Loiterstein v. Woodard, No. 364-10-05 Bncv (Wesley, J., Oct. 10, 2006)

STATE OF VERMONT **BENNINGTON**
SUPERIOR COURT
BENNINGTON COUNTY, SS. **DOCKET NO. 364-10-05 Bncv**

PHILIP & SANDRA)
LOITERSTEIN)
VS.)
)
PETER A. WOODARD &)
WOODARD CONTRUCTION, INC.

OPINION & ORDER

This matter was tried to the Court on August 31, 2006. Plaintiffs were represented by James J. Cormier, III, Esq. Defendants were represented by John R. Doherty, Esq. Plaintiff's claim and Defendant Woodward Construction, Inc.'s counterclaim arise from a contract to build a pond; each party claims that the other is liable for damages for breach of contract. Following the close of evidence, the record was kept open until September 11 to receive proposed findings of fact and conclusions of law.

Findings of Fact

1, Plaintiffs are Maryland residents who own a second home in Shaftsbury, comprised of a log cabin on 30 acres of land, where they have spent the greater parts of each summer for the past 15 years.

2. Defendant Peter A. Woodard is the president and owner of Defendant Woodard Construction, Inc. At all times material to this dispute, Peter A. Woodard has acted in his capacity as agent of Woodard Construction, Inc. Plaintiffs have put forth no evidence of any contractual undertakings by Peter Woodard, individually; nor is there evidence from which such personal responsibility ought to be inferred or implied. All the contractual arrangements addressed by the evidence clearly transpired between Plaintiffs and Peter Woodard explicitly acting on behalf of Woodard Construction, Inc.

3. Plaintiffs first consulted with Woodard Construction, Inc. (Woodard). in late summer 1993 about constructing a pond on their Shaftsbury property. At that time, after digging several test holes, Woodard informed Plaintiffs that there was insufficient surface water to fill a pond. Woodard proposed creating a lined pond to be served by a well, but Plaintiffs decided not to pursue the project.

4. Plaintiffs renewed their inquiry in 2003, discussing placement of the pond at a different location. Although expressing definite interest, Plaintiffs were unable to obtain an immediate commitment from Woodard. After making some unproductive inquiries regarding other contractors, they were told that their names would be "on the list" in 2005.

5. In August 2005, Peter Woodard met with Plaintiffs to discuss the installation of a pond. Plaintiffs were apprehensive that the summer was almost over, but they also were loath to let "another year go by", particularly as their grandchildren had expressed great interest in the prospects of a pond.

6. On a form proposal under the heading Woodard Construction, Inc., Peter Woodard presented Plaintiffs on August 12 with a written bid to construct the pond.

The proposal was for a fixed price of $35,000 specifying "1/3 deposit, balance as billed". The specifications were stated as follows: "to build a pond lined with plastic, approximately 70' x 100' on your property in Shaftsbury, Vermont to include: shaping, liner, covering liner with soil, drilled well with piping (no electric), finish grading, seeding and mulching. Note: If rock over 1 cubic yard is encountered, it will be dealt with at an extra charge." The boilerplate on the form proposal also provided, in pertinent part: "All material is guaranteed to be as specified. All work is to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications below involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control." The proposal did not include any mention of a time frame during when the project was expected to begin and end. Plaintiffs accepted the proposal without alterations by signing it on August 15, and tendering a check for $10,000 as a down payment on the full contract price

7. Based on the Court's conclusion that, as written, the contract was ambiguous as to the parties' expectations for commencement and completion, as well as other specifications such as placement of the pond, the Court allowed oral testimony as to the full scope of the parties' understanding. The parties offered differing accounts of their discussions regarding these issues. 8. Plaintiffs recall having been explicit about their concern for having the pond completely constructed within the period between August 22 and August 26. They claim to have explained that Ms. Loiterstein only had a short time remaining in Vermont before she had to travel to China to assist her son in an adoption, and that she would be on the property between August 24 and

August 26. They claim to have insisted that Ms. Loiterstein's participation was crucial as to the location and dimensions of the pond, and that her approval of the finished construction also made it critical that the work be "materially completed" before she departed on August 26. Finally, they maintain that had Woodard expressed any reservations about its ability to meet such a timeline, they would have delayed the project until the following season.

9. Peter Woodard disputes most of this account. While he acknowledges having been told of some concerns regarding Ms. Loiterstein's schedule, he believed that they only related to her assistance in selecting the exact site and shaping of the pond. He emphatically denies having any discussions in which Plaintiffs explicitly conveyed, or implied, that "time was of the essence" as regards the full completion of the pond construction in a five day period between August 22 and August 26. He denies making any clear representations as to how long the project might take to complete, or exactly when it would start, other than telling them he expected to begin it during the week of August 22 so Ms. Loiterstein could consult regarding the excavation and shaping of the site. He states that discussions regarding the possibilities of encountering ledge, or problems during the drilling of the well, inescapably ought to have left Plaintiffs with the understanding that completion of the project during a five day period was unrealistic.

10. The Court concludes that as to the timing of the project, Peter Woodard's account is more credible. Plaintiff's version is best described as retrospective "wishful thinking". While it is unlikely that as he pitched his project Mr. Woodard draped it in gloom regarding all the possible problems he might encounter, it is also difficult to imagine him painting the rosy picture described by Plaintiffs regarding his ability to

complete the job in the lightening fashion they claim to have required. Given the scope of the project, including the installation of the well, a timeframe of five days appears unrealistic on its face. Since Plaintiffs were already experienced with Woodard's delay in responding to their renewed inquiry, it must be expected that any demand for an exacting timeframe would have been specified through modification of the contract at the time they accepted the written proposal.

11. Peter Woodard brought his bulldozer to the site on Wednesday, August 24, around noon. On the day before, Ms. Loiterstein had called from Maryland and left a message at Woodard's office expressing concern about her schedule and the failure to commence the project. By Wednesday, Mr. Loiterstein had determined that it would be too risky to allow the project to continue since he deemed it inevitable that Ms. Loiterstein would be unavailable to help oversee it. He angrily told Mr. Woodard to remove his equipment, and Mr. Woodard complied.

12. At the time it discontinued work on the project, Woodard had spent less than two hours on the site. It offered no evidence from which the value of this work could be determined. However, in reliance on the contract, it had placed a special order for a pond liner which cost $2,546.66, including shipping. Having been specially ordered to the dimensions specified by the proposal for work, it is unlikely that Woodard can obtain a refund for the liner.

13. The parties had no further extensive discussions regarding the events that curtailed the project. Peter Woodard testified that he was uncertain when he left the property exactly what had prompted Mr. Loiterstein to be so upset, and thought he might hear further from Plaintiffs. However, when they contacted him to seek the return

of the $10,000 deposit, offering to pay for his cost of the pond liner if he was unable to return it, he made a counterproposal which included a claim for lost profits. This litigation ensued.

Discussion

"As a general rule, time is not of the essence in a building or construction contract in the absence of an express provision making it such." *Carter v. Sherburne Corp.*, 132 Vt. 88, 92-93 (1974). As that case noted,

> Construction contracts are subject to many delays for innumerable reasons, the blame for which may be difficult to assess. The structure . . . becomes part of the land and adds to the wealth of its owner. Delays are generally foreseen as probable; and the risks thereof are discounted . . . The complexities of the work, the difficulties commonly encountered, the custom of men in such cases, all these lead to the result that performance at the agreed time by the contractor is not of the essence.

Id. quoting, 3A A. Corbin, Contracts s 720, at 377 (1960). Since the parties omitted any express agreement as to the time for performance, the law implies into the contract a provision that it will be completed within a reasonable time*. Farmers' Feed & Grain Co. v. Longway* 103 Vt.327 (1931). Under the circumstances presented by the evidence, the Court concludes that Woodard engaged in no unreasonable delay, nor was there any other basis for a conclusion by Plaintiff that Woodard would be unable to complete performance within a reasonable time. Rather, Plaintiffs' action in precipitously preventing Woodard from performing effectively terminated the contract, and Defendant's non-performance stems entirely from Plaintiff's unjustified action in breach of the agreement.

Although Plaintiffs acted unreasonably in terminating the project before it could

get started, as regards its decision to withhold the entire down payment without an adequate accounting for its actual damages, turnabout by Woodard did not amount to fair play. In an action such as this one, the rule of damages is clearly set out in *VanVelsor v. Dzewaltowski*, 136 Vt.103,105(1978). "Where the owner breaches the contract by demanding that the work shall stop, the contractor is entitled to recover the contract price less his cost to perform the remainder of the contract." [1] Despite having tied up only minimal time and equipment before being kicked off the project, Woodard claims it is entitled to retain the entire $10,000 down payment as a reasonable measure of the profit it lost as a result of Plaintiffs' breach of the contract. The problem with this theory is that Plaintiff introduced nothing of substance to permit the Court to make a determination of what those profits would have been *in this case*.

As held in *VanVelsor*, the proper approach to such a determination ought to

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[1] In a construction dispute involving a far more expansive project, but which also featured owner termination and the issue of the proper measure of damages, the Supreme Court elaborated on *VanVelsor* as follows:

> The correct measure of the recovery which McGee pursued at trial, as stated in Restatement (Second) of Contracts § 347 (1981), is
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.
>
> As applied to this case, the damages would be calculated by subtracting from the contract price, § 347(a), McGee's cost of completion and other costs avoided, § 347(c). To this recovery would be added the damages McGee incurred as a result of the delay, § 347(b). See *VanVelsor v. Dzewaltowski*, 136 Vt. 103, 105, 385 A.2d 1102, 1104 (1978) ("Where the owner breaches the contract by demanding that the work shall stop, the contractor is entitled to recover the contract price less his cost to perform the remainder of the contract."); 5 A. Corbin, Corbin on contracts 558 § 1094 (1964); 11 S. Williston, A Treatise on the Law of Contracts § 1363 (W. Jaeger 3d ed. 1968).

McGee Const. Co. v. Neshobe Development, Inc. 156 Vt. 550, 557-560 (1991).

have been the presentation of a reasonable estimate of the actual costs Woodard would have been required to expend to complete this particular pond installation. To be sure, the law does not expect that such proofs be "to the precise penny". *Tour Costa Rica v. Country Walkers, Inc*., 171 Vt. 116, 126-127, (2000), quoting *A. Brown, Inc. v. Vermont Justin Corp.*, 148 Vt. 192, 196 (1987). Nonetheless, some evidence of the costs avoided was essential to Woodard's case for lost profits. See, *McGee* at 558.[2]

Rather than providing evidence approximating the costs it saved by not having to build Plaintiff's pond, Woodard argues that its lost profits can be demonstrated by reference to a general profit margin of 35-40% that it expects to make on its pond projects. In support of this approach, Peter Woodard testified from hand-written reconstructions of rough costs associated with the completion of two other ponds. However, as he acknowledged during examination, each pond construction involves significantly different considerations; indeed, the other examples to which he referred differed markedly from Plaintiffs' project as regards size and the need for either a drilled well or a liner. The Court is unable to draw any reliable correlation

[2] "McGee failed to introduce the evidence necessary to calculate its cost of completion. It is undisputed that at the time of Neshobe's wrongful termination, McGee still had some of part 1, and all of part 2, of the Phase II contract left to complete. Yet McGee's showing on its cost of completion consisted solely of the number of days it would take to complete part 2 times its costs-per-day. It did not introduce evidence on how many days of work remained on part 1 as of the date of termination. The cost of completing the work that remained to be done on part 1 was a part of McGee's total cost of completion. Without any evidence on it, the jury did not have the evidence necessary to ascertain McGee's total cost of completion." *Id.* (footnote omitted).

between the expenses associated with different pond projects, and the likely expenses Woodard would have had to incur to complete its performance of Plaintiffs' contract. As with *McGee,* the failure to present sufficient evidence to allow a reliable estimate such costs is fatal to Woodard's justification for retaining the down payment. See also, *State v. May,* 166 Vt. 41, 44-45 (1996) (estimate of lost profits based on speculation and conjecture could not stand).

Woodard's reliance on *Tour Costa Rica's* discussion of "expectation damages" is unavailing. While this Court accepts the argument that assessing "expectation damages" would be the proper approach to damges in this case, none can be awarded because Woodard has not proved what they would have been. A comparison to the facts in *Tour Costa Rica* illustrates the shortcomings in Woodard's proofs. In that case, due to the breach of the opposing party, Plaintiff was awarded damages representing lost future profits for travel tours that it was prevented from conducting. It based its presentation of the costs it would have incurred to fulfill its obligations under the contract on a demonstration of the actual costs associated with two trips that it had conducted for the defendant, before the breach prevented it from realizing any profits on the twelve additional trips that were contemplated. The Supreme Court affirmed the damages award based on the reasonableness of this approximation, given the similar nature of the trips. As discussed above, however, the difference in pond projects makes unworkable here such an extrapolation to Woodard's likely expenses to complete Plaintiff's particular pond. Rather, Woodard urges an extrapolation based on profit margins associated with other work, measured as a percentage of the costs of those projects relative to their contract prices. Even assuming such an approach might arguably be justified under some circumstances - and Woodard has cited no case in which it has been so held - the generation of such a profit guideline from only two marginally

comparable projects is unsound as a matter of statistical methodology, and likely to produce entirely speculative results.

Given the lack of evidence to establish its lost profits, Woodard's claim here reduces to a plea that it should be entitled to retain the deposit as akin to liquidated damages. Yet, the contract did not afford that type of relief. Thus, in the absence of a demonstration of its lost profits, Woodard's only justification for retaining any portion of the $10,000 down payment lay with the cost of the liner it incurred in reliance on Plaintiff's acceptance of the pond proposal. Given the failure of its proof of expectation damages, Woodard was free to claim reliance damages in the alternative. See, *Tour Costa Rica*, 171 Vt. at 124. However, beyond the purchase of the liner, any other reliance damages, such as the cost of Woodard's time in going to Plaintiff's property on the day it was prepared to commence the project, suffer the same fate as Plaintiff's claim for expectation or profits; they are incapable of determination due to failure to produce any evidence of the reasonable costs associated with such activities. [3] Furthermore, despite its insistence on retaining the entire $10,000 down payment, Woodard has at no time tendered the pond liner to Plaintiff on an unconditional basis, or produced evidence that it has been safeguarded in the condition in which it was shipped subject to this Court's ruling. Thus, the Court concludes that Defendant, having retained control during the pendency of these proceedings of both the entire down payment as well as the pond liner, and having failed to establish its defense and counterclaim for lost profits, is not now in a position to claim an equitable offset against return of the down payment based on the cost of the pond liner.

In sum, despite its breach of the contract, Plaintiff is entitled to a full return of its down

payment, because Defendant has failed to establish its affirmative defense and counterclaim based on lost profits, and because Defendant has further failed to demonstrate any other reliance damages that would justify retention of all, or any, of the down payment on a job that it never performed and for which it had but a minimal investment - and one whose monetary value remains unproven. Having retained both the full down payment, as well as the pond liner ordered in reliance on the contract, Defendant is equitably estopped from belatedly seeking a restitution remedy as to said liner.

Plaintiff seeks prejudgment interest calculated at the statutory rate for interest on a judgment. See, *Newport Sand and Gravel Co. v. Miller Concrete Const., Inc.*,159 Vt. 66 (1992) (prejudgment interest awarded as matter of right when the principal sum recovered is liquidated or capable of ready ascertainment); V.R.C.P. 54(a), Reporter's Notes (except for an interest rate specified by contract, prejudgment interest recovered as of right is calculated at the statutory legal rate for judgments). The Court concludes that Plaintiff is entitled to such relief, with interest running from August 24, 2005

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

JUDGMENT FOR PLAINTIFF is **ENTERED** against Defendant Woodard Construction, Inc. in the amount of $10,000, together with costs and prejudgment interest calculated at 12% from August 24, 2005.

The complaint against Defendant Peter Woodard, individually, is **DISMISSED.**

JUDGMENT FOR COUNTERCLAIM-DEFENDANTS is **ENTERED** on Woodard's counterclaim.

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[3] Woodard's proposed findings and conclusions focus exclusively on its claim for lost profits.

DATED October , 2006, at Bennington, Vermont.

John P. Wesley
Presiding Judge