STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 395-12-20 Wncv
ALLAN HERRING, Plaintiff, v. STEVE DEYO, Defendant	

RULING ON THE MERITS

In this civil action, Plaintiff Allan Herring seeks to recover $34,800 from Defendant Steve Deyo for excavation and site work that Herring allegedly performed on Deyo's property at 104 Thelma's Way in Berlin, Vermont, from May to November of 2019. Deyo denies Herring's claim.[1] The Court held a hearing on the merits on May 5, 2022, at which both parties appeared, testified and presented witnesses and exhibits. On May 16, 2022, the parties filed post-trial briefs with the Court. Attorney Christopher J. Smart represents Herring, and Deyo represents himself in this matter. Based upon the credible evidence, the Court makes the following findings, conclusions and orders.

Deyo purchased the lot on Thelma's Way in Berlin, Vermont, in 2018 for the purpose building a home on the property. The lot is on the slope of a hill and contains about 2.3 acres of land and a great deal of ledge. The lot was covered with trees when Deyo purchased it.

Deyo entered into a barter agreement with an Edward Blake under which Blake cut down all the trees on the lot that were four inches in diameter or larger, trimmed off the tops and branches, and removed the logs from the lot. After Blake was done, the lot was littered with tree stumps and slash, which needed to be removed in order to develop the lot. By the time Blake was done, it was already fall.

[1] On December 16, 2020, Deyo filed a counterclaim seeking damages "for work performed by Mr. Herring that has failed due to lack of proper drainage." However, at the hearing on the merits, Deyo proffered no testimony or evidence in support his counterclaim. Therefore, the Court deems the counterclaim to be abandoned or withdrawn.

Deyo then entered into an oral agreement with Herring, who had recently purchased an excavator, to do needed excavation and site work on Deyo's lot. Herring and Deyo had been friends for many years, and Herring also worked in Deyo's business (Herring drove truck for Deyo). Deyo agreed to pay Herring $100 an hour for his excavation and site work.

That fall Herring removed stumps and debris from the areas where the house and driveway were expected to go, and he piled them up in various places on the lot. Herring then cut a driveway for Deyo to the location where Deyo wanted to build his house, he excavated the house foundation, he helped install footing drains and foundation floor drains, and he backfilled about halfway up the foundation walls. At the end of each week that fall, Deyo asked Herring for a bill for the work Herring had done, and Deyo paid each of Herring's weekly bills in full that year. Herring acknowledges that he is not owed anything for work done for Deyo in 2018.

By the time Herring finished his work in November of 2018, he had removed about half of the stumps that Blake had left behind, and the lot was littered with piles of stumps and debris. Those stumps and piles were still there when work resumed in the spring of 2019.

Herring returned to the lot in the spring of 2019 to resume work. From May to November of 2019, Herring removed and either buried or burned the remainder of the stumps and debris that Blake had left behind, he backfilled the remainder of the house foundation, and he helped install Deyo's mound wastewater system. Unlike the year before, however, Herring did not submit weekly bills to Deyo for the work he did in 2019. The reasons are because he and Deyo were friends, he knew that Deyo was having financial difficulties, and Deyo did not ask him for weekly bills in 2019, as he had the year before. In late summer of 2019, after Herring had finished his work on the mound system, Deyo asked Herring "how much do I owe you?" Herring replied, "don't worry, we'll catch up." Herring did not submit a bill to Deyo until September of 2020, after the parties had had a falling out.

Herring claims that he did an additional $34,800 of work for Deyo from May to November of 2019, including digging out over 300 stumps on the parcel, digging holes to bury those stumps, clearing the lot of debris, backfilling the remainder of the house foundation, and helping install Deyo's mound wastewater system, among other things. Herring bases his claim on a calendar that he allegedly kept in 2019, on which he claims to have recorded the number of hours that he had worked on Deyo's project at the end of each day. Herring claims that Deyo therefore owes him $34,800 for the work he did in 2019.

Deyo acknowledges that Herring did help install his wastewater system one weekend in the late summer of 2019, but Deyo denies that Herring did any of the other things he has claimed. Moreover, Deyo contends that Herring's purported

2019 calendar was made up after the fact. In addition, Deyo claims that Herring agreed not to charge him for helping to install the wastewater system and that his time doing that could be "bartered" for other consideration. Therefore, Deyo claims that he owes Herring nothing.

The Court agrees with Deyo's contention that Herring's 2019 calendar appears to have been created after the fact and does not constitute a reliable contemporaneous record of the days on which he worked on Deyo's lot or the number of hours he worked each day that he was there. For one thing, Herring's calendar "records" that he worked exactly 13 hours virtually every weekend from May to November, 6 hours one day and 7 hours the other day; the only exceptions were two days in July when he recorded 5 hours of work each day. It is difficult to believe that Herring actually worked exactly 13 hours each weekend, exactly 6 hours one day and exactly 7 hours the other day. Moreover, that pattern is inconsistent with how Herring had worked in 2018. Secondly, it appears that Herring wrote "6 hrs." on the calendar for July 7th, and then crossed it out and wrote "OFF" in its place. If the calendar truly were a contemporaneously kept record, Herring would not have written "6 hrs." on a day when he was "OFF." Thirdly, Herring's calendar descriptions of the work he allegedly did in 2019 are not always corroborated by the photographic record. Lastly, Herring admitted at the trial that he put the descriptions of his work into the calendar well after the fact. The Court finds that the calendar is not a reliable record of Herring's actual work on Deyo's property in 2019 because it was created after the fact. The Court further finds that the calendar overstates the number of hours that Herring worked for Deyo that year by a considerable amount.

However, the Court disagrees with Deyo's contention that Herring worked only one weekend in 2019 helping to install Deyo's mound system. The credible evidence demonstrates that the work Herring did on the mound system would have taken approximately 40 hours to complete. Moreover, there is no credible evidence that anyone else did that work.

In addition, there is substantial credible evidence that Herring spent a considerable amount of time in 2019 removing stumps and other debris from the lot. A number of witnesses credibly testified that they saw Herring removing stumps from Deyo's lot on several occasions in 2019. Moreover, the photographic evidence shows that the piles of stumps and debris which had littered the lot in the spring of 2019 are no longer there today, and there is no credible evidence that anyone else removed them. Also, when Deyo purchased the property, it was covered with trees, but now it is not. The Court finds that Herring spent about 40 hours removing stumps and debris from Deyo's lot in 2019.

Lastly, the Court finds that Herring performed about 20 hours performing other excavation work on the site in 2019, including backfilling the rest of the house foundation. Again, that work was clearly done, and there is no credible evidence

that anyone else did it. Therefore, the Court finds that Herring performed about 100 hours of work on Deyo's lot in 2019 (about 40 hours removing stumps and debris, about 40 hours helping to install Deyo's mound wastewater system, and about 20 hours backfilling the rest of the house foundation and other site work).

Deyo's testimony, that Herring agreed to work on the mound system on a "barter" basis, is not credible. If Deyo had thought that Herring was doing that work without charge, he would not have asked Herring "how much do I owe you?" after the work was done. The Court finds that Deyo understood and agreed that Herring would be paid $100 an hour for work he did on Deyo's lot in 2019, just as he had been in 2018. Therefore, the Court finds that Deyo owes Herring $10,000 ($100 an hour for 100 hours of work).

This case is governed by Vermont's "Prompt Pay Act," 9 V.S.A. § 4001, et seq. "The purpose of the prompt pay act is to provide protection against nonpayment to contractors and subcontractors." Elec. Man., Inc. v. Charos, 2006 VT 16, ¶ 12, 179 Vt. 351. The Act provides that "[t]he owner shall pay the contractor strictly in accordance with the terms of the construction contract." 9 V.S.A. § 4001(a). If the contract does not contain a payment term, then "the contractor shall be entitled to invoice the owner," and "[e]xcept as otherwise agreed, payment … shall be due from the owner … 20 days after delivery of invoice…." Id. §§ 4002(b) and (c). If payment is delayed beyond the due date, "the owner shall pay the contactor interest … at an interest rate [of 1% per month] on such unpaid balance as may be due." Id., §4002(d).

When the amount due to the contractor is liquidated or "reasonably certain," then an award of prejudgment interest to the contractor is "properly awarded as a matter of right." Birchwood Land Co. v. Ormond Bushey & Sons, Inc., 2013 VT 60, ¶ 24, 194 Vt. 478. Indeed, "[d]amages need not be 'precisely or infallibly ascertainable, only … reasonably so.'" Id. Moreover, the contractor's right to interest is not barred or precluded merely because the owner has asserted a counterclaim for an unliquidated sum of damages." Id. ¶ 23.

Here, because the parties' oral contact did not contain a payment term, Herring was free to send Deyo an invoice after the work was performed. He did that in September of 2020. To avoid having to pay interest, Deyo was required to pay Herring's invoice within 20 days. He has not done so. Therefore, Deyo is liable to Herring for pre-judgment interest in the amount of $1,900 ($100 a month for 19 months).

In addition to authorizing an award of prejudgment interest, the Prompt Pay Act also authorizes the Court to impose a penalty upon any owner who has "wrongfully withheld" payment due to a contractor. *See* Id. § 4007(b) ("If … litigation is commenced to recover payment due under the terms of this chapter and

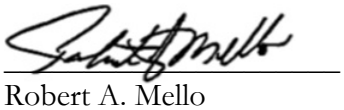
it is determined that an owner … has failed to comply with the payment terms of this chapter, the … court shall award, in addition to all other damages due and as a penalty, an amount equal to one percent per month on all sums as to which payment has wrongfully been withheld."). Unlike an award of interest, which is mandatory, however, the imposition of a penalty is discretionary and requires a finding that the owner acted "wrongfully," i.e., in "bad faith." Birchwood Land Co., 2013 VT 60, ¶¶ 28-30. Here, there is no credible evidence that Deyo acted in bad faith in deciding not to pay Herring's invoice. Indeed, in light of the amount of the invoice ($35,800) and the questionable basis upon which it was computed (Herring's 2019 calendar), Deyo had a good faith basis for disputing the invoice. Therefore, the Court will not impose the statutory penalty.

Lastly, under the Prompt Pay Act, the "substantially prevailing party" is entitled to an award of his, her or its reasonable attorney's fees and costs. *See* Id. §4007(c) ("Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter shall be awarded reasonable attorney's fees in an amount to be determined by the court … together with expenses."). The Court must therefore determine who, if anyone, was the substantially prevailing party in this case. In making its determination, the Court must take 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." Birchwood Land Co., 2013 VT 60, ¶ 36.

Here, Herring has been awarded $10,000 for work that the Court has found he performed on Deyo's property in 2019. Thus, Herring was the net victor in terms of monetary award, but that alone is not enough to make him a substantially prevailing party for purposes of the Prompt Pay Act. Birchwood at ¶ 36. Here, Herring sought a much larger amount, namely, $34,800, but he was awarded less than one-third of what he claimed he was owed. Moreover, Herring based his $34,800 demand on a diary that he claimed to have been contemporaneously kept but which the Court has found unreliable because it appears to have been created after the fact. If Herring had not made such a high demand based on such an unreliable source, this litigation would probably have been less protracted than it was, and it might even have been avoided altogether. For these reasons, the Court concludes that Herring was not the substantially prevailing party and is not entitled to an award of attorney's fees. *See* Birchwood at ¶ 36 ("[T]he failure of contractor to admit to the conversion of the sand, and to fully account for the sand converted, caused the trial to extend for four days. Contractor could take that position, but the trial court acted within its discretion to consider contractor's position in determining whether it substantially prevailed."); Burton v. Jeremiah Beach Parker Restoration and Construction Management Corp., et al., 2010 VT 55, ¶ 10, 188 Vt. 583 (mem.) ("[W]e have squarely rejected the notion that "the party

with a net verdict is automatically the substantially prevailing party." (citation omitted)).[2]

SO ORDERD this 23rd day of May, 2022.



Robert A. Mello
Superior Judge

[2] The Court does not need to determine whether Deyo was the substantially prevailing party in this case because, even if he was, he represented himself in this case and did not incur attorney's fees.