

FILE

*Bennett v. Sands
Construction Company*

Roberts, Dinny & Stein
Attorneys At Law

MEMORANDUM

TO: Applicant
FROM: Celia Roberts
DATE: February 26, 2004
RE: *Bennett v. Sands Construction Company*

Our client, Samuel Bennett, wants us to bring an action against Sands Construction Company (SCC) to recover \$45,000, which is the cost of both replacing the roof and repairing the substantial water damage to his house. The house is a custom structure, designed by an architect and built for our client by SCC, supposedly to the architect's specifications. The roof began leaking seven years ago, the first year that our client occupied the house, and continued to do so until last month, when a new contractor replaced the roof and repaired the structural damage. Bennett only learned about the extent of the problem and its cause when he brought in the new contractor.

Although there are possible contract and tort causes of action, it is apparent that there are serious statute of limitations problems with the case. Bennett has made it clear that he does not want to throw good money after bad. If the statute has run, then we need to let him know and not encourage a lost cause.

Please write a memorandum that analyzes whether the tort and contract causes of action are barred by the statutes of limitation. Be sure your analysis discusses and sets forth your conclusion as to whether we can convince a court that one or both statutes should be tolled.

Notes from Interview with Samuel Bennett
February 23, 2004

Client just paid \$45,000 for new roof and structural and electrical repairs in 7-year-old house. Original roof leaked despite repeated repairs by contractor. Client claims the problem was caused by contractor who substituted a less expensive type of roof for the one specified by architect. Client didn't discover substitution until he got architect to inspect roof in September 2003.

Client contracted with Sands Construction Company (SCC) to build his house in accordance with architect's specifications. Client chose contractor after receiving proposal that was the lowest of 3 bids and after checking on reputation of SCC and its owner, Ray Sands. SCC agreed in writing to "construct house per plans and specifications" and to perform the work in a "professional and workmanlike manner." These plans and specifications called for the installation of an "EPDM rubber membrane roof." Client and Mr. Sands did not specifically discuss the substitution of a different type of roofing material from that contained in the specifications for construction of a flat roof. Client was not aware that the description of the roof contained in the "pricing sheet" attached to the contractor's proposal ("Roofing: Flat-Darbex Roof") was not a brand of rubber membrane roofing. He admits to signing the "pricing sheet" in January 1997, but did so without understanding that the substitution had been made. Says he just relied upon Mr. Sands to stick to the architect's plans and expected that any changes would be brought to his attention. Client has now gone back and compared his copies of the architect's original specifications and Sands' pricing sheet, and it is very clear that Sands substituted a "Flat-Darbex Roof" for the "EPDM rubber membrane roof" specified by the architect.

In July 1997, the building inspector issued a certificate of occupancy, and Bennett moved into the house. By October 1997, the first leaks occurred after there was a huge rain storm. Water dripped along walls in upstairs bedrooms, damaging walls. Contractor Sands inspected after storm and said that windows were problem (see Sands letter 10/9/97 in file). Contractor convinced client that changing windows would solve problem and client agreed to pay to have work done. Client repaired damage to walls himself.

In March of 1998, the first warm day caused melting of the more than 8 inches of snow on the roof. Water poured into upstairs bedroom, and contractor said nothing could be done until snow melted completely. Lots of damage to walls. Contractor finally came a week later and admitted gutters were

clogged with "construction debris that hadn't been cleaned up." Sands cleaned gutters, apologized, and repainted walls at own expense.

July 1999. Huge thunderstorm caused water to drip down face of stone wall of kitchen. Sands came next day, reported that some flashing that should have been installed wasn't and repaired it. Sent letter blaming problems on roof design (see Sands letter 7/31/99 in file).

March 2000. Small water leaks into upstairs bathroom during spring melt-off of snow. Sands inspected and blamed it on accumulations of ice in gutter system.

April 2001. Water poured down face of fireplace brick wall onto wood floor. Sands inspected after all of snow melted. Said flashing around chimney was loose and he re-cemented it at no charge. Insurance paid for sanding and refinishing living room floor.

February 2002. Water stains appeared on walls of upstairs bedroom after freezing rain and snow. Sands said, "Everyone with a flat roof is having problems right now due to unusual pattern of freezing and melting that followed the snow storm." Advised client to re-read letter of 7/31/99. Client very angry. Repainted walls himself.

April 2003. Big storm, three days of heavy rain. Water dripped along walls of south side of house, upstairs and down, soaking carpets and ruining wallpaper and paint. Sands came and reported that seam of roof along south parapet wall had become loose due to accumulation of ice and snow from previous winter. Said, "this is a common problem with roofs of this design." Used blow-torch and special cement to reseal the seam. Charged \$500 and repeated advice about redesigning the roof. Insurance paid \$300 toward roof repair and additional amount for repairing walls and cleaning carpet.

September 2003. Mike Rainier, the architect who designed the house, came at client's request to assess and give advice. Inspection revealed that roofing material was not the type he specified. Said he had specified a rubber membrane roof and that the roof installed was instead a "torch-down roof." First time client knew about this. Architect said the roof design depended upon the rubber membrane to prevent leaks and that the change in materials "might account for the problem." Said that to replace roof at this stage would be "quite expensive, but may be the only effective solution." Client stunned by news, feels misled by years of dealing with Sands, whom he thought was trustworthy.

After client got written report from architect, client wrote angry letter to Sands (see Bennett letter 11/3/03 in file). Sands responded on November 18, 2003. Client called Darbex Company, roofing manufacturer, to try to get them to take responsibility. Darbex blamed it on contractor (see Darbex letter 12/3/03 in file).

Client hired Certified Roofing Contractors to replace roof for \$18,000 on December 22, 2003. Job took from January 19, 2004 to February 16, 2004. When old roof was removed, substantial amount of rotted wood and wet electrical wiring was exposed. Total cost of fixing roof, wood and wiring is \$45,000.

Sands Construction Company

quality builders of custom homes

4801 Industrial Park Road

Gatesville, Franklin 33415

www.Sandsbuild.com

(555)555-1133

October 9, 1997

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Sam:

Sands Construction Company

I have inspected your home to determine the cause of the water seepage you experienced in the recent extraordinary rains. It appears that the fault is with the windows on the top floor. The window model specified by the architect, the Solara model 3000, is not well matched to the siding on the top floor of the house. The top of the window extends past the surface of the siding and therefore collects water. It is inevitable that some of that water will get into the house and damage the interior walls.

I recommend replacing the eight model 3000 windows with the Solara model 5000. Those replacement windows will not change the appearance of the house but will be a better fit with the siding. I am confident this will solve the problem.

The charge for replacing those windows, at my cost, is \$1,749. Please indicate your acceptance of this offer by signing one copy of this letter and returning it to me. We can do the work next week, weather permitting.

Very truly yours,



Ray Sands, President

Accepted:



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(555)555-1133

July 31, 1999

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Sam:

We have completed our additional investigation of the cause of the water problem you are experiencing with your roof. We discovered that metal flashing had not been installed over some wooden banding above the upper gable walls. We have now installed that flashing and thoroughly sealed it to the wall surfaces. This will prevent the water seepage that was occurring in that area. We have done this work at no additional charge to you.

At the same time, I must share with you my misgivings about this roof. Regarding future water problems, it should be noted that the flat roof design is of high risk. As you know, the flat roof is a series of hips and valleys so designed to shed the water through the openings in the parapet walls. If the water settles or doesn't shed fast enough, you run the risk of water seeping through below. A better arrangement would be to redesign the roof and parapet to allow water to drain under the wall and into the gutter system. I would also recommend that the gutter system be built out an additional 4" to discourage dampness and water seepage through and into the side walls. Please contact me if you wish to pursue these suggestions.

Very truly yours,



Ray Sands, President

Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

November 3, 2003

Ray Sands, President
Sands Construction Company
4801 Industrial Park Road
Gatesville, Franklin 33415

Dear Ray:

I have had nothing but trouble regarding roof leaks from the first year I moved into what was supposed to be my dream house. By my count you have been out to try to fix the problem at least 12 times in the past 6 years. Although every time you come you tell me that you have solved the problem, the fact is that each of the repairs has been only temporarily successful. The leaks always seem to return, and whatever wall or ceiling or floor that I have had fixed is again damaged by water.

I have discussed the problem with Mike Rainier, the architect who designed the house. I told him that you think that the design of the roof is the source of the problem. He said that the specifications for the roof in the original plans called for a "rubber membrane roof" but that the roof you installed is not rubber but is instead made of some other material. He says that because you substituted that material, he is not responsible for the defects in the roof. He says that I should look to you to make this right.

I was astonished and outraged to learn that the roof was not built to specifications. In our contract you guaranteed that the material described in the specifications would be used in the construction and that the work would be performed in a workmanlike manner. Nothing you have done can make up for the fact that you didn't adhere to what you promised at the time of the original construction.

Ray, I think you need to accept responsibility for this and make it right. Please assure me that you will do so before we go through another winter with the probability of more leaks.

Very truly yours,



Samuel Bennett

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Gatesville, Franklin 33415

www.Sandsbuild.com

(555)555-1133

November 18, 2003

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Sam:

I have just received your letter of November 3, 2003. Some time ago, I informed you of the potential for roof leaks at your Fairmont house. I felt that the roof as constructed would not allow for adequate drainage and runoff and that the longer this condition was allowed to exist, the worse it would get. Now after the heavy snowfall of last winter a leak has developed. The flatness of the roof and the parapet wall create a trap for snow.

According to my records, your insurance company paid approximately \$1,200 to correct this situation, of which \$300 was paid to me for cosmetic work, and a \$200 balance remains unpaid. Surely a portion of that money should have been used to correct the problem.

As for the roofing product used on your house, the decision to use a torch-down roofing was made for pricing considerations with your full knowledge. I have reviewed our original contract, along with the specification sheet, approved and endorsed by you. The specification sheet clearly says "Flat-Darbex Roof," and your signature is on it, clear as day. Any questions regarding the selection of material should have been raised at the time of construction, not now, 7 years later.

I disagree with Mike Rainier. As an architect, he should know that roofs like the one he designed are wrong for our climate and that no matter what roofing material is used leaks will occur. While the roof that we put on your house is substantially less expensive than a rubber one, we have had very positive experiences with it in many other installations. Should you wish to replace it now, we would do so at your expense. Please let me know if you would like me to provide you with an estimate of the cost.

Very truly yours,



Ray Sands, President

The Darbex Company

2117 Maple Avenue

Nakoma, Franklin 33420

Exclusive Franklin Distributors of Darbex Roofing Supplies

December 3, 2003

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Mr. Bennett:

We have completed our inspection of your roof to determine whether the Darbex membrane used to construct it is defective. While we sincerely regret the problems you have had with moisture seepage, the Darbex membrane, where visible, was found to be in good condition, free from any signs of manufacturing defects, and weathering normally for its relative exposure age.

As you know, Darbex is a superior modified bitumen membrane reinforced with a high-quality nonwoven polyester mat and is one of the finest heat-weld-applied, modified bitumen membranes ever produced. However, Darbex roofing products are intended for use by professional roofers only, thoroughly trained and skilled in the use and handling of propane heat-weld equipment. It seems apparent that the installer of your roof either did not adequately prepare the sub-surface or did not sufficiently heat the material to ensure a waterproof bond. To the best of my knowledge, Sands Construction Company is not a certified installer of Darbex products.

In addition, to be eligible for a Darbex Limited Material Warranty, all exposed smooth surfaced products must be coated with an approved roof coating. Darbex particularly recommends Johns Manville TopGard® Type A aluminum emulsion roof coating. Periodic maintenance and recoating is the responsibility of the building owner. Your roof is not fully treated with this coating.

For these reasons, although the Darbex Company stands behind its product, since the problems with your roof were caused by the installer, we are unable to cover the situation under our product warranty. We recommend that you have the existing roof removed and a new Darbex membrane installed by a qualified contractor. We would be pleased to supply you with the names of such contractors on request.

Very truly yours,



Tonya Braniff
Quality Assurance Manager