

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**No. 2009-0577**

**Spurling Painting, LLC**

**v.**

**A.J. & Sons, Inc. and James Patierno**

**BRIEF FOR APPELLANTS, A.J. & SONS, INC.  
AND JAMES PATIERNO**

**APPEAL OF AN AWARD OF MONIES IN FAVOR OF THE APPELLEE,  
ISSUED BY THE MILFORD DISTRICT COURT**

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**January 13, 2010**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

QUESTIONS PRESENTED .....1

STATEMENT OF THE CASE .....2

STATEMENT OF FACTS .....2

SUMMARY OF THE ARGUMENT .....4

STANDARD OF REVIEW .....5

ARGUMENT .....5

    I.    THE DISTRICT COURT ERRED IN FINDING THAT  
          THE APPELLANTS-DEFENDANTS ARE OBLIGATED  
          TO PAY FOR SERVICES THAT WERE NOT AUTHORIZED  
          IN ACCORDANCE WITH THE CONTRACT’S TERMS .....5

        A. Choice of Law .....5

        B. The Additional Work Was Covered Under the  
           Original Scope of Work .....6

        C. The Parol Evidence Rule Bars Spurling From Attacking  
           The Plain Language of the Contract .....7

CONCLUSION .....8

ORAL ARGUMENT .....8

COURT ORDER .....10

CERTIFICATION OF COUNSEL .....11

TABLE OF AUTHORITIES

**Cases**

Bankeast v. Michalenoick, 138 N.H. 367, 369 (1994) .....4, 6

Barrows v. Boles, 141 N.H. 382, 389 (1996) .....6

Consolidated Mutual Insurance Company v. Radio Foods Corp.,  
108 N.H. 494, 496 (1968) .....5

Czumak v. N.H. Div. of Developmental Servs., 155 N.H. 368, 373 (2007) .....5, 6

Gamble v. University System of N.H., 136 N.H. 9, 13 (1992).....6

Kellerher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 830 (2005) .....5

LaPierre v Cabral, 122 NH 301, 306 (1982).....8

Massachusetts Municipal Wholesale Elc Co. v. Town of Danvers,  
411 Mass. 39, 48 (1991) .....8

Richey v Leighton, 137 NH 661, 664 (1993) .....8

R. Zoppo Co. v. City of Dover, 124 N.H. 666, 670-71 (1984).....6

Sargent v. Tenaska, Inc., 914 F.Supp. 722 (D. Mass. 1996) .....8

Sherman v. Graciano, 152 N.H. 119, 121 (2005) .....5

Sirrell v. State, 146 N.H. 364, 370 (2001) .....5

## **QUESTIONS PRESENTED**

1. Whether the District Court erred in awarding monies to the Appellee for claimed additional work when the work in question was not additional work but was work that was already within the scope of the original agreed contract?
2. Whether the District Court erred in awarding monies to the Appellee for work that was part of the original agreed contract price?

## STATEMENT OF THE CASE

The Appellant-Defendants in this action are A.J. & Sons, Inc. and James Patierno<sup>1</sup> (hereinafter “A.J. & Sons” or “Appellants”). The Appellants contend that the Milford District Court erred in finding them liable to the Appellee-Petitioner, Spurling Painting, LLC (hereinafter “Spurling” or “Appellees”) in the amount of \$950.00 plus costs and interest for painting services provided in conjunction with a subcontractor agreement at a construction project in Massachusetts. The Appellants contend that the Appellee should not have characterized the painting of the windowsills as additional work and was not authorized to charge the Appellants-Defendants above the contract price for the painting of the same.

This action was originally filed on December 19, 2008 in Milford District Court as a small claims matter. A hearing on the merits was held on July 17, 2009. The Court issued its opinion awarding damages to the Appellees on July 22, 2009 in the amount of \$1,019.20, including \$69.20 in costs and interest. On August 13, 2009, Appellant filed its Notice of Appeal. The case was accepted by the Supreme Court on August 31, 2009.

## STATEMENT OF FACTS<sup>2</sup>

The Appellant, A.J. & Sons, Inc. is a general contractor with a principal place of business in Tyngsboro, Massachusetts. The Appellant, James Patierno is President of A.J. & Sons, Inc. Hereinafter A.J. & Sons, Inc. and James Patierno shall collectively be referred to as the “Appellants.” Appellant was the general contractor under an AIA contract for the rehabilitation of property owned by Tewksbury Physical Therapy, located at 885 Main Street in Billerica, Massachusetts (“Project”). The Appellee, Spurling Painting, LLC, (“Spurling”) provided a work proposal to the Appellant concerning painting work associated with the Project. (Ap. Pet.s

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<sup>1</sup> The lower court opinion named the Defendant as Jim Bertenoy. The Defendant’s name is James Patierno. Any references to the same herein shall refer to “Mr. Patierno”

<sup>2</sup> References to the Appellant-Petitioner’s Appendix shall be designated as follows: “Ap.-Pet.’s App.”

App at 3). The work proposal submitted by Spurling detailed the work Spurling agreed to perform, which included all painting associated with the installation of the windows in the property, excluding painting of the windows themselves. The total agreed contract price for work to be performed by Spurling was \$13,900.00.

Appellant duly paid Appellee for all work specified in the contract. Upon completion of certain of the work, Appellee submitted Application for Payment No. 1 in the amount of \$9,200.00, which after Appellant confirmed with the architect and owner, it duly paid. (See Application and Certificate for Payment, Ap. Pet. App.5). In accordance with the AIA agreement governing the job, any change orders were required to be approved by the Project architect and also the owner. Appellee completed the remaining work and submitted Application for Payment No. 3, seeking the balance owed of \$4,200.00 but including two change orders one in the amount of \$350.00 and a second in the amount of \$950.00, the amount in dispute in this appeal. (See Application and Certificate for Payment No. 3, Ap. Pet. App.10). Appellee, the architect and the owner agreed to the change order in the amount of \$350.00 but not the requested change order in the amount of \$950.00 as that sought payment for work already governed by the contract. Thereafter Appellee, in accordance with the contract paid Appellant the remaining balance of \$4,200 (See Ap. Pet. App. at 13). In addition, pursuant to an agreed change order, approved by the architect and owner, the Appellee was paid an additional \$350.00. (Ap. Pet. App. At 14). There were no additional agreements executed between the Parties and no additional work was approved by the architect or the owner for the Project.

The change order request from Spurling requesting payment of the additional \$950.00 for the painting of the windowsills was not paid as this work was part of the original contract, and further no change had been approved by the architect and owner. (Ap. Pet.'s App. 15). A.J. &

Sons informed Spurling that the windowsills were included as part of the original contract price and that Spurling did not have authorization to charge above and beyond the contract price for the same. Therefore, the invoice/change order regarding the same would not be paid by A.J. & Sons and was not approved by the architect.

In addition, the original agreement specified that Spurling would be paid for painting the interior doors, however the contractor purchased pre-painted doors and Spurling therefore did not perform this work, although it was paid over \$600.00 for same. A.J.& Sons provided a quotation from Merrimack Building Supply evidencing entitlement to a \$682 credit. (Ap. Pet. App.16). Spurling responded by filing a complaint in small claims court seeking \$950.00, cost and interest.

#### **SUMMARY OF THE ARGUMENT**

"The interpretation of a contract is a question of law to be determined by focusing on the language of the written contract, as it reflects the intent of the parties." Bankeast v. Michalenoick, 138 N.H. 367, 369 (1994). The parties entered into a written contract that specified the scope of work and the agreed upon contract price to complete said work. The Appellant duly paid the Appellee for all work performed and specified by the contract but did not pay for any" additional work" because the work was not addition but rather was included in the original scope of work. In addition, the general contract for the project specified that any change orders for alleged additional work required approval of the architect and the owner. No approval of by the architect and the owner was ever obtained for the alleged additional work. Accordingly, the award of additional monies to the Appellee for the alleged additional work was error.

## STANDARD OF REVIEW

The issue on appeal to this Court involves the interpretation of the subcontract agreement and whether the painting of the windowsills was included in the contract. The interpretation of unambiguous language contained in a contract is a question of law which this Court must review *de novo*. Czumak v. N.H. Div. of Developmental Servs., 155 N.H. 368, 373 (2007); Sherman v. Graciano, 152 N.H. 119, 121 (2005). This Court is not obligated to follow the trial court's conclusions of law in regards to the interpretation of the contract. See Kellerher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 830 (2005) (explaining that this Court reviews "trial court's legal conclusions *de novo*"); Sirrell v. State, 146 N.H. 364, 370 (2001). Therefore, the claims in this matter must be reviewed *de novo*.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN FINDING THAT THE APPELLANTS-DEFENDANTS ARE OBLIGATED TO PAY FOR SERVICES THAT WERE NOT AUTHORIZED IN ACCORDANCE WITH THE CONTRACT'S TERMS

#### A. Choice of Law

This Court has determined that "in the absence of an express choice of law validly made by both parties, the contract is to be governed, both to validity and performance, by the law of the state with which the contract has its most significant relationship." Consolidated Mutual Insurance Company v. Radio Foods Corp., 108 N.H. 494, 496 (1968). As the contract in this matter is silent on the issue of choice of law, the Court must determine whether New Hampshire law or some other state's laws should apply. This contract involved a construction project in Massachusetts and involved a Massachusetts-based owner of land and Massachusetts-based general contractor. Id. at 497 (deeming location of insured risk integral to determination of which state's law governed insurance contract). All of the services performed pursuant to the

contract were performed in Massachusetts. See id. Other than the fact that the Appellee-Plaintiff is a New Hampshire limited liability company, this matter bears no relationship to New Hampshire. It is without question that Massachusetts is the state with which this matter had the most significant relationship. As such, its law should apply.

**B. The Additional Work Was Covered Under the Original Scope of Work**

The central issue on appeal is interpretation of the subcontract agreement between the parties and whether the work that Spurling claims was additional work was in fact already included in the scope of the contract. "The interpretation of a contract is a question of law to be determined by focusing on the language of the written contract, as it reflects the intent of the parties." Bankeast v. Michalenoick, 138 N.H. 367, 369 (1994) citing R. Zoppo Co. v. City of Dover, 124 N.H. 666, 670-71 (1984). As a general rule, the Court will "determine the meaning of a contract based on the meaning that would be attached to it by reasonable persons." Gamble v. University System of N.H., 136 N.H. 9, 13 (1992).

The interpretation of unambiguous language contained in a contract is a question of law which this Court reviews de novo. Czumak v. N.H. Div. of Developmental Servs., 155 N.H. 368, 373 (2007). In addition the Court is empowered to set aside factual findings where they lack evidentiary support and/or constitute a clear error of law. Barrows v. Boles, 141 N.H. 382, 389 (1996).

Here it is manifest from the contract documentation that the painting of the window sills was included within the originally agreed upon contract price and did not constitute additional work. (Ap. Pet.'s App.3). Specifically, the documentation utilized by Spurling and the Appellant in the negotiation and formation of the contract provides that Spurling would be responsible for all paint work, excluding only the actual windows themselves and the exterior of

the building. (Ap. Pet.'s App. 3). This necessarily included painting of the framing and the sills utilized to install the window. (Ap. Pet.'s App. 3). Dictionary.com defines "window sills" as "the sill under a window." (Ap. Pet. App. 16); while defining "windows as "such an opening with the frame, sashes and panes of glass, or any other device, by which it is closed." If the sill is located under the window, it cannot logically be part of the window itself. The Appellant duly paid the Appellee the full amount of the agreed upon contract price for the work specified in the contract, which included painting of the window sills. The Appellant refused to pay the Appellee any amounts beyond those agreed in the contract.

Moreover, the parties were operating under an AIA agreement with the owner of the project and the AIA general contract expressly required that any change order for additional work had to be approved by the owner of the project. No change order was ever approved by the owner of the Project regarding the alleged additional work by Spurling totaling \$950. Spurling was paid for an approved change order in the amount of \$350. (Ap. Pet. App 14). Accordingly, the District Court erred when it awarded additional monies to Spurling for alleged additional work where the work was already within the scope of the contract and further where no valid change order had been issued by the project architect and owner.

**C. The Parol Evidence Rule Bars Spurling From Attacking The Plain Language of the Contract**

The terms of the contract requiring that any change order be approved by the architect and owner of the Project in order to be modified as well as the fact that the contract only excluded windows and the exterior of the building, both support that any alleged modification to the original contract in this matter cannot be enforced. The terms of the contract are unambiguous. Therefore, other evidence such as discussions that the Appellee claimed at the lower court took place between himself and the former project manager and any other oral

agreements which allegedly authorized the painting of the windowsills cannot be considered by the Court as they are barred by the parol evidence rule. See Massachusetts Municipal Wholesale Elc Co. v. Town of Danvers, 411 Mass. 39, 48 (1991). The first step in determining whether the Parol Evidence Rule is admissible or applicable is to consider whether the writing in question is a total integration and completely expresses the agreements of the parties. LaPierre v Cabral, 122 NH 301, 306 (1982); Richey v Leighton, 137 NH 661, 664 (1993).

While the Appellee claimed in the lower court that the original contract terms were modified to include the painting of the windowsills, there was no written modification agreement reached by the Parties. Moreover, the contract specifically excluded windows but not *windowsills* from the items that were to be painted in exchange for payment of \$13,900.00. While Massachusetts courts recognize the ability to modify contracts, the terms cannot be modified unilaterally. Sargent v. Tenaska, Inc., 914 F.Supp. 722 (D. Mass. 1996). The same meeting of the minds that existed in the formation of the original contract must exist in order to reach a modification agreement.

### CONCLUSION

For the reasons outlined herein, the award entered by the District Court in favor of Spurling should be set aside.

### ORAL ARGUMENT

The Appellant does not request that the Court schedule an Oral Argument in this matter.

Respectfully submitted,

AJ & Sons, Inc. and James Patierno,  
By their Attorney,

A handwritten signature in black ink, appearing to read 'Timothy J. Ervin', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

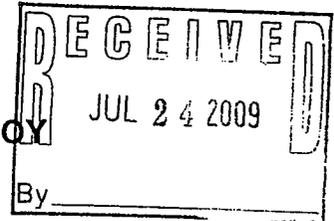
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NOTICE OF DECISION



Case Name: SPURLING PAINTING LLC VS AJ SONS/JIM BERTENCOY  
Case Number: 458-2009-SC-00104

The Court rendered the following decision on .

JUDGMENT FOR PLAINTIFF

**Defendant:** You are obligated to pay the specified amount within 30 days, otherwise, the plaintiff may initiate collection proceedings against you, which may result in the issuance of an order requiring your personal appearance in court.

**Plaintiff:** If payment is not received within 30 days, you may complete a Motion for Periodic Payments form (NHJB-2364-D) pursuant to RSA 524:6-a and return it to the Court with \$25.00 for further action.

CASE DEFAULTED ON DEFENDANT'S FAILURE TO APPEAR FOR HEARING.  
JUDGMENT FOR PLAINTIFF

**Defendant:** You are obligated to pay the specified amount within 30 days; otherwise, the plaintiff may initiate collection proceedings against you, which may result in the issuance of an order requiring your personal appearance in court.

**Plaintiff:** If payment is not received within 30 days, you may complete the attached Motion for Payments form and return it to the Court with \$25.00 for further action.

Judgment Amount	\$950.00
Costs	\$60.00
Interest 04/08/2009 -	\$9.20
Total Due	\$1,019.20

JUDGMENT FOR DEFENDANT

CASE DISMISSED ON PLAINTIFF'S VOLUNTARY DECISION NOT TO PURSUE THE CASE.

**PAUL S. MOORE**

Paul S Moore, Justice

July 22, 2009

(370)

c: SPURLING PAINTING LLC

**CERTIFICATION OF COUNSEL**

I, Timothy J. Ervin, hereby certify that on this 13<sup>th</sup> day of January 2010, I have served two true copies of the foregoing documents on all parties of record by causing two (2) copies of the same to be delivered by first class mail to:

Spurling Painting, LLC  
Roger Spurling  
11 Columbia Drive  
Amherst, NH 03031



\_\_\_\_\_  
Timothy J. Ervin