

MAR 19 2008

STATE OF VERMONT
RUTLAND COUNTY

JOHNATHAN LASEK

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Rutland Superior Court
Docket No. 706-10-07 Rdev

v.

)

on appeal from
Docket No. 948-12-06 Rdsc

JOSEPH LEVY

)

SMALL CLAIMS COURT APPEAL
Decision

This case came before the Court on appeal from the Opinion and Decision of the Small Claims Court dated September 10, 2007, in which Johnathan Lasek's claim for breach of contract was dismissed and attorneys' fees and expenses were awarded to Joseph Levy in the amount of \$3,249.19. Mr. Lasek has appealed.

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.

Small Claims Court Findings of Fact

The Small Claims Judge found the following facts based on evidence presented at the hearing on May 17, 2007. Appellant Johnathan Lasek operates a business cleaning and staining houses, fences, and other structures. Appellee Joseph Levy is a homeowner. In late October, 2006, the parties entered into a contract for the cleaning and staining of the Levy family home. The total contract price was \$3,600, to be paid in two equal installments. The first installment of \$1,800 was paid after Mr. Lasek's employees completed the cleaning work, and there is no dispute regarding the payment of this installment.

The disputes arose after the staining work commenced. After a crew of four employees performed some staining work on November 8, 2006, Mr. Levy inspected the work and found defects and incomplete work. He expressed these concerns to Mr. Lasek, who advised him that the foreman would address the concerns during the next visit.

The foreman returned on November 11th and resisted the additional work requested by Mr. Levy. After a phone call to Mr. Lasek, the foreman performed some of the additional work. At the end of the day, Mr. Levy inspected the work and found poorly-applied caulking, stain drips, and an unpainted door. In addition, the deck was not finished because of a miscommunication about the type of stain needed. The foreman

advised that he would return to finish the deck; in the meantime, Mr. Levy was to purchase the correct stain.

On Saturday, November 18th, the foreman called Mr. Levy and advised that he would arrive at 11:45 a.m. to finish the deck. Mr. Levy went to the hardware store to purchase the correct stain, but did not return until 12:10 p.m. By that time, the foreman had left.

Mrs. Levy then called Mr. Lasek in an attempt to resolve the ongoing problems. Mr. Lasek was rude to her on the telephone. Mr. Levy and Mr. Lasek then talked by telephone, but did not resolve differences.

At some point after this sequence of phone calls, Mr. Lasek contacted the police with a complaint alleging that the Levys had made threatening phone calls. On Monday, November 20th, Officer Tobin of the Rutland City Police Department contacted the Levys, advised them of the complaint, and told them not to have further contact with Mr. Lasek.

On Tuesday, November 21st, Mr. Lasek called the Levys to make arrangements to complete the job. The Levys, relying upon instructions from the police officer, refused further contact with Mr. Lasek.

The staining work remains unfinished. Mr. Levy estimates that the job is presently three quarters complete. He has obtained an estimate from an independent contractor in the amount of \$896 in labor to complete the job, with materials to be supplied by Mr. Levy.

Claims and Judgment in Small Claims Court

Mr. Lasek filed a complaint in Small Claims Court seeking \$3,400.00 money damages for breach of contract and for the value of work performed both under the contract and in addition to it. Mr. Levy filed an answer denying the allegations and setting forth a number of "defenses." These defenses included the assertion of a right to set-off for the cost of materials, the cost of completing the job, the cost of personal property damaged by Mr. Lasek's employees, and the value of a ten-year warranty. The defenses also included notice of an intent to seek recovery of attorneys' fees and expenses pursuant to the Prompt Payment Act, 9 V.S.A. § 4007(c). Mr. Levy did not file a counterclaim.

The Judge concluded that the parties modified the contract by adding extra work to be performed, and that Mr. Lasek had not shown that he was entitled to recovery for breach of contract. She reasoned that Mr. Levy acted appropriately in following police instructions and terminating the contract. She also reasoned that Mr. Lasek did not have "clean hands" because "he brought about this situation by contacting the police rather than trying to remedy the problem through other avenues." Her apparent reasoning is that because Mr. Lasek had unclean hands, he could not enforce the contract.

The Judge then went on to conclude that Mr. Lasek was not entitled to be paid for the value of the work completed on grounds of poor workmanship. She found that the staining work was not performed in a good and workmanlike manner in that there were numerous stain drips, many missed spots in painting and staining, and the caulking and staining were both poorly applied. She also found that the deck remained unfinished. She concluded that Mr. Lasek was not entitled to be paid for the work completed because of the poor quality.

Finally, the Judge awarded attorneys' fees and expenses to Mr. Levy in the amount of \$3,249.19 pursuant to 9 V.S.A. § 4007(c). She reasoned that "in this matter the defendant is the prevailing party and, therefore, the award of attorney's fees and other expenses is mandatory under these circumstances." She arrived at the amount by finding that "Defendant has incurred attorney's fees of \$3,249.19 in this matter."

Mr. Lasek appealed. He argues that the Judge erroneously applied the law in concluding that he was not entitled to be paid. He also argues that the Judge incorrectly awarded attorneys' fees to a party who had not filed a claim, and without first determining whether the requested fees were reasonable. The Court addresses the claims in turn.

Analysis

Whether Mr. Lasek is entitled to be paid.

The Judge concluded that Mr. Lasek was not entitled to any recovery. She reasoned that he had unclean hands because he involved the police in the dispute between himself and the Levys, and further reasoned that the Levys acted reasonably in following the police instructions. She also concluded that Mr. Lasek was not entitled to be paid for the value of the work performed because of poor workmanship.

"Clean hands" is an equitable maxim stating that "he who comes into equity must come with clean hands." *Starr Farm Beach Campowners Assoc., Inc. v. Boylan*, 174 Vt. 503, 506 (2002) (mem.). It means that a party seeking equitable relief must show that his or her conduct has been fair and equitable as to the controversy in issue. Black's Law Dictionary 268 (8th ed. 2004). However, this equitable doctrine is normally applied only when the plaintiff seeks an equitable remedy, such as eviction or specific performance. Dan B. Dobbs, *Remedies* § 2.4, at 45-46 (1973). Plaintiffs seeking money damages are considered to be seeking a legal remedy, and not an equitable remedy. *Id.*; see also Black's Law Dictionary, *supra*, at 1320 (distinguishing equitable remedies from legal remedies). For this reason, the clean hands doctrine is not a defense in actions for money damages, and the trial judge's reliance on the doctrine was error in this case.

Mr. Levy argues that the judgment can be affirmed on the alternative theory of anticipatory repudiation. An anticipatory breach occurs when a party represents that he cannot or will not perform his obligations under a contract. *Record v. Kempe*, 2007 VT

39, ¶ 15, 18 Vt. L. Wk. 116. The representation must be either an unequivocal statement that the party will not perform, or a voluntary affirmative act which renders the party unable or apparently unable to perform the contract. *Id.* (quoting Restatement (Second) of Contracts § 250). If the representation is an action, the act must be both voluntary and affirmative, and must make it impossible or apparently impossible for the actor to perform the contract. *Id.*

Mr. Levy has not cited any authorities that support the proposition that a contractor may commit an anticipatory breach of a construction contract by complaining to the police about the homeowner. Neither the record nor the findings of fact establish that the police complaint made it impossible for Mr. Lasek to finish performance under the contract, and the facts show that he sought to do so. The record does not establish precisely why the police complaint was filed or whether the complaint was reasonable. The record also does not show that Mr. Lasek's complaint to the police resulted in any circumstance that made Mr. Lasek unable to return to the Levy property to complete the contract. Therefore, even though the Levys may have acted reasonably in deciding to follow the advice of the police officer, their conduct nonetheless amounted to breach of their contract with Mr. Lasek. Their argument that the trial court decision is supported by an alternate legal theory, anticipatory repudiation by Mr. Lasek, fails.

Mr. Lasek argues that a homeowner who prevents a contractor from completing performance due under a contract is liable for breach. This is a correct statement of the general rule. *Peist v. Richmond*, 97 Vt. 97, 99–100 (1923); 13 Am. Jur. 2d Building & Construction Contracts § 75. In this case, Mr. Levy prevented Mr. Lasek from completing the staining work. Mr. Levy's actions were not justified by any prior breach of the contract by Mr. Lasek or by an anticipatory repudiation. Therefore, the Small Claims Court findings of fact support the conclusion that Mr. Levy breached the contract.

When a homeowner prevents a contractor from completing performance, the contractor may generally treat the contract as terminated and elect to seek either damages for breach of contract or reasonable compensation for the value of the work performed. *Id.* In this case, Mr. Lasek sought damages in the form of reasonable compensation for the value of the work performed under the contract, including the modifications to it.

The Small Claims Judge included, in her opinion, findings and conclusions on whether Mr. Lasek had proved damages in the form of reasonable compensation for the work he performed, even though she concluded that he had not established a breach of contract. She found that the staining work was not performed in a good and workmanlike manner. She detailed specific defects in the work, including poorly-applied staining and caulking, missed spots in painting and staining, and stain drips. These findings are supported by the evidence in the record, including forty-four photographs of the work performed.

Based on these findings, the Judge concluded that Mr. Lasek was not entitled to be paid for the work he had done because of the poor quality of the work. This conclusion is supported by the findings of fact made by the Judge. This Court will not

reweigh conflicting evidence on appeal or otherwise substitute its judgment for that of the Small Claims Judge when the conclusion is supported by the findings of fact, and the findings are supported by the evidence in the record.

The effect of this conclusion is that Mr. Lasek did not prove that he was entitled to any damages, even though Mr. Levy breached the contract. To be entitled to recovery, a claimant must show breach of contract and damages resulting from the breach. Here, Judge Coloutti erred in finding no breach of contract, but Mr. Lasek is not entitled to reversal unless he can show not only breach but that damages were proved at the trial court level. He is unable to show that he proved damages: because the Judge's findings of fact on damages are supported by the evidence, and her conclusion on damages is supported by her findings, the overall result in Small Claims Court—that Mr. Lasek did not prove his claim—is unaffected, and the judgment of the Small Claims Court must be upheld.

Mr. Lasek argues that since Mr. Levy breached the contract, Mr. Lasek should not have to pay attorneys' fees to Mr. Levy. The Vermont Prompt Payment Act contains a fee-shifting provision that applies to construction contracts. 9 V.S.A. § 4007(c). That provision provides that "the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter shall be awarded reasonable attorneys' fees in an amount to be determined by the court or arbitrator, together with expenses." *Id.* Though the statute requires the award of attorneys' fees in cases where the statute applies, determining whether either party to a proceeding has substantially prevailed falls within the discretion of the trial court. *Fletcher Hill, Inc. v. Crosbie*, 2005 VT 1, ¶ 12, 178 Vt. 77.

In deciding to award attorneys' fees to Mr. Levy, the Judge cited *DJ Painting, Inc. v. Baraw Enterprises, Inc.*, 172 Vt. 239 (2001), in which the Court held that a defendant who demonstrates that he or she does not have to pay a contractor's claim is entitled to an award of attorneys' fees under the statute. This holding is reinforced by the persuasive language in *The Electric Man, Inc. v. Charos*, 2006 VT 16, ¶ 12, 179 Vt. 351, which explains that § 4007(c) was intended to provide protection to homeowners "who demonstrate that they should not have to pay a contractor's bill because of nonperformance or poor-quality work." As Mr. Levy has demonstrated that he does not have to pay for Mr. Lasek's work under the staining contract, which was the sole claim in the case, there is no error in the Judge's decision to award attorneys' fees to Mr. Levy.

Whether attorneys' fees may be awarded to a party who has not filed a claim.

Mr. Lasek argues that attorneys' fees may not be awarded under § 4007(c) to a party who has not filed a claim. The plain language of the statute does not support Mr. Lasek's argument. The statute awards attorneys' fees to the substantially prevailing party in any proceeding to which it applies, without making any distinction based upon whether or not the party has filed a claim. See 9 V.S.A. § 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 attorneys' fees in an amount to be determined by the court or arbitrator, together with expenses.'").

Furthermore, the Vermont Supreme Court has counseled against such narrow interpretations of § 4007(c). In *The Electric Man*, the Court explained the practical and policy purposes underlying the statute. 2006 VT 16, ¶ 12. "A claim of failure to pay will virtually always be met with some defense that reflects a breakdown in the working relationship between the owner and the contractor—for example, as here, a defense of breach of contract or defective workmanship. . . . It will always be possible to use different labels and theories to describe claims and defenses." *Id.* As discussed above, the Court went on to state that the statute should provide protection to "owners who demonstrate that they should not have to pay a contractor's bill because of nonperformance or poor-quality work." *Id.* This language persuasively rebuts the argument that § 4007(c) should be read to include a distinction between homeowners who file a counterclaim and homeowners who successfully defend themselves against a contractor's claim.

In addition, Mr. Levy provided reasonable notice of his intent to seek recovery of attorneys' fees and expenses pursuant to § 4007(c). This notice was provided in his answer, which was filed near the commencement of the proceedings. This notice provided Mr. Lasek with an adequate opportunity to consider the possibility of an adverse award of attorneys' fees before proceeding with the merits phase of this lawsuit. Therefore, the fact that Mr. Levy did not file a counterclaim is not a bar to his recovery of attorneys' fees.

Whether the attorneys' fees and expenses were reasonable.

The Judge did not make any findings with respect to whether the attorneys' fees and expenses claimed by Mr. Levy were reasonable. The statute calls for the award of "reasonable attorneys' fees . . . together with expenses." 9 V.S.A. § 4007(c). This places on the Judge the responsibility to make a determination of reasonableness. In this case, the Judge did not do so, but awarded all the fees requested. The case is remanded for a determination by the court of a "reasonable" amount of attorneys' fees and expenses.

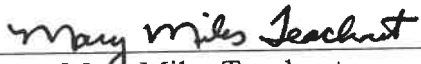
The most common approach to determining the reasonableness of attorneys' fees is the "lodestar" approach. The lodestar is the reasonable number of hours spent on the case multiplied by a reasonable hourly rate. *L'Esperance v. Benware*, 2003 VT 43, ¶ 22, 175 Vt. 292, 301 (2003). The court may then adjust upward or downward based on various factors, including the novelty of the legal issue, the experience of the attorney, the results obtained in the litigation, and the amounts involved. *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

The Judge may have heard sufficient evidence already and may make this determination without further hearing, or she may decide that it is necessary to hear additional evidence. The parties should remain mindful of the jurisdictional limit on the ability of the Small Claims Court to award relief. V.R.S.C.P. 2(a).

ORDER

The award of attorneys' fees and expenses is *reversed and remanded for further proceedings as set forth in this Decision*; in all other respects the Judgment of September 10, 2007 is *affirmed*.

Dated at Rutland, Vermont this 19th day of March, 2008.



Hon. Mary Miles Teachout
Superior Court Judge