concrete "spalling" occurs when the rebars are placed too near the edge of the concrete. In this case, the rebars corroded and expanded causing the concrete to fall out. Such a condition is a violation of MPS § 603-1, supra.

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[7] The defendant claims that the ponding of water on the plaintiff's roof is the result of debris on the roof clogging the downspouts. The court considers this unlikely. The only testimony in *support* of this claim indicated the presence of soda cans at the bottom of tho downspouts which in any event were not large enough to clog the downspouts.

The defendant has also admitted and the trial testimony discloses that the door and window openings are oversized. In the case of the doors, grout used to fill the gap between the concrete edge and the door frame is cracked and falling out. There was unrebutted testimony that wood strips also filled the gaps between the concrete edge and door frame. Pursuant to MPS § 608-2.1, doors are to be weather tight and caulked with a nonhardening sealant. Additionally, the plan drawings indicate that the door frames are to be attached directly to the concrete edge of the wall.

The window installation suffers from the same defects as the doors. Wood strips have been used to fill the gap between the concrete and window frames. The wood has since shrunk and rotted away in places leaving gaps. The window drawings in the plans indicate that the window frames are to be mounted directly to the edge of the concrete wall. The defective window installation violates MPS §§ 500, 607-4.1(d), 608-4.1, and 608-4.4.

The defendant has admitted that the doorknobs at the plaintiff's house do not work properly. The plaintiff's expert testified that this was probably due to the use of "poor quality materials." The bathroom doorknob does not work and that it does not have a privacy lock that can be opened from the outside in emergencies, a violation of MPS § 402-3.4(d). Testimony also revealed that the garage door dead bolt is permanently stuck. Such a condition is a violation of MPS § 402.3-4(a).

The plaintiff testified that floor tiles were coming up throughout the house. MPS § 509-9.1 requires that all such finishing be resistant to moisture in areas subject to moisture and reasonably durable. The defendant attempted to shift blame for this defect onto the plaintiff by showing that she left a water faucet on overnight once, causing some water to spill onto a small area of the floor. This argument fails to take into account the fact that tiles are coming up throughout the house well beyond the area where the water spilled on that one occasion.

The defendant has admitted that the plaintiff's home is infested with termites. The plaintiff's expert testified that there were signs of termites underneath a sink of the plaintiff's home. MPS § 606-2.1 required the defendant to provide protection against termites where they are determined to be a hazard. Although protection was provided against ground termites, the testimony reveals that the defendant did not provide protection against airborne termites, also a hazard in the CNMI. This testimony was unrebutted.

The defendant claims that the plaintiff is estopped from asserting these defects at this date because FmHA inspected and approved the construction of the plaintiff's home at various stages throughout construction. A contractor is not relieved of his duty to construct a house in accordance with agreed plans and specifications merely because an FmHA inspector approved the contractor's work. Fox v. Webb, 268 Ala.

111, 105 So.2d 75, 67 ALR2d 1007 (1958).

The defendant also attempted to show an independent inspector was hired by the plaintiff to advise her. Testimony revealed that this inspector was a MIHA employee and was acting for the benefit of the MIHA, the holder of the real estate deed of trust. The actions of the MIHA inspector have nothing to do with the issues in dispute.

The defendant has admitted the existence of all the foregoing defects in the plaintiff's house. The plaintiff's expert witness testified that all of these defects were substantial deviations from acceptable construction practices. His testimony was unrebutted. The defendant's own expert testified that the slopeless roof and the carport ceiling defects were a substantial deviation from acceptable construction practices.

The court concludes as a matter of law that each of the cited defects in the plaintiff's home are material and the direct result of the defendant's breach of the construction contract.

IMPLIED WARRANTY OF HABITABILITY

In her third cause of action, the plaintiff alleges the defendant has breached an implied warranty of habitability and workmanlike construction.

This court followed the majority of jurisdictions in the United States when it recognized that an implied warranty of habitability exists to protect purchasers and owners of new

homes from shoddy workmanship. Babauta v. Valdez, 2 CR 1181 (CTC 1987).[8/] The warranty of habitability is founded on the notion that a contractor impliedly represents that the house will be erected in a reasonably workmanlike manner and will be reasonably fit for habitation. Shipper v. Levitt, 44 N.J. 70, 207 A.2d 314, 325 (1965).

Based on the findings in the discussion of the plaintiff's breach of contract claim, supra, the court concludes as a matter of law that the defendant breached the implied warranty of habitability given to the plaintiff upon the completion of her house.

CONSUMER PROTECTION ACT

In her fourth cause of action the plaintiff alleges that the defendant violated the provisions of the Consumer Protection Act, 4 CMC §§ 5101-14. Section 5103 of the Act contains a list of prohibited acts "in the conduct of any trade or commerce" of which three are applicable to the instant case:

[8/] The defendant asserts that the warranty of habitability is recognized in only a minority of jurisdictions and only applies to builder-vendors of new homes and not to contractors who construct homes on the owner's property as the defendant did in the instant case. The warranty of habitability Is the majority rule. Shedd, The Implied Warranty of Habitability: New Implications, New Applications, 8 Real Estate L.J. 291, 298 (1980). Even if it were not the majority rule, it is the rule in this jurisdiction. Moreover, the warranty of habitability applies equally to a builder such as the defendant who constructs a house on the owner's property and a builder-vendor who constructs homes on land he is developing. Moxley v. Laramie Builders, 600 P.2d 733, 735 (1979).

(e) Representing that goods or services have ... characteristics, ingredients ... that they do not have....

. . .

(g) Representing that goods or services are of a particular standard, quality, or grade ... if they are of another.

. . .

(m) Engaging in any act or practice which is unfair or deceptive to the consumer.

The plaintiff bases this cause of action on Section 5106 of the Act which grants a private cause of action to any person who:

> "... purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 5103...." (emphasis added).

In this case, the plaintiff contracted and paid for the defendant's services in the construction of a home for herself and her family. It is beyond question that the defendant rendered these services primarily for family or household purposes.

There is an implied representation in every contract for work or services that the work or services will be

performed skillfully, carefully, diligently, and in a workmanlike manner. 17 AmJur2d, Contracts, § 371. This implied representation was present in the plaintiff's construction contract with the defendant. The fact that this representation of workmanlike construction was false is established by the court's findings in the discussion of the plaintiff's breach of contract claim, supra. Consequently, the court concludes as a matter of law that the defendant's represen[illegible] of workmanlike construction of plaintiff's home violates Section 5103(e) and (g) sf the Act.

The defendant argues that the Consumer Protection Act does not apply under the circumstances of this case. The defendant focuses his argument solely on the plaintiff's claim that the defendant told her the problems at her house were minor and not serious. While this statement was made well after the performance of services for the plaintiff, the court finds that the representation was in fact false and relates back to the services performed under the contract. The court concludes as a matter of law that such a representation is violation of Section 5103(m) of the Act.

DAMAGES

Based on the foregoing findings of fact and conclusions of law, the plaintiff is entitled to recover all out-of-pccket Expenses proximately caused by the defendant's defective construction of her home, the cost of repair of the

defects, and nominal damages for the loss in market value of her home.

		Amount
(1)	Out-of-pocket Expenses	$ 2,500.00
(2)	Cost of Repair	
	(a) Concrete cracks, paint, windows doors, locks, tiles, etc	20,000.00
	(b) Roof	6,300.00
	(c) Termite Eradication	900.00
	(d) Two (2) weeks lodging at hotel during repair - 14 days at $90.00 per day	1,260.00
(3)	Loss of Market Value	100.00
	TOTAL	$31,060.00

Pursuant to 4 CMC § 5106(d), the plaintiff is also entitled to her reasonable attorney's fees an5 costs. The plaintiff shall motion the court within five (5) days for such an award by filing her request and affidavit for costs and fees which, upon approval, shall be entered in the judgment.

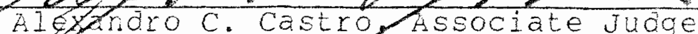
The plaintiff's claim for nominal damages pursuant to CMC § 5106 is denied based on tie court's award of actual damages.

The plaintiff's claim for incidental and consequential damages is also denied on the basis that such damages are not recoverable under any cause of action either raised in the complaint or presented at trial. The court notes that Collins v. Uniroyal, L c , i26 N.J. Super. 401 (App.Div. 1973), the authority cited for plaintiff's recovery of incidental and consequential damages involved a breach of an express warranty

governed by the Uniform Commercial Code. Incidental and consequential damages were awarded on the basis of the U.C.C. provision specifically providing for their recovery. The instant case does not fall within the scope of the CNMI U.C.C. (5 CMC §§ 1101-10104) Moreover, contract damages are not recoverable beyond an amount that the evidence permits to be established with reasonable certainty. Restatement (Second) of Contracts, § 352 (1979). See footnote 3. The plaintiff's testimony that her loss of enjoyment and deterioration in quality of life are worth $10,000 falls far short of this "reasonable certainty" standard. Additionally, recovery may not be had for emotional disturbance unless the breach also caused bodily harm or the contract or breach is of such a kind that serious emotional disturbance would be a particularly likely result. Id. at § 353. The plaintiff's testimony concerning her distress while locked inside her bathroom does not meet the requirements of this section of the Restatement either.

This Memorandum Decision shall constitute the findings of fact and conclusions of law of the court. Judgment shall be entered accordingly.

Dated this 12 day of April, 1990,



Alexandro C. Castro, Associate Judge