B&F Land Development, LLC, v. Steinfeld, Docket No. 277-7-05 Bncv (Wesley, J., Feb. 13, 2007)

STATE OF VERMONT **BENNINGTON SUPERIOR COURT**
BENNINGTON COUNTY, SS. **DOCKET NO. 277-7-05 Bncv**

B & F LAND DEVELOPMENT, LLC,)
Plaintiff)
)
v.)
)
Geoffrey T. STEINFELD,)
Defendant)

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION TO AMEND COUNTERCLAIM, AND GRANTING DEFENDANT'S MOTIONFOR DISCOVERY SANCTIONS

The Court here considers several motions related to this contractual dispute. Defendant B & F Land Development hired plaintiff Gregory Steinfeld as a contractor to create a roadway in the subdivision under development by B & F. After Steinfeld had completed a portion of the roadway, B &F alleged that he had improperly removed subsurface gravel from the path of the excavation, and brought claims for negligence, breach of contract, and conversion. Steinfeld answered and filed counterclaims against B & F for unjust enrichment and for damages based on B & F's withholding of

compensation for services. Currently pending are Steinfeld's motions for summary judgment, to amend his counterclaim, and for discovery sanctions. The Motion for Summary Judgment seeks a complete dismissal of all of Plaintiff's claims, or, in the alternative, partial judgment as to the count for negligence. Due to the existence of issues of material fact, Steinfeld's general motion for summary judgment is **DENIED**. However, the motion for partial summary judgment, addressing B& F's negligence claim, is **GRANTED** consistently with the application of the economic loss rule. Steinfeld's Motion to Amend Counterclaim to state a cause for malicious prosecution is **DENIED** as futile. Steinfeld's Motion for Discovery Sanctions and attorney's fees is **GRANTED,** subject to any further request for a hearing as to the amount of the fee award.

I. Defendant's Motions for Summary Judgment

Steinfeld's Motion for Summary Judgment advances arguments for both summary judgment as to all claims and partial summary judgment regarding B & F's negligence claim. As the crux of his argument for complete relief, Steinfeld claims that the absence of any proof that he removed gravel is dispositive. B & F argues in response that it has produced sufficient evidence from which Steinfeld's wrongful acts may be inferred. As to his claim for more limited relief, Steinfeld contends that the economic loss rule bars the negligence claim, as the facts of this case do not implicate tort law. B & F nominally addressed this argument, but did little more than restate its original claim.

The following facts are undisputed. B & F is a land developer presently

developing a subdivision in Manchester. In 2004, B & F and Steinfeld entered an oral contract by which Steinfeld was to perform site excavation and preparation, including the building of a private road. According to the performance specifications understood between the parties, Steinfeld was to excavate material from the path of the roadway to a depth of approximately eight inches. Any excavated material was to be placed in piles for use elsewhere on the site. After Steinfeld finished the excavation, piles of topsoil were located around the site, but no piles of gravel. No witnesses saw Steinfeld remove any gravel from the site. There is scientific evidence that any saleable gravel at the site would have been located twenty-two to thirty-six inches below the surface of the land, a depth greater than excavated by Steinfeld. The amount of gravel alleged by B & F to have been taken by Steinfeld, fifteen hundred cubic yards, would fill approximately seventy-five dump trucks. Steinfeld does not own a dump truck.

Against this factual background, B & F argues that other testimony and inferences developed during discovery create issues of material fact which preclude summary judgment. First, B & F's principal, Christopher Baudo, states that B & F has asked Steinfeld to explain what happened to the "missing" material, but Steinfeld has provided no answer. It argues that "[t]he only reasonable inference that can be drawn from [Steinfeld's] presentment of the job-site as complete with the sub-surface material not located any place on the project site is that it was removed by [Steinfeld] or his agents." Second, a professional excavator has stated that he would not have removed more than three to four inches of topsoil from the path of the roadway, and that he did not see any gravel stored at the site. The excavator has also stated that he saw a dump truck (not owned by Steinfeld) at the site while Steinfeld was there. Third, B & F's

other principal, Michael Fufidio, avers that "he [has] reason to believe that gravel was removed from the job site and that it was not on the site." Finally, Peter Helmetag, a landscape architect retained by Plaintiffs' as an expert witness, testified from his observations that Steinfeld removed approximately twelve inches of subsoil from the roadbed, and that "based upon his observations . . . materials were not stockpiled on the site and were missing." Helmetag also testified that it would not have been necessary to excavate the roadbed so deeply in order to accomplish Steinfeld's objective.

"To prevail on a motion for summary judgment, the moving party must show there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law." VRCP 56(c)(3); *Gordon v. Bd. of Civil Auth. for Town of Morristown*, 2006 VT 94, ¶ 5, 17 Vt.L. W. 300. The court does not weigh the evidence, but merely determines whether a triable issue of fact exists. *Berlin Dev. Assocs. v. Dept. of Social Welfare*, 142 Vt. 107, 111-112 (1982). This is a stringent test, as "the party opposing summary judgment is entitled to the benefit of all reasonable doubts and inferences." *Wesco, Inc. v. Hay-Now, Inc.*, 159 Vt. 23, 26 (1992); *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). In opposing a motion for summary judgment, "an adverse party may not rest upon . . . mere allegations or denials . . ., [but] must set forth specific facts showing that there is a genuine issue for trial." V.R.C.P. 56(e).

As Defendant vigorously insists, the key issue common to all Plaintiff's claims is whether there is any evidence that Steinfeld removed material from the site. Most of the "facts" presented by B & F have scant evidentiary underpinning and amount to little more than various reconfigurings of the suspicions held by Plaintiff's principals.

Nonetheless, according Plaintiff the benefit of all reasonable doubts and inferences, an issue of material fact is created by Mr. Helmetag's professional observation that materials left over from the excavation of the roadway appeared to be missing from the site. As Defendant insists, Plaintiff's expert conceded at deposition that he personally knew of no reason to blame Steinfeld for the missing gravel. Nonetheless, his conclusion from his examination of the premises that the underburden from the deeper-than-expected excavation could not be accounted for, coupled with Steinfeld's access and control, would permit an inference that Defendant was responsible for any removal. The Court must therefore deny Steinfeld's motion for summary judgment as it pertains to all claims.

Resolution of Steinfeld's motion for partial summary judgment as to B & F's negligence claim requires examination of an even narrower set of facts. The economic loss rule states that "absent some accompanying physical harm, there is no duty to exercise reasonable care to [prevent another's economic loss]." *Wentworth v. Crawford and Co.*, 174 Vt. 118, 126 (2002). The rule "serves to maintain the boundary between contract law, which is designed to enforce parties' contractual expectations, and tort law, which is designed to protect citizens and their property by imposing a general duty of reasonable care." *Hamill v. Pawtucket Mut. Ins. Co.*, 2005 VT 133, ¶ 7, 179 Vt. 250. "Economic loss" includes damages alleged for diminished value or potential lost profits. *Heath v. Palmer*, 2006 VT 125, ¶ 15, 17 Vt.L.W. 426 (citing *Gus' Catering, Inc. v. Menusoft Sys.*, 171 Vt. 556, 558-559 (2000). The rule applies in the context of contractor agreements. See *id.*

The damages alleged by B & F focus on the replacement value of the gravel and are inextricably bound up with the contractual understanding between the parties. Any alleged loss is purely economic. B & F has not alleged the existence of any physical harm related to Steinfeld's action, seeking only the marketable value of the lost gravel. In addition, B & F has simply declined to address the substance of Steinfeld's argument regarding the applicability of the economic loss rule, compelling the conclusion that its negligence claim is barred by the economic loss rule. Thus, the Court **GRANTS PARTIAL SUMMARY JUDGMENT** to Defendant as to that count of Plaintiff's complaint.

II. Defendant's Motion to Amend Counterclaim

Having conducted significant discovery in this case, Steinfeld has moved to amend his counterclaim in order to add a claim for civil malicious prosecution. The general impetus for this motion is his allegation that "[B & F's] claims are without merit" and that it "brought the suit in bad faith and for malicious reasons." More specifically, Steinfeld argues that B & F had no cause to bring the lawsuit and has not uncovered any supporting evidence or has uncovered only contrary evidence. He contends that "it would not be humanly possible to remove gravel from that site." Steinfeld anticipates judgment in his favor and the accumulation of significant expenses in defending against the lawsuit. In opposition to Steinfeld's motion, B & F contends that the amendment is frivolous and would be prejudicial at this point in the case.

Leave to amend a claim "shall be freely given when justice so requires." V.R.C.P. 15(a). See also *Lillicrap v. Martin*, 156 Vt. 165, 170 (1991). A court should consider several factors in deciding whether to permit amendment, including undue

delay, bad faith, futility of amendment, and prejudice to the opposing party. *Perkins v. Windsor Hospital Corp.*, 142 Vt. 305, 313 (1982). An amendment is futile if it would not provide the amending party with additional or stronger grounds for relief. See *Mellin v. Flood Brook Union School Dist.*, 173 Vt. 202, 219 (2001).

Although Plaintiff makes no more than a bare invocation of futility, unsupported by legal authority or reasoning, the Court must conclude that Steinfeld's proposed amendment must fail as futile in its present procedural posture. In order to bring a viable claim or counterclaim for civil malicious prosecution, the proceedings alleged to have been instituted maliciously must be concluded. It is well-settled that "an action for malicious prosecution may not be asserted by way of a cross-complaint or counterclaim in the original proceeding prior to its termination, because it is essential that the original proceeding be previously terminated in favor of the party bringing the malicious prosecution action." 52 AM. JUR. 2D *Malicious Prosecution* § 11 (2000). See also RESTATEMENT (SECOND) OF TORTS § 674 cmt. j (1977). This is the rule in Vermont. See *Anello v. Vinci*, 142 Vt. 583, 587 (1983) (citing American Jurisprudence).

Steinfeld relies on *Chittenden Trust Co. v. Marshall,* 146 Vt. 543 (1986) as support for his argument. Yet *Chittenden* acknowledges the force of the preceding authorities, which establish the impropriety of Steinfeld's proposed amendment. Furthermore, the facts of that case are distinct from those here. In *Chittenden*, the trial court allowed defendants to maintain a counterclaim against the plaintiff for malicious prosecution. However, trial on the counterclaim only proceeded after the plaintiff "abandoned its claim" against the defendants, by assigning its interest in the suit to another party in return for payment. *Id.* at 546. On appeal, neither party disputed that

by abandoning its claim, the plaintiff had terminated the suit (although verdict on the counterclaim was reversed for failure of the trial judge to properly charge the jury's duty to assess whether the abandonment of the claim amounted to the type of favorable disposition necessary to support a claim for malicious prosecution). As no proceedings have terminated in the instant case, the Court must **DENY** Steinfeld's motion to amend as futile.

III. Defendant's Motion for Discovery Sanctions

This motion seeks to compel discovery and obtain reimbursement of attorney's fees necessary to rectify B & F's failure to answer discovery. Steinfeld alleges that Baudo has repeatedly failed to answer his legitimate interrogatories and requests to produce, and demonstrated similar recalcitrance during deposion. Steinfeld has asked Baudo if Baudo has been a party to any lawsuits in the last ten years. Baudo has refused to answer, and B & F asserts that this question is irrelevant and immaterial, is part of a "fishing expedition," and that a protective order is warranted.

Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." To be relevant, information must only be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* A court should apply the Rule with a presumption in favor of discovery. See 23 AM. JUR. 2D *Depositions and Discovery* § 3 (2002). However, discovery should not be had if the requested information is unreasonably cumulative or duplicative, could have been obtained from another more convenient source, or is unduly burdensome or expensive. V.R.C.P. 26(b).

B & F has offered only broad and vague justifications for its refusal, and its argument that Steinfeld is conducting a "fishing expedition" is clearly without merit. See *Hickman v. Taylor*, 329 U.S. 495, 507-508 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."). In addition, V.R.C.P. 30(d), governing the conduct of depositions provides that "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion alleging bad faith." None of these grounds is established by B & F's objections. Under these circumstances, Steinfeld's request for information related to Baudo's litigation history was proper under Rule 26.

Based on the foregoing, it is hereby **ORDERED**:

Defendant's Motion for Summary Judgment is **GRANTED** as to plaintiff's negligence claim and is otherwise **DENIED**.

Defendant's Motion to Amend Counterclaim is **DENIED**.

Defendant's Motion for Discovery Sanctions is **GRANTED**. Plaintiff shall submit answers to discovery regarding prior litigation within 10 days of this order. Defendant's request for attorneys fees in the amount of $350 is **GRANTED**, with fees to be paid within 30 days, unless within 10 days Plaintiff shall seek further hearing on the amount of the fees, in which case hearing will be set, and should Defendant prevail, the award will be increased to further reflect the costs associated with the hearing.

DATED , at Bennington, Vermont.

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John P. Wesley

Presiding Judge