SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** 42

Justice

----------X

CROWN WISTERIA, INC.,

Plaintiff,

- v -

FIONA CIBANI, SHAWMUT WOODWORKING & SUPPLY d/b/a SHAWMUT DESIGN AND CONSTRUCTION

Defendants.

----------X

INDEX NO. 651307/2018

DECISION + ORDER AFTER TRIAL

NANCY M. BANNON, J.

I. INTRODUCTION

The plaintiff in this action, Crown Wisteria, Inc. (Crown), seeks, *inter alia*, to recover money damages for the breach of a license agreement pursuant to RPAPL § 881, dated December 17, 2017, (the License Agreement) entered into by and between Crown and defendant Fiona Cibani (Cibani). Crown and Cibani, the owners of adjacent townhouses on East 78th Street in Manhattan, entered into the License Agreement in connection with Cibani's renovation of her townhouse, which required Cibani to access Crown's property. Pursuant to Section 12(c) of the License Agreement, Cibani agreed to install on a new wall facing Crown's rear yard brick matching the front façade of Cibani's townhouse. However, Cibani instead purchased non-matching, less expensive brick for installation. On December 12, 2019, the Appellate Division, First Department, granted Crown summary judgment on the issue of liability on its breach of contract claim and remanded for a determination of the amount of damages and attorneys' fees to which Crown is entitled.

OTHER ORDER – NON-MOTION

Prior to the issuance of the First Department's decision, the court began conducting a nonjury trial on Crown's breach of contract claim and heard testimony, including on the issue of damages, on November 25, 2019, and December 2, 2019. On December 12, 2019, the court directed further proceedings on the limited issue of attorneys' fees. The court conducted hearings on the issue of attorneys' fees on January 24, 2020, and February 13, 2020. The parties presented documentary evidence. Susan Stamell (Susan"), an agent of Crown and resident of the townhouse owned by Crown, testified on behalf of Crown. Crown also presented the testimony of Andrew Liebhaber, a general contractor in New York City, and Andrew Goldenberg, Crown's counsel in this matter. Cibani presented the testimony of Marc Albertin, a licensed architect who performed work on the underlying renovation project.

The court credits the testimony of the witnesses and the documentary evidence to the extent indicated in the following findings of fact.

II. FINDINGS OF FACT

A. The Underlying Dispute

Crown is the owner, on behalf of actual residents Jared and Susan Stamell, of a townhouse located at 118 East 78th Street, New York, New York (the Crown Property). Cibani is the owner of a townhouse on the neighboring property located at 116 East 78th Street, New York, New York (the Cibani Property), a new-Georgian style residence constructed in 1866.

Since approximately 2011, Cibani has been engaged in a full gut-renovation of the Cibani Property (the Project). As part of the Project, Cibani built a full-height addition to the rear of her townhouse. The east exterior wall of the addition (the East Exterior Wall) faces the rear yard of the Crown Property. While the original, existing east wall of the townhouse is a party wall

shared with the Crown Property, the East Exterior Wall is a lot line wall entirely within the bounds of the Cibani Property and used solely for the Cibani Property.

On December 13, 2017, Crown and Cibani entered into the License Agreement pursuant to RPAPL § 881. Under the License Agreement, Cibani was granted access to the Crown Property in order to install temporary protections on the Crown Property so that Cibani could perform certain construction work in furtherance of the Project. Cibani agreed to pay Crown $10,000.00 per month under the License Agreement in exchange for access to the Crown Property. Section 12(c) of the License Agreement further provided that Cibani was to "install finished gray brick veneer on the exterior side walls facing the [Crown Property] that matches the front façade of the [Cibani Property]" at Cibani's sole cost. As the First Department has held, Cibani breached this provision insofar as she found "matching" brick prior to entering into the License Agreement but chose to build the East Exterior Wall using a cheaper brick that does not match. Crown Wisteria, Inc. v Cibani, 178 AD 3d 524, 525 (1st Dept. 2019).

The License Agreement further provided, in relevant part, that Cibani would indemnify Crown from the attorneys' fees it incurred because of the construction work she performed. The License Agreement did not limit indemnification to a specific list of items, nor did it limit indemnification to third-party claims. Id. The License Agreement provided that such fees were to be paid by Cibani as invoices were presented.

B. The Instant Action

On March 18, 2018, Crown commenced this action, stating claims sounding in breach of contract and fraudulent inducement. In the original complaint, Crown sought to enjoin Cibani from using the non-matching brick to build the East Exterior Wall. Crown also sought money damages "in a sum to be determined at trial" and contractual attorneys' fees. On March 21,

2018, the court (Edmead, J.) denied Crown's application for a temporary restraining order preventing Cibani from constructing the wall (SEQ 001). On April 16, 2018, the court (Crane, J.) denied Crown's motion for a preliminary injunction seeking the same relief (SEQ 001). Cibani completed construction of the wall using the non-matching brick at some point thereafter.

On April 17, 2018, Crown filed an amended complaint reasserting its breach of contract and fraud claims and supplementing its demand for relief. Specifically, as relevant to its breach of contract claim, Crown sought money damages consisting of no less than "the cost of building a wall on Plaintiff's side of the adjoining properties which matches the brick on the [façade of the Cibani Property]," "the value of the loss of [the Crown Property] the new wall will occupy," and "the diminution in market value to [the Crown Property] due to Defendants' breach." Crown also restated its demand for contractual attorneys' fees.

Discovery ensued. Notwithstanding Cibani's demand, served on May 25, 2018, for documentation supporting any alleged damages sustained by Crown, as described in the amended complaint, and any communications relating to the same, Crown provided no such proofs, without excuse. Crown nonetheless proceeded to file its Note of Issue, certifying that all discovery known to be necessary had been completed, on June 4, 2018.

On January 17, 2019, the court (Crane, J.) denied Crown's motion for partial summary judgment on the issue of liability and granted Cibani's motion for summary judgment dismissing the complaint to the limited extent that it dismissed Crown's fraud and attorneys' fees claims (SEQ 002, 003). Thereafter, the parties appeared on July 18, 2019, and August 7, 2019, in the Judicial Mediation Part. On August 6, 2019, Crown, for the first time, provided to Cibani a two-page proposal prepared by New York City contractor Andrew Liebhaber (Liebhaber) (the Liebhaber Proposal). The Liebhaber Proposal was addressed to Susan Stamell and assessed the

cost of removing Cibani's East Exterior Wall and installing new brick at $646,400.00. This amount, according to the Liebhaber Proposal, was based on Liebhaber's "site visit."

In November 2019 and December 2019, as described above, a bench trial commenced to resolve Crown's breach of contract claim, including the issue of damages. After Crown had rested, and during Cibani's presentation of her defense, on December 12, 2019, the First Department modified the court's decision on summary judgment to (i) grant Crown's motion for partial summary judgment on liability as to Crown's breach of contract claim, (ii) restore Crown's attorneys' fees claim, and (iii) remand for a determination of the amount of damages and attorneys' fees to which Crown is entitled.

C. Damages

At trial, Susan Stamell testified as to the nature of the remedy she seeks in this action. She was equivocal, first stating that what she wants is "[r]emoval and replacement of the brick [and] installing brick that matches in accordance with the agreement" but later insisting that such a project would be "a nightmare, a disaster." Susan feared that if Cibani again required access to the Crown Property to remedy the defective East Exterior Wall, "[e]verything would be ruined" and that further construction on Cibani's property will result in damage to "brand new curtains and beautiful things" in her townhouse. Ultimately, Susan sought "the money that they saved by not putting up the right brick, the money that it would cost [Cibani] to take that brick down and re-put it up." That is, Susan lacks the power to perform any re-bricking of the East Exterior Wall because the East Exterior Wall is located exclusively on the Cibani Property, and will not allow Cibani the requisite access to her property to perform the renovation work she seeks.

Liebhaber, who was permitted to testify notwithstanding Crown's failure to disclose him or the Liebhaber Proposal until well over a year after the Note of Issue was filed, prepared the

Liebhaber Proposal in the spring of 2019 for the benefit of Susan. Liebhaber did not obtain any subcontractor bids or quotes in support of the items in his estimate. Liebhaber relied on Susan's unidentified quote, not offered or admitted into evidence, for the "correct" brick to be used in correcting the East Exterior Wall. Liebhaber did not know whether the new brick would match the façade or have the requisite structural properties required for the party wall portion of the east wall. Liebhaber further based his estimate on visits to the Crown Property, where he worked as Crown's representative on Crown's own townhouse renovation beginning in summer 2018. Liebhaber also relied on his own experience and knowledge of pricing from previous jobs. Liebhaber, who was not admitted to testify as an expert, never visited the Cibani Property upon which the East Exterior Wall was actually located, nor did he ever speak or consult with, or otherwise obtain information about, the contractors and architects who built the East Exterior Wall as part of the Project.

Susan was without authority to accept Liebhaber's proposal because she is not the owner of the Cibani Property. Only Cibani could undertake the work described in the proposal. Neither Liebhaber nor Susan provided any estimate for any type of work that Susan could actually undertake to remedy the harm caused by Cibani's breach, namely, Susan's having to look at bricks in her neighbor's yard she finds unattractive.

D. Attorneys' Fees

At trial, Crown's counsel, Andrew Goldenberg, testified as the amount of fees Crown incurred in prosecuting this matter. Goldenberg is "of counsel" to Stamell & Schager, LLP (S&S), of which Crown's officer Jared Stamell (Jared) is the owner and managing partner. Goldenberg has practiced law in New York since 2008 and focuses primarily on complex commercial litigation. He was the principal attorney in this case.

Crown and S&S have an "ongoing relationship" based on the fact that Jared is the owner and managing partner of S&S, the president of Crown, and, with Susan, a resident at the Crown Property. There is no written letter of engagement between S&S and Crown for this matter. S&S does not generate monthly invoices to Crown for this matter. S&S has, however, issued two invoices to Crown for this matter, one covering March 2018 through December 2019, and one pre-bill for January 2020, to account for fees incurred through January 14, 2020. Notably, Crown has not paid S&S any fees for this matter.

S&S kept itemized time records recording work its attorneys performed on this matter, which includes: (i) the filing of the complaint and initial application for an injunction, (ii) the filing of the amended complaint, (iii) fact discovery, (iv) the filing of a motion for summary judgment and opposition to Cibani's motion for summary judgment, (v) the filing of its appeal of the denial of Crown's summary judgment motion and opposition to Cibani's cross-appeal, (vi) participating in settlement conferences, (vii) the filing of a motion to stay trial and for judicial recusal, (viii) the filing of a failed appeal of the denial of the stay and recusal motion, and (ix) the trial of Crown's breach of contract claim and hearing on the issue of attorneys' fees.

Crown does not seek compensation for work performed by Jared and has also omitted from its application $11,880.00 in fees incurred on the recusal motion. Crown does seek fees for its unsuccessful motion to stay and adjourn the trial. Crown further seeks fees related to Mary Jablonski, who was disclosed by Crown as an expert witness on November 11, 2019, well after the court's deadline for witness disclosures, as well as compensation for its opposition to Cibani's successful motion to preclude Jablonski

Crown's counsel provided certain services at trial that were not necessary. For example, Crown prepared jury instructions and a bench memorandum articulating its position on specific

performance and later withdrew such documents. Crown also incurred costs for preparing unauthorized witness statements on the issue of damages after the close of testimony on that issue, including the statement of Jablonski, who had already been precluded from testifying, and Liebhaber, who had already testified.

Crown's counsel block-billed for almost all of his time. Moreover, many of counsel's entries are vague, such that it cannot be ascertained what exactly counsel was working on and why it should reasonably occupy the hours it did.

Goldenberg billed for all work, including clerical work performed by him, at a rate of $550 per hour. In addition, Goldenberg stated that S&S hired attorneys Darin Wizenberg (Wizenberg) and Mark Zauderer (Zauderer) as co-counsel at fixed rates for their work at trial. Wizenberg, a criminal defense attorney, acted as counsel during the trial on Crown's breach of contract claim and damages only, for a fee of $15,000.00. Zauderer, a New York trial and appellate lawyer, appeared as co-counsel for the attorneys' fees hearing, for $10,000.00. Zauderer did not actually participate in the attorneys' fees hearing. No statement of qualifications or information about the fees charged by Wizenberg and Zauderer was provided.

Crown's submission of additional materials outside of the record after the close of trial, to which Cibani objects, was unauthorized by this court and plainly inappropriate. The court does not consider any material outside of the trial record.

III. CONCLUSIONS OF LAW

A. Damages

"It is well settled that in breach of contract actions 'the nonbreaching party may recover general damages which are the natural and probable consequence of the breach.'" Bi-Econ.

Mkt., Inc. v Harleysville Ins. Co. of New York, 10 NY3d 187, 192 (2008) (quoting Kenford Co. v County of Erie, 73 NY2d 312, 319 [1989]). Put differently, "breach of contract damages are intended to place a party in the same position as he or she would have been in if the contract had not been breached." Tullett Prebon Fin. Servs. v BGC Fin., L.P., 111 AD3d 480, 481 (1st Dept. 2013) (internal quotation marks and citation omitted). Even where liability for breach has been established, the burden is on the nonbreaching party to present competent proof of actual damages resulting from the breach. See Crippen v Adamao, 165 AD3d 1227, 1229 (2nd Dept. 2018); Haber v Gutmann, 64 AD3d 1106, 1108 (3rd Dept. 2009); Austin Baldwin & Co. v Kohler, 94 Misc 142, 146 (1st Dept. 1916). Where the law recognizes a technical invasion of the nonbreaching party's contractual rights, but such party fails to prove actual damages or a substantial loss of injury to be compensated, only nominal damages can be awarded. Brian E. Weiss, D.D.S., P.C. v Miller, 166 AD2d 283, 283 (1st Dept. 1990) (citing Good Karma Productions v Penthouse Int'l Ltd., 88 AD2d 561 [1st Dept. 1982]); see Quik Park W. LLC v Bridgewater Operating Corp., 189 AD3d 488, 489 (1st Dept. 2020); Ross v Sherman, 95 A.D.3d 1100, 1100 (2nd Dept. 2012); Buchwald v Waldron, 183 AD2d 1080, 1081 (3rd Dept. 1992).

Contrary to Crown's assertions, the First Department's decision on the issue of liability does not excuse Crown from its obligation to prove damages. Nor did the First Department anywhere indicate it was "certain" any actual damages existed, as is required before Crown can invoke the principle that uncertainty as to the amount of damages should be resolved in favor of the nonbreaching party. See Cole v Macklowe, 105 AD3d 604, 605 (1st Dept. 2013). Thus, the burden at trial was on Crown to establish, by competent evidence, the existence of actual damages and the amount thereof. Crown failed to meet that burden.

Initially, the court notes that Crown's testimony as to its own theory of damages at trial was less than clear. In its pre-trial memorandum, Crown claimed to be "entitled to money damages in an amount equal to correcting the mismatched sixty-foot high brick wall" due to its "aesthetic appearance" since "Crown residents, not Cibani, will see the brick wall every time they look outside their windows or use their rear yard or terrace." As indicated above, Susan suggested at various intervals that she wanted specific performance of the breached provision of the License Agreement, also that she would not permit such performance, and also that she wanted "the money [Cibani] saved" by using different brick, and that she wanted "the money that it would cost [Cibani] to take that brick down and re-put it up." After Susan testified, the court repeatedly asked Crown's counsel to clarify Crown's theory of damages but was met with similarly equivocal responses before counsel finally stated that Crown was seeking "money damages or, in the alternative, specific performance." In its post-trial memorandum and proposed findings of fact and conclusions of law, however, Crown does not mention specific performance.

As to evidence of actual damages, Crown presented only the testimony of Liebhaber and the two-page Liebhaber Proposal purporting to demonstrate the cost of demolishing and rebuilding the East Exterior Wall with brick sourced by Susan. While the Liebhaber Proposal was addressed to Susan, all witnesses agreed that Susan, who did not bear any cost of the Project and was in fact paid $10,000.00 per month by Cibani for access to the Crown Property for the duration of the License Agreement, could not bear the cost of re-bricking the East Exterior Wall because Susan owns no part of the East Exterior Wall.

Crown did not include specific performance in its prayer for relief in the amended complaint. Nor did Crown ever indicate during discovery or at any other point prior to trial that

it intended to ask the court for such a remedy. Similarly, Crown did not seek in the amended complaint or present to Cibani any evidence of the cost of re-bricking the East Exterior Wall until approximately one month before the first scheduled trial date. As to the damages actually sought in the amended complaint, Crown presented no evidence that it lost property or that its property value was diminished due to Cibani's use of non-matching brick. Further, Crown did not present any evidence as to the cost of Crown's having to construct a screen wall on its own property using matching brick. Indeed, Crown abandoned all theories of damages stated in the amended complaint in favor of two novel theories on which it had exchanged no discovery until the eve of trial. As the court stated at trial, Crown's conduct was without excuse and undoubtedly prejudicial to Cibani. Notwithstanding, the court permitted Liebhaber to testify and Crown to present proof on its re-bricking theory. Crown has presented no proof or argument as to entitlement to specific performance, however, and to the extent Crown sought such relief at trial it is denied.

As to Crown's re-bricking theory, it fails insofar as the cost of re-bricking does not, and never could, rationally flow to Crown as a result of Cibani's breach of the License Agreement. Thus, the damages Crown seeks are more than speculative; they are an impossibility. Crown does not own any part of the East Exterior Wall and cannot legally perform any of the work proposed. This was equally true at the time the parties entered the License Agreement. Indeed, Cibani was to bear the entire cost of constructing the East Exterior Wall pursuant to the agreement. Additionally, Susan's testimony, as well as Crown's apparent waiver of its specific performance argument in the post-trial submissions, indicate that Crown has no interest in Cibani re-bricking the wall.

Crown argues that it is entitled to the cost of remedying the defects in the East Exterior Wall because there is caselaw permitting such damages to homeowners where a construction contract has been breached. None of these cases is relevant to the facts at hand. Cibani was not Crown's contractor and the License Agreement was not a construction contract. Most significantly, the East Exterior Wall is, and always was contemplated to be, the exclusive property of Cibani and subject to her sole control. Put differently, the plaintiffs in the cases cited by Crown paid for construction work that was performed incorrectly on property that the plaintiffs owned. In those cases, it was reasonably foreseeable that the plaintiffs would have to bear the costs of remedying the defective work in order to receive the benefit of the bargain. Crown neither paid for any of the work Cibani performed on the East Exterior Wall nor owned the property on which it was performed. When the License Agreement was entered into, and at all times thereafter, it was not possible that Crown would ever bear the cost of re-bricking the East Exterior Wall.

Even if the re-bricking theory of damages pursued by Crown were viable, the evidence Crown introduced at trial is too speculative to warrant an award. Liebhaber never visited the property on which the East Exterior Wall is actually located and did not obtain any information about its construction or what is structurally required in the wall. Liebhaber did not even know whether the brick sourced by Susan could actually be used in the wall. Moreover, Liebhaber did not obtain any quotes or refer to any substantive pricing information in describing how he formulated his proposal. The two-page Liebhaber Proposal sheds no further light on how he arrived at the figures listed therein.

The evidence elicited at trial established that the only actual harm suffered by Crown as a result of Cibani's breach is that Susan and Jared Stamell will now have to see brick in their

neighbor's backyard that does not precisely match the brick on the front of their neighbor's townhouse. There has been no evidence that the nonmatching brick diminished the value of the Crown Property. There has been no evidence that the Stamells will have to undertake any remedial work to get the brick they wanted. In other words, Crown has pleaded no economic harm whatsoever as a result of Cibani's breach. While the Stamells may be unhappy with the brick Cibani used, no legal precedent supports the imposition of damages to compensate a homeowner for suffering the view of brick he or she subjectively dislikes on a neighboring property.

In light of the foregoing, Crown fails to prove any actual damages arising from Cibani's breach of the License Agreement. No compensatory damages may be awarded. The court instead awards $10 in nominal damages.

B. Attorneys' Fees

Notwithstanding that a plaintiff recovers only nominal damages on a contract claim, "such damages will suffice to support an award of attorneys' fees" under the contract. Greenman-Pedersen, Inc. v Berryman & Henigar, Inc., 130 AD3d 514, 517 (1st Dept. 2015); see Quick Park West LLC v Bridgewater Operating Corporation, 189 AD3d 488, 489 (1st Dept. 2020); Ross v Sherman, 95 AD3d 1100, 1100-01 (2nd Dept. 2012). Here, the First Department has determined that the indemnification clause in the License Agreement applies to Crown's contractual claim. Crown has prevailed on its claim, even though it has failed to demonstrate any compensatory damages. Moreover, the License Agreement includes a provision requiring Cibani to pay Crown's reasonable attorneys' fees related to the Project as invoices are presented, rather than as payment is actually made. Accordingly, the only question for the court is whether the $307,550.89 Crown claims in legal fees is reasonable.

The factors used to determine the reasonableness of legal fees "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted)." Matter of Barich, 91 AD3d 769 (2nd Dept. 2012); see Matter of Freeman, 34 NY2d 1 (1974); JK Two LLC v Garber, 171 AD3d 496 (1st Dept. 2019). Requested fees may be reduced to eliminate work that was duplicative or was unnecessarily performed by an attorney rather than a paralegal or secretary (JK Two LLC v Garber, 171 AD3d 496 [1st Dept. 2019]) or where the amount sought was unsubstantiated by evidence. Josefsson v Keller, 141 AD2d 700 (1st Dept. 1988). An award of reasonable attorney's fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1st Dept. 2009). Here, weighing all factors, the court concludes that $307,550.89 is far from reasonable.

First, counsel may not recover for such unnecessary services as (i) work performed on a preliminary injunction application and a motion and appeal for a stay that were all denied, (ii) work related to the belated retention and preparation of a witness who was precluded from testifying due to Crown's own conduct, (iii) filing opposition to Cibani's successful motion to preclude that witness, and (iv) unauthorized and inappropriate post-trial filings. Second, Crown has not established why it was reasonable or necessary to hire Wizenberg, a criminal defense attorney, and Zauderer, a prominent New York trial and appellate attorney who did not participate at all in the only hearing he attended, to assist Goldenberg, a seasoned attorney specializing in complex litigation, in prosecuting a straightforward breach of contract claim. Nor has Crown offered any statement of qualifications for Wizenberg or Zauderer. Third, while the trial of Crown's breach of contract claim ultimately spanned more than two days, the duration of

the trial was not due to the complexity of the issues but, principally, to the conduct of Crown's own counsel, including frequent outbursts and interruptions. Fourth, S&S's practice of block billing does not provide adequate information to justify many of the fees charged. Fifth, many of the sums claimed, such as $25,245.00 in fees for an attorney's fees hearing, $24,514.00 for filing post-trial submissions, and nearly $40,000.00 on the motions for summary judgment, not including over $50,000.00 on the appeals of those motions, are excessive on their face, particularly in light of the straightforward nature of this action and the lack of detail provided in the invoices. Fifth, and most importantly, after years of protracted litigation, mostly occasioned by Crown, Crown demonstrated no economic harm at trial and recovered only nominal damages of $10 for Cibani's breach of the License Agreement.

In light of the foregoing, the court finds that $30,000.00 is reasonable and appropriate as and for reasonable attorneys' fees and costs Crown is entitled to under the License Agreement.

IV. CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that the plaintiff shall have judgment against defendant Fiona Cibani in the sum of $10.00, plus $30,000.00 in attorneys' fees and costs; and it is further

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

DATED: September 16, 2022