Commonwealth Court in *Tyrone Area Education Association v. Tyrone Area School District*, 24 Commwlth. Ct. 483 (1976), and that court held, "Appellant's employment cannot ripen into the status of a temporary professional employe" (p. 486). This decision is despositive of plaintiff's contention.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter.

2. No vacancy was created in the social studies department of the Chambersburg Area Senior High School on or about December 4, 1974, by reason of the intraschool transfers of John Osen and Lee Powell, which would permit the employment of a temporary professional employee.

3. The plaintiff was hired as a substitute for Lee Powell who was absent from his assigned teaching position with the approval of the defendant's board of school directors.

4. The plaintiff, as a substitute teacher, had no quasi-tenure or reasonable expectation of continued employment.

5. Subject to the applicable provisions of the Public School Code the authority to employ teachers is a discretionary authority vested exclusively in the boards of directors of school districts.

6. This Court has no authority to grant the writ of mandamus or the other relief prayed for by the plaintiff.

DECISION

NOW, this 7th day of March, 1978, the Complaint in Mandamus of Robert R. Nolder is dismissed.

Costs to be paid by the Plaintiff.

**Editor's Note–**
**See earlier decision on discovery reported with respect to this case, at 1 Franklin 120.**

MAXWELL v. STEVENSON, C.P., Franklin County Branch, A.D. 1977-677; MAXWELL v. PENWELL, C.P., Franklin County Branch, A.D. 1977-645

*Assumpsit - Construction Contract - Restitution - Measure of Damages - Anticipatory Breach - More Specific Complaint - Pa. R.C.P. 1019(h)*



1. Upon a breach of contract by a party, the other party has the right to bring an action claiming breach of contract or treating the contract as rescinded.

2. The fact that there is a written contract does not bar an action where the agrieved party treats the contract as rescinded and seeks restitution.

3. Under the theory of restitution, the builder may recover the reasonable value of all that the owners have received. The value of goods and services performed is not limited by the contract price.

4. Where an owner withdraws the entire balance in his mortgage account, it is reasonable for a builder to demand assurances that he will be paid.

5. The plaintiff must provide the defendant with a list of "extras" which plaintiff claims he provided over and above the terms of the contract.

6. Where a party seeks to have a contract rescinded, his claim is not based on the contract and the contract need not be attached to the Complaint.

*Marcus A. McKnight, III, Esq.*, Attorney for Plaintiff, John E. Maxwell

*Jan G. Sulcove, Esq.*, Attorney for Defendants, Dale S. Penwell and Kathleen J. Penwell, his wife

*William H. Kaye, Esq.*, Attorney for Defendants, John A. Stevenson and Nancy K. Stevenson, his wife

OPINION AND ORDERS

EPPINGER, P.J., March 29, 1978:

These are companion cases, involving many of the same issues. In each case John E. Maxwell (builder) agreed to construct a house for the defendants, John A. Stevenson and Nancy K. Stevenson (Stevensons) and for the defendants, Dale S. Penwell and Kathleen J. Penwell (Penwells). In each case the builder contended that the owners breached the contract and seeks to recover substantial sums based on a restitutionary theory of recovery.

The owners have filed preliminary objections in the nature of motions to strike, motions for more specific complaint and demurrers.

RESTITUTIONARY THEORY OF RECOVERY

In each case the owners' motions to strike assert that the builder's claim for restitutionary damages is an improper measure of damages. When a contract has been breached by

one of the parties to it, the other party has several options open to him. These include bringing an action against the defaulter claiming breach of contract damages or treating the contract as rescinded and recovering on a quantum meruit basis for the work completed. *Philadelphia v. Tripple*, 230 Pa. 480, 79 A. 703 (1911).

In *Tripple* a subcontractor, at a time when he was not in default on his contract was ordered by the contractor to discontinue work. Affirming the conclusion of the arbitrator, George Whatton Pepper, the Supreme Court held that the subcontractor had the right to bring an action against the contractor for breach of contract *or to treat the contract as rescinded* (emphasis supplied) by the action of the contractor and sue for the amounts the subcontractor expended for labor and material, less sums paid on the contract price. Thus even though the subcontractor might have been losing money on the project, when the contractor breached, the subcontractor would not be limited to the agreed price, if he elected to treat the contract as rescinded, but could recover the actual costs of labor and material expended by him.

The builder's suits in these cases are for restitution based on the work that has been performed. The existence of a written contract is not a bar to this type of action. *Tripple*, supra.

If restitution is a remedy for breach of contract, then what is the proper measure of damages? If the owners have breached the contract either by repudiation, discharge or prevention of performance by the builder, then the builder may recover the reasonable value of all that the owners have received by performance of the contract. *6 Corbin on Contracts 1109.* The builder should be put in a position as good as that which he occupied before the contract was made. To do that an evaluation must be made of the goods or services rendered by the builder in terms of money. *Corbin*, supra. This valuation is not limited by the contract price, for as the court said in *Tripple*:

> "How can the plaintiff's claim for disbursements actually made be met by the limitation contained in a contract, unless the defendant retains the right to enforce the contract? And how can it be contended that the defendant retains such a right when the contract has been discharged by his own act?... But where the defendant undertakes to limit the plaintiff's recovery by treating the contract price as a limitation upon such recovery, he is asserting a right under the very contract which he himself has discharged." 230 Pa. 487.



The standard for valuing builder's work is set forth in comment (c) to the Restatement of Contracts, First, Sect. 347 which provides in part:

> "(c) If the plaintiff's performance is part of the very performance for which the defendant bargained as part of an agreed exchange, it is to be valued, not by the extent to which the defendant's total wealth has been increased thereby, but by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered.... From the amount so determined must be deducted the value of any part performance received by the plaintiff and not returned, estimated at the amount by which it has enriched him. The rate of payment agreed upon in the contract is admissable in evidence on the question of value, but it is not conclusive."

Proof of the value of the performance rendered by the builder must await trial. As a proper claim for restitutionary damages has been plead, preliminary objections on this ground are not well taken.

## STEVENSON — ANTICIPATORY BREACH

In the Stevenson case, the builder discovered that the owners had withdrawn the entire balance from the mortgage account in the Mechanics' Building and Loan Association. Fearing that the owners were experiencing financial difficulty, the builder sent the owners a certified letter requesting payment or assurances of payment by a certain date six days hence. The owners did not provide the requested assurances and builder regarded such failure as a material breach and did no further work on the house.

On their preliminary objections the owners argue that they had no obligation to furnish the builder with reasonable assurances of payment and since he has not completed his performance, he has not alleged a cause of action. The contract between the parties contains no provisions about the owners' mortgage account and their dealing with it. The builder states however that an implicit promise of acting in good faith exists and that the owners have breached such promise by withdrawing the funds from the mortgage account and that the builder has reasonable insecurity of future payment.

In deciding this question the court has been guided by the Restatement of Contracts and analogies to the Uniform

Commercial Code, Act of April 6, 1953, P.L. 3 reenacted Oct. 2, 1959, P.L. 1023. While the UCC does not apply to this case as we are dealing with a construction contract, not a sale of goods, its provision are enlightening. For the UCC provides in Sect. 2-609, 12A P.S. Sect 2-609:

> "(1) . . . When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
>
> "(2) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

Thus, the law on sale of goods recognizes that one party may have reasonable grounds to doubt the other party's performance and gives him a remedy. He may suspend his own performance or treat the contract as repudiated. Does this seemingly salutory rule carry over into building contract law? There is a provision in Restatement of Contracts, Sect. 318 for anticipatory repudiation by one who commits any voluntary affirmative act which renders substantial performance of his contractural duties impossible or apparently impossible. Section 287 of the Restatement of Contracts also excuses a promisor's performance if the other party is insolvent. Insolvent is defined as being unable to pay debts as they mature. But there is no provision for the promisor who is reasonably insecure over the financial responsibility of his promisee who is not actually insolvent.

It appears this gap has been noticed and addressed in Tentative Draft No. 8 of the Restatement of Contracts, Second. Proposed Sect. 275 is entitled "When a Failure to give Assurances is a Repudiation" and provides as follows:

> When a reasonable grounds for insecurity arise with respect to an obligor's future performance as a result of (a) his manifestation by words or other conduct that he doubts that he will be willing to perform, or (b) his apparent inability to perform without a breach by non-performance that would of itself give the obligee a claim for damages for total breach under Sect. 268, his failure upon a reasonable demand by the obligee to give within a reasonable time such assurance of due performance as it is reasonable to require is a repudiation.



Comment (a) to this section refers to UCC Sect 2-609 and further states that the rule "rests on the principle that the parties to a contract look to actual performance and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain." Restatement of Contracts, Second, Tenative Draft No. 8, Sect. 275 (1973).

Common Law and the Restatement, First, may seem to limit the request for assurances to the presence of actual insolvency. We conclude, however, that this is only a specific example of a general rule. Given the direction taken in the UCC and the proposed Restatement of Contracts, Second, it is reasonable for a builder to demand assurances that he will be paid if the project is completed. No person should be required to complete a contract to build a home knowing, or reasonably believing that he is not going to get paid just so he can sue to recover the money he is entitled to receive by performance, when there is little or no likelihood the owners have the money. In this era of high mortgage percentages and stipulations against liens, the builder would be in jeopardy of not being paid at all.

Whether in this case the request for evidence of security was reasonable is not a matter to be decided in ruling on a demurrer. These are factual issues for later determination. We find that the builder has plead an anticipatory breach and as such, is not required to show that he has completely performed a contract that the owners have breached. *Anvil Mining Company v. Humble, 153 U.S. 540 (1893). This demurrer to the Complaint will be overruled.*

## NEED TO ITEMIZE IMPROVEMENTS AND CHANGES

In the Complaints, the builder alleges that he provided improvements and changes beyond the items contemplated by the contract, all done at the owners' requests. There are no descriptions of these items and their value is apparently included in the lump sum demand. General allegations of indebtedness, lumping charges and gross sums covering different items of damages ordinarily constitute insufficient pleading. *Price v. Pennsylvania Railroad Co.*, 17 D & C2d 518 (1958). The builder here is not claiming either partial performance of the contract and the right to have the contract price of such work paid to him, nor is he stating that he is entitled to that figure plus certain additions because of the extra work. Rather he is claiming the value of what is there and, in his view, what is there is readily apparent to each of the parties and can be lumped.

However, the owners must be informed of the basis of the builder's claim to prepare a defense. "Surely, the invoices and dates of delivery or installation of each nail and board are matters of evidence and can best be obtained by discovery, but defendants are entitled to know at least what general items contribute to the total in a cost plus or quantum meruit contract." *Starcu Construction and Real Estate Co. vs. Kresge and Metzger*, 30 Lehigh Co., L. J. 201, 204 (1963). As to what was required to be put into the premises under the contract, that document though not necessarily required to be pleaded as we will discuss later, affords each party with a record of what was to be done. As to the additions, there may be questions that require them to be enumerated. As we said earlier, at trial an evaluation must be made of the goods and services rendered by the builder in terms of money. And since we have found that the correct measure of damages is the reasonable value of all the owners have received by the performance of the contract in terms of the amount for which such services and material could have been purchased from one in the builder's position at the time they were rendered, the builder must provide the owners with information on what he deems to be extras by listing them and stating generally what was contemplated and what was done. Accordingly we will require a more specific Complaint on this point as requested.

## FAILURE TO ATTACH A COPY OF THE CONTRACT

Pa. R.C.P. 1019(h) requires plaintiff to attach a copy of a writing to the Complaint if the claim is based upon a writing. In these cases there were written contracts between the builder and the owners and each of the owners has asked us to strike the Complaint because the contracts are not attached. In *Gilson v. Twin Trailer Sales of Sharon, Inc.*, 53 D & C2d 211 (1971), the Plaintiff alleged a breach of contract but was seeking recission of the contract itself rather than damages. The Court held that Rule 1019(h) did not require the attachment of the agreement unless it was to be relied on as an element in the case and that the terms of the contract are probably irrelevant where the Plaintiff seeks to rid himself of the contractual obligation. In these cases the builder does not base his recovery on the contracts. Instead he is treating them as rescinded. As his claim is not based on the contracts, they need not be attached to the Complaint.

The remaining preliminary objections have either been discussed and decided within the preceding sections or have no merit and are therefore denied.



## ORDER OF COURT

NOW, March 29, 1978, the Defendants' preliminary objections are denied, except the motion for a more specific complaint is granted as to an itemization of the extra or additional work done by the Plaintiff as outlined in the opinion. The Plaintiff is given twenty (20) days from this date to file an amended complaint or suffer non pros.

## WYCKO v. EASTLAND MOTORS, INC., C.P., Franklin County Branch, A.D. 1977-570

*Default Judgment - Pa. R.C.P. 209 - Petition and Order to Open Judgment - Pulisevich Petition*

1. The Court's opinion in *Pulisevich Petition*, 63 D&C 357 (1948), holding that Pa. R.C.P.209 would not be followed in the 39th Judicial District, is specifically limited to matters involving custody of children.

2. A default judgment in an action in trespass will be opened where all of the following factors are present: (1) the failure of a defendant to answer or appear is due to an inadvertent mistake by his insurer (2) the plaintiff takes a judgment in default, without notice of his intention to do so, shortly after the expiration of the answer's due date; (3) the defendant moves promptly to petition for the judgment to be opened; and (4) the prejudice to the defendant by not opening the judgment would be out of proportion and greater than that caused to the plaintiff by opening the judgment.

*Lawrence C. Zeger, Esq.*, Attorney for Plaintiff

*Robert C. Schollaert, Esq.*, Attorney for Defendant

## OPINION AND ORDER

KELLER, J., March 13, 1978:

This action in trespass was commenced by the filing of a complaint in the office of the Prothonotary on October 21, 1977. A true copy of the complaint was served upon the treasurer of the defendant at its place of business by a deputy sheriff on October 21, 1977 at 4:15 P.M. A praecipe for default judgment was filed in the Prothonotary's Office at 8:29 A.M. on November 14, 1977, and judgment was entered against the defendant. Counsel for the defendant presented a petition to open judgment on November 23, 1977, and an order was entered the same date granting a rule upon the plaintiff to show cause why the judgment should not be opened. The rule was