

JUN 16 2009


Clerk of Court/Assistant

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IN THE
HO-CHUNK NATION TRIAL COURT

Mary Bernhardt,

Plaintiff,

v.

**HoCak Construction, LLC and Ho-Chunk
Nation Department of Housing,**

Defendants.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT**

Case No.: CV 05-22

Procedural Background

Plaintiff, an enrolled member of the Ho Chunk Nation of Wisconsin, filed this action on March 14, 2005, asserting several claims pertaining to the construction of a new home on tribal land. Plaintiff alleges that the defendant, HoCak Construction, LLC, (hereinafter referred to as the "contractor") and a Limited Liability Company organized under the laws of the Ho Chunk Nation of Wisconsin, a federally recognized Indian Tribe, (hereinafter referred to as "the Tribe"), was negligent in the construction of her home. Plaintiff principally claimed that the poor workmanship resulted in excessive water seepage causing toxic mold that consequently, made the home uninhabitable.

Prior to the plaintiff's filing suit in this matter, the Tribe dissolved HoCak Construction, LLC. Ho Chunk Nation Department of Housing, another named defendant, is an authorized sub-entity the Ho-Chunk Nation.

The Tribe appears on behalf of defendant Ho-Chunk Nation Department of Housing and denied liability on numerous grounds, alleging that the Tribe, including its authorized agents and sub-entities, had sovereign immunity and that the plaintiff's suit was filed past the applicable

1 statute of limitations. As such, the Tribe requested the summary dismissal of the plaintiff's
2 claims.

3 In the first Trial Court decision dated December 5, 2007, the Court granted the Tribe's
4 Motion for Summary Judgment and dismissed the plaintiff's claims on the ground that they were
5 barred by the Tribe's three-year statute of limitations. That decision to dismiss was based upon
6 the facts developed in the record including the pleadings, affidavits and attached exhibits filed in
7 connection with the Motion for Summary Judgment but without the benefit of a full hearing on
8 the Motion.
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10 Because of the absence of a motion hearing or the development of a record beyond the
11 pleadings, on September 19, 2007, the Ho Chunk Supreme Court reversed and remanded for a
12 hearing on the Motion for Summary Judgment.
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14 On remand, this Court held several Status Conferences and provided an opportunity to
15 the parties to supplement the record and have the hearing on the Tribe's Motion for Summary
16 Judgment. The parties filed supplemental affidavits with attached exhibits and requested this
17 Court to make a decision without additional hearings or testimony. The parties specifically
18 requested that the following two issues be addressed on remand: 1) Whether the plaintiff's
19 motion to amend the pleadings to include individual legislative members and the Director of
20 Housing may be granted, and 2) whether the defendant's Motion for Summary Judgment should
21 be granted.
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23 On July 15, 2008 this Court issued its decision granting the plaintiff's motion to amend
24 the pleadings and denying the Tribe's Motion for Summary Judgment, on the grounds that the
25 the Ho Chunk Tribal Legislature specifically waived sovereign immunity as to the Tribe's
26 Housing Department in an effort to specifically resolve Ho Cak Construction Company's
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1 alleged deficiencies in its construction contracts with tribal members. That trial court decision
2 also specifically reversed a previous finding that the Tribe's statute of limitations applied when
3 it does not; the Tribe's statute of limitations ordinance was in fact enacted after the plaintiff's
4 commencement of this action. Finally, because the facts surrounding the signed releases were
5 unresolved or disputed and were essential to the resolution of the claims, the previous decision
6 granting the motion for summary judgment was reversed and the case was scheduled for a full
7 hearing on the claims.
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9 The hearing was held on March 5, 2009 and included the appearances of plaintiff, Mary
10 Bernhardt and her Attorney, James A. Ritland and the defendant, HoCak Department of Housing
11 through its Executive Director, Penny Ybarra and its attorney, Wendy Huling.
12

13 Findings of Fact

14 The facts are substantially as previously found by this court in its previous decisions but
15 will be recited again for clarity and convenience and are based upon the pleadings and record
16 including testimony and evidence admitted at the hearing on March 5, 2009.
17

18 The plaintiff, Mary Bernhardt, is an enrolled member of the Ho Chunk Nation of
19 Wisconsin and resides on Tribal trust property located in the State of Wisconsin. The defendant,
20 HoCak Construction, LLC, was chartered on June 16, 1998 under the Tribe's constitutional
21 authority to "...charter corporations and other organizations for economic and other purposes..."
22 See Ho Chunk Nation Leg. Res. No. 6/16/98A. Pursuant to that resolution, the Ho Chunk
23 Legislature approved with amendment, HoCak Construction LLC's, Articles of Organization
24 and Operating Declaration. Neither of these documents was submitted to the court for review,
25 so the exact purpose of the formation HoCak Construction LLC is unclear; however, the Ho
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1 Chunk Nation Legislature dissolved said corporation by resolution on December 19, 2000. *See*
2 Ho Chunk Nation Leg. Res. No. 12/19/00B.

3 Pursuant to the dissolving resolution, it is clear that HoCak Construction LLC was a
4 business wholly owned and funded by the Tribe inasmuch as the Ho Chunk Legislature dictated
5 when HoCak Construction LLC received funding to operate and directed when the construction
6 company was to cease all operations (December 31, 2000). *Id.* The resolution also specifically
7 called for "...a legal review of HoCak Construction's existing contracts to determine liabilities
8 and responsibilities that will be incurred after the December 31, 2000, [and] that there shall be a
9 liquidation and closeout plan to be presented at a duly convened Legislative session
10 immediately." *Id.* The terms of the liquidation and closeout plan are unknown.

13 On January 29, 1999, the HoCak Construction, LLC (herein referred to as "Contractor")
14 entered into a written contract with the plaintiff, Mary Bernhard, for the construction of a four-
15 bedroom home. In relevant part, subsection 2(b) of said contract stated that the
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17 Contractor will provide each of the following, as reflected in or contemplated by
18 the Plan and Specs and in conformity of all applicable building codes, including
19 any and all codes of the Ho Chunk Nation, in consideration of the Contract Price
20 and without further charge: *(xi) drain tiling both inside and outside basement*
21 *foundation, with a sock to basement pit area, covered with at least 12 inches of*
22 *washed rock meeting ILHR 21.17(2)(c) criteria; and (xiii) a sump pump which*
23 *shall be fully operational and adequate to the need of the Home...(emphasis*
24 *added)*

23 See Plaintiff's Exhibit #4. Agents for the Tribe's Home Ownership and Benefit Housing
24 Program for the General Welfare of Elders (hereinafter referred as to "Homeownership Program
25 or HOP"), 8 HCC §7 approved the contract on February 16, 1999 as that program substantially
26 financed the construction. The Homeownership Program, in turn, required that the construction
27 be accordance with all applicable building codes, including the Tribe's; however, the contract
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1 also made clear that the plaintiff could not hold the Homeownership Program responsible for the
2 contractor's performance under the contract. The plaintiff claimed that she agreed to the
3 contract with the Tribe's construction company because as a tribal company, she felt she could
4 trust them more than others and that they would build her a good home. At the time plaintiff
5 entered into the contract, the Tribe's Homeownership Program provided elders with advocates
6 and the advocate assigned to Ms. Bernhardt was Rachel Winneshiek, but the extent to which Ms.
7 Winneshiek represented the plaintiff was never made clear on the record.
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10 The home construction contract required the contractor to provide all framing, plumbing,
11 electrical, heating, ventilation, and air-conditioning, finish work, and most importantly to this
12 case, drain tiling. The initial contract did not require the contractor to provide any site
13 preparation or excavation work; however, a subsequent contract dated May 7, 1999 and entered
14 into between the plaintiff and contractor, authorized the contractor to perform the site
15 preparation and excavation for the home construction because of Tribe's Public Works
16 Department's failure to timely complete this preliminary work. See Defendant's Exhibit C.
17 Under the terms of this second contract, the plaintiff agreed to indemnify and hold harmless the
18 Tribe and HoCak Construction for any of this site preparation work which HoCak Construction
19 agreed would be performed in "...conformance to state and local building codes, and standard
20 practice." Id.
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23 On April 4, 1999, a Soil and Site Evaluation report was completed for Ms. Bernhardt's
24 lot, and Ms. Ybarra, the Executive Director of Housing, indicated that such evaluations are done
25 for all new home construction and that no drain tile was installed on the plaintiff's home because
26 she understood it was not required; however, Ms. Ybarra was unable to determine who exactly
27 drew this conclusion and on what factual basis that conclusion was drawn. See Defendant's
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1 Exhibit K. Although Mark Palmer completed the evaluation, he was not present at the hearing
2 to testify to any of the information contained in the report or to any of the conclusions drawn
3 there from.
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5 In June 1999, HoCak Construction LLC forwarded to HoCak Nation Department of
6 Labor a Foundation Inspection Report that indicated, among other things, that the drain tile was
7 not required for the plaintiff's project. See Paragraph 4 of Defendant's Exhibit F. At the bottom
8 of this report, although plaintiff signed her name indicating she was satisfied with the work
9 completed thus far and requested that work continue on her home, plaintiff also testified that the
10 had no idea what drain tiling was and that her focus was mainly on the diagram of the house.
11 Ms. Ybarra explained that the Tribe's Homeownership Program provided project coordinators,
12 whose job function included working as a liaison between the contractor and the homeowners,
13 particularly so that the homeowners know what is going into their homes. Ms. Ybarra admitted
14 that sometimes the Project Coordinators do not understand some of the technical data used in
15 construction, but indicated that when that happens, the contractor would provide the
16 explanation. In this instance, there was no testimony as to whether anyone explained to Ms.
17 Bernhardt the conclusion that drain tile was not needed on her home construction project. The
18 construction contract itself was never formally amended to exclude the requirement to install
19 drain tiles.
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23 The Tribe's housing office and the plaintiff inspected the nearly completed construction
24 on June 1, 2000 and released the Tribe and HoCak Construction from any additional
25 requirements save the one-year builder's warranties due the plaintiff. Neither the pleadings nor
26 the June 1, 2000 Inspection Reports make reference to the scope of those warranties. See
27 Defendant's Exhibit E. At that time, the final grading had not been completed, and the report
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1 makes no mention of the absence of the drain tiles. Plaintiff testified that she remembers
2 signing the property inspection report so that she could take possession of the property and that
3 she signed the document without having an elder advocate present to explain anything when she
4 signed. She indicated that at the time she was frustrated because both she and her husband had
5 pointed out many faulty items during construction, including vinyl siding, doors etc. and
6 because her house was originally supposed to be completed in the summer of 1999. Although
7 most of the faulty workmanship was corrected, other issues like door latches that do not close,
8 remain unresolved.
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11 The plaintiff received her occupancy permit from the Homeownership Program in
12 September 2000 and took possession at that time. Plaintiff and her husband testified that they
13 were not happy with a number of construction items and that they continued to work with the
14 Homeownership Program and the contractor to correct many of the problems including faulty
15 grading, incorrect foundation work, and faulty shingle installation. They lived in the house
16 approximately fifty per cent of the time until June 2004, when, during a heavy rainstorm, the
17 finished basement flooded six inches, resulting in serious flood and mold damage to the drywall
18 and carpeting. The damage took three days to clean up and required the installation of new
19 carpeting. Until this major flood, the plaintiff noticed that every time it rained, the front yard of
20 her house flooded, but this was the first instance in which the flooding occurred in her basement.
21 It was also after this flood that plaintiff first realized the importance of the absence of drain tile
22 on her house. Because of the extensive damage and the consequent mold growth, the plaintiff
23 and her husband moved out of the house for approximately one year while she attempted to
24 work with the Tribe to resolve the construction deficiencies.
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1 On June 24, 2004, the Ho Chunk Nation Legislature approved a motion "...to grant a
2 waiver to have the Department of Housing investigate, repair and fund deficiencies of the
3 HoCak Construction-built home for Tribal Elder Mary Bernhardt. This should be completed on
4 an emergency basis." See Plaintiff's Exhibit #9. This was after the dissolution of HoCak
5 Construction, L.L.C. In response to this directive, the Tribe's housing department completed
6 some work, but the addition of drain tiles was not included. Because of the lack of funding, in
7 November 2004, the Tribe's legislature denied any further liability for the plaintiff's claims.
8

9 That same month, at the plaintiff's request, Mr. Randy Sullivan, a state certified building
10 inspector, evaluated the plaintiff's property and concluded that the flooding, dampness, and
11 mold problems were directly the result of an absence of drain tile and improper exterior grading.
12 See Plaintiff's Exhibit #1. He testified that the surrounding water table is higher than the
13 basement floor which results in water seepage and that the moist conditions from this seepage
14 encourages mold growth which may be a health hazard.
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16 Mr. Rob Dunham, a Field Inspector with American Water Works, corroborated Mr.
17 Sullivan's testimony. Mr. Dunham inspected the plaintiff's basement and concluded that
18 because there is cracking in the middle of the basement floor causing seepage, the hydrostatic
19 pressure on the basement foundation walls is severe and can only be corrected with the
20 installation of drain tiles and a sump pump. The cost to complete this work would be Ten
21 Thousand One Hundred Forty Eight Dollars and No Cents (\$10,148.00). The cost for repairing
22 the sheet rock in the basement would be approximately Five Thousand Three Hundred Fifty One
23 Dollars (\$5,351.00). The cost for replacing the basement carpeting would be Two Thousand
24 Three Hundred Twenty Two Dollars No Cents (\$2,322.00).
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1 Plaintiff also alleges that HoCak Construction Company's faulty work included
2 improperly installed roof shingles on the garage. Mr. Bernhardt, the plaintiff's husband,
3 testified that at some point the shingles blew off the roof, but he does not remember exactly
4 when. He concluded that it was the result of poor nailing, but the plaintiff's witness, Mr. Don
5 Neitzel, indicated the shingle damage was mostly due to weather, particularly wind damage,
6 instead of faulty construction. He was also not clear as to whether the absence of roof venting
7 was standard practice or not. The costs of replacing the roof, including the installation of roof
8 vents, would be Twelve Thousand Eight Hundred Eighty One Dollars (\$12,881.00). Although
9 the Tribe admits to the presence of water damage, it denies ever having been notified of any
10 problems with the plaintiff's roof.
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13 Conclusions of Law and Judgment

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15 The construction contract specifically addresses the applicable law that should be applied
16 in the absence of Tribal law. Paragraph thirteen (13) of that contract states that in the absence of
17 existing Tribal law "...at the time of the occurrence of any incident out of which any claim or
18 dispute shall arise...with respect to any matter material to the disposition of the claim or dispute,
19 the laws of Wisconsin shall be incorporated and supply the rule of decision as to that matter
20 only." Under Wisconsin law, a breach of contract claim has a six-year statute of limitation,
21 §893.43, Stats. Moreover, "... a contract cause of action accrues at the moment when the
22 contract was breached, regardless of whether the injured party knew or should have known the
23 breach occurred." *CLL Associates and Arrowhead Pacific*, 174 Wis.2d 604, 608, 497 N.W.2d
24 115 (1993). *See also Williams v. Karek Builders, Inc.*, 212 Wis.2d 150, 568 N.W.2d 313 (Ct.
25 App. 1997).
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1 In this case, the contract commenced February 16, 1999, when all parties, including the
2 Homeownership Program representative, signed the contractor's proposal, and was completed
3 June 1, 2000, when the final inspection occurred, the contractor was released, and the Builder's
4 Warranty began. Subsections 2(b)(xi) and (xiii) of the construction contract required the
5 contractor to install drain tiles on both the inside and outside of the basement foundation and a
6 sump pump, neither of which was done. Nor was the contract amended to exclude these items.
7 Paragraph 16 of the contract requires all amendments to be completed in writing and is not
8 effective until signed by all parties, including the Tribe's Homeowner Program representative.
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11 Written contract amendments are required to protect all parties to make clear the
12 expectations under the contract terms. The Tribe essentially argues that the plaintiff's signature
13 on the June 1, 2000 memorandum, which declares, "drain tile is not required in this soil" is the
14 same as an amendment to the contract. It is not. It is merely a conclusion drawn by someone
15 without any disclosed factual basis. Although a soil and site evaluation for the plaintiff's site
16 had been completed in April 1999, the author of the report did not testify to any of his
17 conclusions drawn as a result of the report.
18

19 A proper amendment to the construction contract should have included some reference to
20 the contract being amended and should have clearly stated why the contract was being amended.
21 Had this been done, the plaintiff would have had a reasonable opportunity to specifically
22 question the conclusions drawn from the soil and site evaluation study and would have also
23 arguably benefited by some reduction in the price she paid as the installation of the drain tiles
24 was clearly included in the original price. Finally, the plaintiff's signature on the June 1, 2000
25 memorandum, although not coerced, clearly only indicated the plaintiff's satisfaction with the
26 work to date and gave her permission to continue. It cannot reasonably be construed to be
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1 anything other than that and certainly not an agreement to change the terms of the original
2 construction agreement. The complete failure to complete work required under the terms of the
3 contract constitutes a breach of duty.
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5 Moreover, it is the absence of the drain tiles, first discovered in June 2004 when the
6 basement flooded six inches, that is the proximate cause of the damage to the plaintiff's house.
7 Two experts indicated that the plaintiff's house is located in an area with a high water table and
8 had the drain tiles been installed, the flooding would not have occurred. Both agreed that the
9 hydrostatic pressure could only be alleviated with the installation of proper tiling so that the
10 water may be channeled properly and then pumped out with a sump pump. Both clearly
11 indicated that the damp conditions cause mold and mildew and that a thorough cleaning,
12 replacement of the drywall and proper drainage are the solutions to the problem. The costs to
13 complete this work was uncontroverted and total Seventeen Thousand Eight Hundred and
14 Twenty One Dollars (\$17,821.00).
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17 Although plaintiff also alleged that the contractor should be liable for the faulty roof
18 installation, the evidence was far less persuasive than the requirement that drain tile be installed.
19 First, no one testified that the quality of work was in any way substandard. In fact, the
20 testimony indicated that the damage to the roof shingles might have been due to the weather and
21 age of the shingles. Because there was also no evidence comparing the work completed to
22 generally acceptable workmanship, it is impossible to conclude that the contractor in this case
23 did not live up to the industry's standards.
24

25 According to paragraph 7(b), the plaintiff agreed that only the contractor could be held
26 responsible for claims concerning material or workmanship, but for reasons given in a previous
27 decision, the Tribe waived its immunity on these claims and is liable for the damage sustained to
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1 the plaintiff in the amount of Seventeen Thousand Eight Hundred Twenty One Dollar No Cents
2 (\$17,821.00).

3 Finally, the parties raise the issue of whether the plaintiff may recover attorney fees and
4 costs in this matter. The court's decision in *Ronald K. Kentwood v. Ho Chunk Nation Housing*
5 *Dep't et al*, Case No, CV-04-33 (Ho Chunk Nation Tr. Ct., July 27, 2006) appears to be
6 dispositive. In *Kentwood*, the trial court adopted the "American Rule" where the prevailing
7 party is generally not authorized to collect fees from the losing party unless there's evidence of
8 bad faith, willful disobedience of a court order or other claim in equity. Id at pp.15-16
9 (*additional citations omitted*). Since none of these exceptions apply in this case, the court is
10 without authority to award fees or costs.

11 The parties are advised of their right to timely file a post judgment motion with this
12 Court in accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order*.
13 Otherwise, "[a]ny final *Judgment or Order* of the Trial Court may be appealed to the Ho Chunk
14 Supreme Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter
15 *HCN R. App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal." *HCN R.*
16 *Civ. P. 61*. The appellant "shall within sixty (60) calendar days after the day such judgment or
17 order was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment
18 or order, together with a filing fee as stated in the appendix or schedule of fees" *HCN R. App. P.*
19 *7(b)(1)*. "All subsequent actions of a final *Judgment or Trial Court Order* must follow the [*HCN*
20 *R. App. P.*]." *HCN R. Civ. P. 61*.

Ho-Chunk Nation Court System
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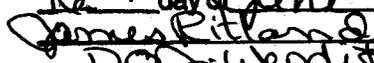
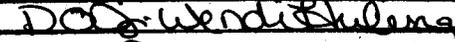


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IT IS SO ORDERED this 13th day of June 2009, by the Ho Chunk Nation Trial Court
from within the sovereign lands of the Ho-Chunk Nation.


Honorable Kimberly M. Vele
Trial Court Judge *Pro Tempore*

A true and correct copy of the foregoing was
sent to the following parties of record this

13th day of June, 2009.


Asst. Clerk 