

STATE OF VERMONT
ORANGE COUNTY

FILED
JAN 22 2009
ORANGE SUPERIOR COURT

ROBERT CARTER,)	
Appellee,)	Orange Superior Court
)	Docket No. 186-8-08 Oecv
v.)	
)	on appeal from
CHARLES BACON)	Docket No. 218-8-07 Oesc
and MAUREEN BACON,)	
Appellants.)	

**SMALL CLAIMS APPEAL
Decision**

Defendants Charles and Maureen Bacon appeal from a judgment of the Small Claims Court dated June 24, 2008. The court determined that the Bacons owed plaintiff Robert Carter \$1,218 for site plan and septic design work on an existing small lot in Fairlee, Vermont. The court also entered judgment in favor of Mr. Carter on the Bacons' counterclaims for professional negligence and breach of contract. On appeal, the Bacons contend that the court misinterpreted the evidence and drew erroneous conclusions.

Both parties represented themselves in the Small Claims Court and on appeal. This court has reviewed the record; listened to the tape recording of the full hearing held in Small Claims Court on October 31, 2007; reviewed the notice of appeal filed by Mr. Bacon on July 23, 2008; reviewed the statement of legal questions filed by Mr. Bacon on September 5, 2008; reviewed the response filed by Mr. Carter on September 19, 2008; and heard oral argument on December 15, 2008.

It is not the function of the Superior Court to substitute its own judgment for that of the Small Claims Court Judge. Rather, the role of the Superior Court is to determine whether or not the evidence presented at the hearing supports the facts that the Judge decided were the credible facts, and whether or not the Judge correctly applied the proper law and procedure.

Decision and Order of the Small Claims Court

The Small Claims Court Judge made the following findings of fact in the written decision of June 24, 2008. The Bacons are the owners of a very small lot in Fairlee. The lot is bordered on two sides by roads, which intersect at one corner of the property. The lot is also bordered on one side by a golf course, and on one side by a private residence.

The Bacons purchased the lot in 1984. To fulfill a condition of the sale, the sellers hired Mr. Carter to design a septic system for a two-bedroom home. Mr. Carter's

design used the property boundaries described in the deed and shown on the town tax map. The sellers paid Mr. Carter for his work.

The Bacons did not proceed with plans to build a home until 2003. At that time, Mr. Bacon hired Mr. Carter to update the septic design plan. Mr. Carter submitted an updated plan in August 2003, again using the property boundaries described in the deed and shown on the tax map. The Town issued a septic permit in September 2003.

In October 2003, the Town denied Mr. Bacon's request for a driveway access permit, explaining that they wanted the driveway to be placed as far from the intersection as possible. Mr. Bacon asked Mr. Carter to revise the site plan to address this issue. Mr. Carter complied, and submitted a second updated site plan in December 2003.

The Town denied the driveway access permit again in February 2004. The Town sent a letter to Mr. Bacon explaining eight areas of concern that would need to be addressed before the access permit and other permits could be granted, including culverts on the property, power line easements, and setback variances necessary to accommodate a proposed garage. Mr. Bacon provided a copy of this letter to Mr. Carter.

On March 10, 2004, Mr. Carter went to the property and took "transit shots" in an attempt to resolve the issues raised by the Town. The transit shots showed that the actual property boundaries were different from those suggested by the tax maps and deed descriptions, and that the lot size was smaller than previously believed. Mr. Carter prepared an updated site plan and sent it to Mr. Bacon, showing him that the lot lines had changed. Mr. Carter believed that the Town would request a "real" survey based upon this information.

Mr. Carter submitted the updated site plan to the Town, and the Town responded as anticipated. In a letter dated April 28, 2004, the Town expressed concern that "the parcel shape changed from the previous drawing," and requested that the property be surveyed by a licensed surveyor. Mr. Bacon complied, and the subsequent survey showed the lot to be 460 square feet smaller than previously believed, with a total acreage of 0.11 acres. As a result, the lot no longer qualified as a buildable lot under town regulations requiring existing small lots to be at least 1/8th of an acre in size.

The Town ultimately granted the driveway access permit based upon Mr. Carter's updated plan. However, the Zoning Board of Adjustment did not approve a building on the property because the lot is too small for development under the town zoning regulations.

Mr. Carter subsequently filed a complaint seeking \$1,918 for services rendered in connection with the site plans, though he later amended the amount downward by \$700 in acknowledgement of partial payment by Mr. Bacon. Mr. Bacon disputed the remaining amount due, and filed a counterclaim alleging professional negligence and seeking return of \$1,127 in fees already paid, plus \$2,268 in surveying costs and attorney's fees.

The Small Claims Judge determined first that Mr. Carter did not breach a duty of professional care by failing to discover a mistake in the boundary lines sooner. She reasoned that Mr. Carter had not been asked to conduct a survey in 1984, but merely to design a septic system, and concluded that it was reasonable for Mr. Carter to rely upon tax maps and deed descriptions when designing the septic system.

The Judge next determined that it was reasonable for Mr. Carter to take transit shots on the property in an effort to resolve the issues raised by the Town in their February 2004 letter. She found that Mr. Carter had been given a copy of the letter by Mr. Bacon, and reasonably believed that it was part of his job to try to resolve the issues. The Judge concluded that Mr. Carter acted reasonably by returning to the property and conducting further investigation on March 10, 2004.

Finally, the Judge concluded that the expense of a new survey and attorney's fees incurred by Mr. Bacon were not attributable to negligence or unprofessional work on the part of Mr. Carter. She explained that Mr. Carter had not done anything improper or unprofessional by showing revised lot configurations on the updated site plan, and that the real cause of the additional expenses was the small lot size.

For these reasons, the Small Claims Court entered judgment in favor of Mr. Carter in the amount of \$1,218 plus \$60 in court costs, and also entered judgment in favor of Mr. Carter on the counterclaim.

Mr. Bacon raises a number of arguments on appeal. He contends first that Mr. Carter committed professional negligence by not raising questions about the lot boundaries sooner. Second, he argues that Mr. Carter committed professional negligence by taking transit shots to ascertain the lot boundaries when he was not licensed to perform surveys, and by taking inaccurate transit shots. Third, he argues that he should not have to pay for the transit shots because they were not within the scope of any contract or agreement between the parties. Finally, he argues that Mr. Carter did not "reveal" discoveries of the small lot size, but rather simply submitted an inaccurate site plan, which caused a "real" survey to be conducted at extra expense to the Bacons.

Whether Mr. Carter should have raised boundary issues sooner

The first issue on appeal is whether Mr. Carter committed professional negligence by not raising questions about the lot boundaries sooner. Mr. Bacon contends that any questions about boundaries should have been raised and resolved when the project commenced in 2003, rather than in 2004, after the permitting process was underway and expenses incurred.

The Small Claims Judge did not expressly address this issue. Her discussion of professional negligence was limited to the question of whether Mr. Carter should have discovered boundary discrepancies in 1984; she did not analyze whether he had a duty to ascertain the lot boundaries with more certainty prior to beginning septic design work and

driveway access work in 2003. Nevertheless, it is implicit in her decision that there was no breach of professional duty.

The evidence in the record is sufficient to support the conclusion that Mr. Carter did not commit professional negligence by failing to raise questions about the lot size sooner. Professional negligence is ordinarily demonstrated through expert testimony describing (1) the proper standard of skill and care for the profession, (2) how the defendant's conduct departed from that standard of care, and (3) how the defendant's conduct was the proximate cause of the plaintiff's harm. *Bull v. Pinkham Engineering Assocs., Inc.*, 170 Vt. 450, 457–58 (2000); *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497 (1998). Expert testimony is generally required to establish a breach of a professional duty of care unless the “professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it.” *Nicholson*, 168 Vt. at 497–98.

There was no expert testimony presented in Small Claims Court setting forth an engineer's duty to ascertain property boundaries before preparing a site plan or designing a septic system, and the evidence does not show a lack of care obvious to a person of common knowledge and experience. Mr. Carter was asked to design a septic system and prepare a site plan in connection with an application for a driveway access permit; he used lot boundaries described in a deed and shown on a tax map when doing so. It is not obvious that he acted unprofessionally by relying on these tools prior to February 2004. (Mr. Bacon admits that reliance on the deed and tax map was reasonable.)

It furthermore appears that the scope of the project evolved over time. The original site plan called for a two-bedroom house with dimensions of 30' x 36', but the plan was amended to include a deck and garage. Other issues that arose during the course of the project included setbacks from power lines and the need to account for several culverts draining into the property. All of these issues presented engineering challenges in terms of conforming with setback and zoning requirements, and squeezing the proposed house, deck, garage, and driveway onto as small of an area as possible. In short, the evidence supports the conclusion that precise boundary determinations were not important at the beginning of the project, but that it became essential along the way to know the exact boundaries of the property, down to the foot, if the various engineering challenges were to be resolved in a satisfactory manner. Viewed in the light most favorable to the judgment, *Bartley-Cruz v. McLeod*, 144 Vt. 263, 264 (1984), the evidence supports the conclusion that Mr. Carter did not breach a professional duty by failing to seek a survey at an earlier time in the project.

Whether Mr. Carter acted unprofessionally by taking transit shots

The second issue on appeal is whether Mr. Carter acted unprofessionally by taking transit shots when he was not licensed as a surveyor. Mr. Bacon argues essentially that he should not have to pay for two sets of transit shots for the same property: one set performed by Mr. Carter, and another set performed by a licensed surveyor.

The evidence supports the conclusion that it was reasonable for Mr. Carter to undertake a more detailed investigation of the property in response to the various permitting issues raised by the town, and to take his own transit shots in furtherance of that investigation. It is not obvious to a person of common knowledge and experience that these are inappropriate decisions for an engineer to make, and there was no expert testimony presented establishing whether an engineer should or should not take his own transit shots when the circumstances call for a more precise determination of boundaries in relation to the site plan. An engineer's "transit shots" are simply measurements; they are not the same as a survey. It makes sense for an engineer to attempt his own measurements before requesting the costlier alternative of a licensed survey, which might or might not be required, depending upon the engineer's findings.

On this record, it was reasonable for the Judge to conclude that, although no one requested a "survey," Mr. Carter did not commit professional negligence by taking transit shots in an attempt to resolve the engineering challenges presented by the permit application.

Whether Mr. Carter's transit shots were negligently performed

Mr. Bacon argues that Mr. Carter performed the actual transit shots negligently, because they were not consistent with the licensed survey. Mr. Bacon also argues that Mr. Carter caused damages by submitting an inaccurate site plan, requiring correction by a licensed surveyor.

However, the evidence shows that Mr. Carter's results were at least very close to the licensed survey. More importantly, Mr. Carter's drawings showed that the lot boundaries set forth by the deed description and the tax map were not necessarily consistent with the actual boundaries found on the ground. It was this finding, which was true, that caused the Town to request a licensed survey of the property; the actual boundaries drawn by Mr. Carter on his updated site plan were not material to the Town's request except to the extent that they showed inconsistencies. A licensed survey was required regardless of whether Mr. Carter's transit shots were correct or incorrect, and it is reasonable to conclude that the site plans would have been redrawn to reflect the licensed survey either way. Under these circumstances, any "inaccuracies" in Mr. Carter's transit shots do not constitute a defense to payment for his services, and the record supports the Judge's conclusion that the transit shots were not negligently performed.

Whether Mr. Carter exceeded the scope of the contract

Mr. Bacon argues that Mr. Carter exceeded the scope of the parties' agreement by taking transit shots of the property. However, the evidence supports the Small Claims Judge's conclusion that the scope of the agreement was defined by Mr. Bacon asking Mr. Carter to address the issues raised by the Town's February 2004 letter. For the reasons set forth above, it was reasonable for Mr. Carter to decide that resolution of the

permitting issues required further refinements to the site plan, including a more precise determination of the property boundaries.

Whether the Small Claims Judge misinterpreted the evidence

Finally, the record shows that the Small Claims Judge did not misinterpret the evidence by finding that Mr. Carter was hired to “redo the lot design” in connection with the driveway access permit. It is clear from her reasoning that she meant to convey a finding that Mr. Carter was hired to update the site plan to accommodate the town’s request that the driveway be located as far from the intersection as possible. She did not mean to say that Mr. Carter was hired to survey or lay out property boundaries in connection with his October 2003 work.

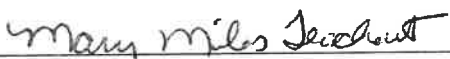
Conclusion

The evidence supports the judgment of the Small Claims Court. Mr. Carter acted within the scope of the parties’ agreement by attempting to resolve the permitting issues raised by the Town’s February 2004 letter, and by taking transit shots. Furthermore, he did not commit professional negligence by taking transit shots of the property boundaries.

ORDER

For the foregoing reasons, the Judgment of the Small Claims Court dated June 24, 2008 is *affirmed*.

Dated at Chelsea, Vermont this 22nd day of January, 2009.



Hon. Mary Miles Teachout
Superior Court Judge