STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 174-4-20 Wncv
CARRIE E. MCCOOL, Plaintiff, v. JOSHUA MACURA, Defendant.	

RULING ON CROSS-MOTIONS FOR ATTORNEY'S FEES

This is a partition action involving a residence at 79 Lepage Road in Barre Town, Vermont. On October 4, 2021, the parties entered into a written Settlement Agreement in which the parties resolved all their claims against each other, granted Plaintiff Carrie E. McCool "a very short period of time to close on financing to allow her to buy [Defendant Joshua Macura's] interest in the HOME and discharge all existing secured debts for which he is liable," and providing that, if McCool does not or cannot buy out Macura's interest within that "very short period of time," then "the HOME is to be sold by [Heney Realtors, or some other mutually-agreeable realtor] immediately" (Id. ¶5).

Shortly after the Settlement Agreement was signed and filed with the Court, the parties began filing with the Court a series of "emergency" motions claiming that the opposing party was violating the agreement and requesting various forms of relief. Those motions have all been resolved. Presently before the Court are the parties' cross-motions for attorney's fees. Each party claims to be entitled to an award of attorney's fees pursuant to pursuant to ¶ 6.3 of the Settlement Agreement, which states: "The prevailing party in any legal action concerning the subject matter of this Agreement may recover … reasonable attorney fees and other litigation expenses incurred in good faith."

Thus, the Court must determine who the "prevailing party" was and what "reasonable attorney fees" he or she "incurred in good faith." The Vermont Supreme Court has set forth the following standard for determining who the substantially prevailing party was in the context of a Prompt Pay Act case:

> Our cases are uniform in stressing that whether a party substantially prevailed is not a mathematical calculation based on the number of claims won or the amount of money awarded…. [T]he determination rests on a flexible and reasoned approach focused on determining which side achieved a comparative victory on the issues actually litigated or the greater award proportionally to what was actually sought…. Further, the trial court may decide that neither party substantially prevailed….

Birchwood Land Co. v. Ormond Bushey & Sons, Inc., 2013 VT 60, ¶ 36, 194 Vt. 478 (citations and internal quotation marks omitted). The Supreme Court has further held that a trial court should employ the "common core of facts" analysis in deciding whether a party substantially prevailed in a construction contract dispute. *See* Nystrom v. Hafford, 2012 VT 60, ¶ 24, 192 Vt. 300 ("We reaffirm our prior holding that a fee award should *not* be apportioned among claims that arise from a common core of fact…. However, as a threshold matter, trial courts must consider and determine which claims do, in fact, arise from a common core of facts insofar as the evidence relevant to those claims is the same." (citing The Electric Man, Inc. v. Charos, 2006 VT 16, ¶¶ 10 and 17, 179 Vt. 351). Lastly, the Supreme Court has held that a party need not succeed on all of its claims in order to qualify as the "substantially prevailing party." Reed v. Zurn, 2010 VT 14, ¶ 16, 187 Vt. 613 (mem.). Although this is not a suit under the Prompt Pay Act, the foregoing principles are just as applicable here as they are in a construction contact dispute. Therefore, this Court will apply that standard.

The first round of motions was Macura's "Emergency Motion to Enforce Settlement Agreement" dated October 18, 2021, and McCool's "Motion for Relief from Judgment" dated October 19, 2021. Macura claimed that McCool had breached the Settlement Agreement by refusing to sign a listing agreement with Heney Realtors and by refusing to cooperate with the broker. Macura asked the Court to authorize the broker to proceed with the listing without McCool's signature, and to order McCool to cooperate with the broker in the future. McCool opposed Macura's motion and asked the Court to "remove" the requirement that she list the property with a realtor.

On November 12, 2021, the Court issued its ruling on those motions. The Court concluded that the Settlement Agreement clearly required McCool to sign the proposed listing agreement and to cooperate with Heney Realtors in attempting to market the property. The Court rejected McCool's contention that she had no obligation to sign a listing agreement or to cooperate with any realtor because she was pursuing the financing needed to refinance the property and buy Macura out herself. The Court also rejected her contentions that the deadlines set forth in the Settlement Agreement were merely "aspirational," that her credit union's failure to

process her application more quickly somehow excused her from complying with those deadlines, and that V.R.C.P. 60(b)(6) empowered this Court to relieve her from the requirement that she cooperate with Heney Realtors or meet the strict deadlines set forth in the Agreement. The Court therefore held that McCool had breached the Settlement Agreement by refusing to sign the proposed listing agreement with Heney Realtors and by refusing to cooperate with that realtor. The Court authorized Heney Realtors to proceed with the listing agreement without McCool's signature, and the Court ordered McCool to cooperate with Heney Realtors in its efforts to market and sell the property.

On November 15, 2021, McCool filed a "Motion for Extension of Time" seeking an order extending the deadline for her to buy out Macura's interest in the property without having to incur a realtor's commission. The Court denied the motion on November 18th, again noting that the Court had no authority to extend the deadlines set forth in the Settlement Agreement. Then, on November 29th the Court rejected McCool's claim that Macura was required to mediate his dispute with her pursuant to an earlier order issued in the partition action. The Court held that "the earlier order has been superseded by the Settlement Agreement, which does not contain a mediation requirement."

In the meantime, on November 22, 2021, Macura filed his second motion for emergency relief with the Court. In this motion, Macura noted that several individuals had made offers to purchase the property, that one of the offers (an offer made by Ryan Murphy to purchase the property for $275,000) was clearly the best offer, and that Murphy's offer would expire at 4:30 pm on December 1st if it was not accepted before then. Macura further indicated that McCool was refusing to accept Murphy's offer, and that he (Macura) was at risk of losing his right under the Settlement Agreement to receive $36,000 for his interest in the property if Murphy's offer was not accepted. Macura asked the Court to order that Murphy's offer be deemed accepted without McCool's signature. McCool opposed the motion and asked the Court to order that her offer to purchase the property for $255,000 be deemed accepted without Macura's signature.

The Court held an evidentiary hearing on the motion on December 1, 2021. At the conclusion of the hearing, the Court found that Murphy's offer was clearly the best of all the offers that had been made but that McCool should be given a very brief opportunity to improve her offer in a manner that would assure that Macura would be paid his $36,000, whether she was able to close on her offer, or not. Therefore, the Court ordered that "[t]he offer made by Ryan Murphy to purchase the property at 79 Lepage Road for $275,000 will be deemed accepted without [McCool's] signature unless by 4:00 pm today unless [McCool] delivers to Heney Realtors a non-refundable deposit of $36,000." The Court further ordered, "[i]f [McCool] does deliver to Heney Realtors a non-refundable deposit of $36,000 by

j4:00 pm today, then [McCool's] offer to purchase the property … for $255,000 will be deemed accepted without [Macura's] signature." Lastly, the Court ordered "[i]f [McCool] does not deliver the $36,000 non-refundable deposit to Heney Realtors by 4:00 pm today … then both parties shall cooperate in completing the sale of the property to Ryan Murphy."

McCool delivered a certified check for $36,000 to Heney Realtors by 4:00 pm on December 1st, which meant that her offer to purchase the property for $255,000 was deemed approved. On December 6th Macura filed a "Motion to Clarify" asking the Court to clarify what was to become of the $36,000 deposit if McCool failed to close on her offer. Then, on December 15, 2021, Macura filed a motion for an award of attorney's fees. In an entry dated January 3, 2022, the Court denied both motions on the grounds that they were premature. The motion to clarify was premature because it was based on an assumption that might or might not prove to be true, namely, the assumption that McCool would not close on her offer to purchase the property. Macura's motion for attorney's fees was premature because this matter was not yet fully resolved.

On January 3, 2022, Macura filed his third motion for emergency relief. In his motion, Macura asserted that McCool had instructed the realtors to deduct a portion of the realtor's commission and other closing costs from the $36,000 that Macura was entitled to receive from the proceeds of her purchase of the property. Macura asked the Court to order that he be paid his full $36,000, without reduction for any commissions or closing costs. The Court granted the motion on January 4, 2021, saying "[i]n accordance with the parties' Settlement Agreement, upon the closing of the sale of the property to [McCool], [Macura] is entitled to receive $36,000 without deduction for closing costs or real estate commissions."

On January 4th McCool filed her "Emergency Motion to Clarify." In this motion, McCool pointed out that the listing agreement called for the "sellers" (i.e., Macura and McCool both) to pay the closing costs and realtor's commission. The Court denied the motion, saying: "As between the parties to this case, the settlement agreement trumps the listing agreement. Under the settlement agreement, [Macura] is entitled to receive at the closing $36,000 without deduction for closing costs or realtor commissions, language in the listing agreement to the contrary notwithstanding."

Based upon the foregoing, the Court must conclude that Macura was the prevailing party in this case for purposes of the fee-shifting provision of the Settlement Agreement. He prevailed in his first emergency motion by proving that McCool had breached the Settlement Agreement, and he obtained orders from this Court authorizing Heney Realtors to proceed with the listing agreement without McCool's signature and ordering McCool to cooperate with the realtors in marketing

and selling the property. Macura also prevailed in his second emergency motion by proving that McCool had refused to sign Ryan Murphy's proposed purchase and sales contract, even though his was the best offer that had been made, and even though his offer was going to expire shortly unless accepted. The Court ordered that Murphy's offer would be deemed accepted without McCool's signature unless McCool immediately came up with a $36,000 non-refundable deposit. The purpose of the non-refundable deposit was to assure that Macura would receive the $36,000 that he was entitled to under the Settlement Agreement, despite the loss of the sale to Murphy, whether McCool ultimately proved able to close on her purchase of the property, or not. Macura prevailed again when he had to file his third emergency motion, seeking an order overruling McCool's instructions to the realtor to withhold a portion of the closing costs and realtor's commission from Macura's $36,000 share of the proceeds of the sale.

McCool, in contrast, failed to prevail in nearly every dispute that arose under the Settlement Agreement. Her objections to Macura's three emergency motions were largely, if not entirely overruled, and she failed to prevail in her "Motion for Relief from Judgment" dated October 18, 2021, her "Motion for Extension of Time" dated November 15, 2021, her contention on November 29th that Macura had to go through mediation in order to enforce his rights under the Settlement Agreement, and in her "Emergency Motion to Clarify" dated January 4, 2022. Her only litigation success came when the Court denied two of Macura's motions on the grounds that they were premature; those denials did not amount to a substantive victory for McCool, however, because Macura remained free to renew those motions if he needed to do so.

Both parties ended up with pretty much what they had hoped to end up with in this case. McCool ended up purchasing her grandmother's property, although she had to pay a realtor's commission that she had hoped to avoid. Macura got his name taken off the mortgage on the property, and he ended up with his $36,000 share of the equity in the property. However, it took months of litigation to achieve these outcomes. On the issues actually litigated between the parties, Macura was clearly the comparative victor. Moreover, he was awarded virtually all of the relief that he sought in his dispute with McCool over the Settlement Agreement. Therefore, he was the prevailing party.

Macura seeks an award of $5,880 in attorney's fees. That figure is comprised of 32.87 hours of work by his attorney at a composite rate of $179 per hour. McCool does not challenge either the number of hours worked by Macura's attorney or the hourly rate charged for that work. The Court has reviewed a summary of the work done by Macura's attorney and agrees that the work was necessitated by McCool's failure to comply with the Settlement Agreement and by the unwarranted positions she took in this case. The Court also agrees that the hourly rate charged for that

work is reasonable in light of the time and labor required, the novelty and difficulty of the questions, the skill required, the time limits imposed by the circumstances at hand, the results obtained, and the fees customarily charged for such work. *See* Perez v. Travelers Insurance, 2006 VT 123, ¶ 10, 181 Vt. 45; Hensley v. Eckert, 462 U.S. 424, 430 (1983). The only portion of Macura's fee request that McCool specifically challenges is $426 charged for pre-motion efforts to obtain her cooperation. However, an effort by a lawyer to avoid the cost of litigation, by seeking to obtain an opposing party's cooperation before filing a motion, can hardly be considered unreasonable or unjustified.

For the foregoing reasons, McCool's motion for an award of attorney's is *denied,* Macura's motion for an award of attorney's fees is *granted,* and Macura is awarded $5,880 in attorney's fees.

SO ORDERED this 11th day of March, 2022

Robert A. Mello
Superior Judge