

NOT DESIGNATED FOR PUBLICATION

INDEPENDENT SUPPLY CO., * NO. 2006-CA-1444
L.L.C. *
VERSUS * COURT OF APPEAL
 * FOURTH CIRCUIT
CSF CONSTRUCTION, INC., *
AMERICAN TANK AND * STATE OF LOUISIANA
VESSEL, INC., AND *
STOLTHAVEN NEW *****
ORLEANS, L.L.C./STOLT-
NIELSEN TRANSPORTATION
GROUP

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 52-781, DIVISION "B"

Honorable William A. Roe, Judge

Judge Dennis R. Bagneris, Sr.

(Court composed of Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty, and Judge Leon A. Cannizzaro, Jr.)

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MARCH 21, 2007

REVERSED

Defendants/appellants, American Tank and Vessel, Inc. and Stolthaven New Orleans, L.L.C./Stolt-Nielsen Transportation Group, appeal from a judgment that awards plaintiff/appellee, Independent Supply Co., L.L.C., attorney fees and penalties under the Private Works Act, La. R.S. 9:4801, *et seq.* For the reasons that follow, we reverse that part of the judgment that finds American Tank and Vessel, Inc. and Stolthaven New Orleans, L.L.C./Stolt-Nielsen Transportation Group liable for attorney's fees and penalties. In all other respects, the judgment of the trial court is affirmed.

FACTS

This is an action to collect money owed for materials and supplies provided by Independent Supply, Co. L.L.C. (Materialman) to the defendants, CSF Construction, Inc. (Subcontractor), American Tank and Vessel, Inc. (General Contractor) and Stolthaven, New Orleans, L.L.C. (Owner).

From November 29, 2004 through March 31, 2005, Independent Supply, Co. L.L.C. ("Independent Supply") provided materials and supplies to CSF Construction, Inc. ("CSF") for the benefit and use of American Tank and Vessel,

Inc. (“ATV”) and Stolthaven, New Orleans, L.L.C. (“Stolthaven”). All of the materials were delivered to and accepted by Stolthaven for use and installation at the Stolthaven’s facility, which is a tank farm located in Braithwaite, Louisiana.

Although CSF (the subcontractor) and ATV (the general contractor) had been paid, Independent Supply (the materialman and supplier) had not been paid. Consequently, on July 18, 2005, Independent Supply delivered a Notice of Non-Payment and Sworn Statement of Account to ATV, and Stolthaven. On August 3, 2005, Independent Supply also filed a materialman’s lien in accordance with the Private Works Act, La. R.S. 9:4801 *et seq.* in Plaquemines Parish.

Less than one month later, on August 10, 2005, Independent Supply filed this action against CSF, ATF and Stolthaven seeking payment of the principal debt, costs, attorney fees and penalties. ATV and Stolthaven then filed a third party demand against CSF seeking indemnity.

The trial judge found that Independent Supply had adequately proven his entitlement to payment for the materials and supplies used by and incorporated into the Stolthaven facility. Accordingly, the trial judge rendered judgment against CSF, ATV, and Stolthaven, *in solido*, and in favor of Independent Supply in the amount of \$78,457.03, plus attorney’s fees of \$58,814.78 and penalties of \$78,000.00 and interest.¹

On appeal, ATV and Stolthaven briefed two assignments of error, arguing that: (1) the trial court erred in awarding penalties and attorney’s fees to Independent Supply against them; and (2) alternatively, the attorney’s fees and penalties were, in any event, excessive and erroneous².

¹ ATV and Stolthaven have paid the principal amount owed in the judgment.

² CSF did not appeal the judgment.

DISCUSSION

The Louisiana Private Works Act, La. R.S. 9:4801, *et seq.*, creates a claim in favor of materialmen of a subcontractor against the owner and contractor and a privilege on the immovable on which the work is performed to secure payment of the movables sold that become component parts of the immovable or that are consumed on the work site. La. R.S. 9:4802(A)(3) & (B). Specifically, La. R.S. 9:4802 states as follows:

A. The following persons have a claim against the owner and a claim against the contractor to secure payment of the following obligations arising out of the performance of work under the contract:

* * *

(3) Sellers, for the price of movables sold to the contractor, or a subcontractor that become component parts of the immovable, or are consumed at the site of the immovable, or are consumed in machinery or equipment used at the site of the immovable.

* * *

B. The claims against the owner shall be secured by a privilege on the immovable on which the work is performed.

C. The owner is relieved of the claims against him and the privileges securing them when the claims arise from the performance of a contract by a general contractor for whom a bond is given and maintained as required by R.S. 9:4812 and when notice of the contract with the bond attached is properly and timely filed as required by R.S. 9:4811.

D. Claims against the owner and the contractor granted by this Part are in addition to other contractual or legal rights the claimants may have for the payment of amounts owed them.

E. A claimant may assert his claim against either the contractor, his surety, or the owner without the joinder of the others. The claim shall not be subject to a plea of discussion or division.

ATV and Stolthaven challenge the trial court's award of attorney's fees and penalties, on the grounds that there is neither a statute nor a contract that provides for the award of attorney's fees and/or penalties to Independent Supply against

them. Contrarily, Independent Supply argues that there is a statutory basis for an award of attorney's fees and/or penalties under Louisiana Revised Statute 9:4814.

This statute states:

9:4814. Contractors; misapplication of payments prohibited; civil penalties; payment of claims, attorney fees and costs

A. No contractor, subcontractor, or agent of a contractor or subcontractor, who has received money on account of a contract for the construction, erection, or repair of a building, structure, or other improvement, including contracts and mortgages for interim financing, shall knowingly fail to apply the money received as necessary to settle claims to sellers of movables or laborers due for the construction or under the contract. Any seller of movables or laborer whose claims have not been settled may file an action for the amount due, including reasonable attorney fees and court costs, and for civil penalties as provided in this Section. (emphasis added)

B. When the amount misapplied is one thousand dollars or less, the civil penalties shall be not less than two hundred fifty dollars nor more than seven hundred fifty dollars.

C. When the amount misapplied is greater than one thousand dollars, the civil penalties shall be not less than five hundred dollars nor more than one thousand dollars, for each one thousand dollars in misapplied funds.

D. A contractor, subcontractor, or agent of a contractor or subcontractor who is found by the court to have knowingly failed to apply construction contract payments as required in Subsection A shall be ordered by the court to pay to plaintiff the penalties provided in Subsection B or C, as may be applicable, and the amount due to settle the claim, including reasonable attorney fees and court costs.

As a general rule, attorney's fees may not be awarded to a successful litigant unless specifically provided for by statute or contract. *Campbell v. Melton*, 2001-2578, p. 15 (La.5/14/02), 817 So.2d 69, 80. In this case, there is no contract between the parties providing for an award of attorney's fees. Although Independent Supply cites to La. R.S. 9:4814 for statutory authority to recover attorney's fees, this statute only provides for penalties and attorney fees against a contractor or subcontractor

who “knowingly fail[s] to apply the money received as necessary to settle claims to sellers of movables or laborers due for the construction or under the contract.”

Only upon a finding by the trial court that ATV knowingly misapplied construction payments does La. R.S. 9:4814 provide for attorney’s fees and penalties, and the record is void of any such evidence. Further, La. R.S. 9:4814 does not have a provision for attorney’s fees and penalties against the owner; thus, this statute has no application to Stolthaven.

We find nothing under the Private Works Act that expressly permits the imposition of attorney fees and penalties against ATV and Stolthaven under these facts. ATV and Stolthaven have paid the judgment relating to the principal amount of \$78,457.03, plus court costs and recording costs. It is also worth noting the fact that ATV and Stolthaven received Notice of Non-Payment one month prior to Independent Supply filing this action for the amount of the materials owed plus attorney fees and penalties, as well as the fact that Independent Supply was unwilling to consider any settlement that did not include ATV paying attorney’s fees.

In conclusion, we find that the trial court erred in finding ATF and Stolthaven liable for attorney’s fees and penalties to Independent Supply. Accordingly, we hereby reverse that portion of the judgment, which finds ATV and Stolthaven liable for attorney’s fees and penalties. In all other respects, the judgment of the trial court is affirmed.

REVERSED

