Polli Construction, Inc. v. Burns, No. 1022-06 Cncv (Katz, J., Jan. 10, 2008)

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STATE OF VERMONT SUPERIOR COURT

Chittenden County, ss.: Docket No. 1022-06 CnC

POLLI CONSTRUCTION, INC.

v.

JAMES J. BURNS

ENTRY

Plaintiff's Motion in Limine and Motion for Partial Summary Judgment

Defendant Burns accepted Plaintiff Polli's offer to perform construction on a "time and materials" basis, which Polli said would have the advantage over a flat-rate contract in that "all labor and materials get billed at cost without mark up (can save up to 20%)." (P.'s Ex. B.) The parties agreed on labor rates of $45 per hour for carpentry and $35 for painting. Polli now sues to collect for work performed under the contract. Polli moves to exclude as irrelevant expert Rabideau's evidence on the reasonable value of Polli's work, and seeks partial summary judgment that Polli is entitled to recover

at the contract rates. Defendant Burns argues that (a) it is admissible to show that Polli breached the contract by charging more than the actual labor costs and (b) it is relevant to his own counterclaims, which include fraud and negligence. The parties agree that there remains a factual dispute about whether all of the billed hours were actually worked.

Burns does not deny agreeing to the $45/$35 labor rates. (Answer ¶ 3; Burns' October 29, 2007 Aff. ¶ 6.) Any interpretation of Polli's reference to "billed at cost without markup" suggesting that Polli was offering to take nothing for overhead or profit is patently unreasonable. Polli could perform such a contract only at a loss. There is thus no ambiguity as to the agreed-on rate as ambiguity requires the alternative interpretations to both be reasonable. See Main Street Landing, LLC v. Lake Street Ass'n, Inc., 2006 VT 13, ¶ 7, 179 Vt. 583. Nothing in Burns' acceptance so much as implies that he expected Polli to take a loss, and Burns' unexpressed intentions are irrelevant. See Quenneville v. Buttolph, 2003 VT 82, ¶ 15, 175 Vt. 444. Rather, "at cost" as used in the construction industry includes an allowance for overhead and profit. See, e.g., 48 C.F.R § 16.601(c)(2) (hourly rate for time and materials contracts with the federal government to include overhead and profit). Polli's reference to a "markup" surely refers not to an amount charged to Burns over the workers' hourly wage to pay for Polli's overhead and profit, but to a price increase designed to protect a builder in a fixed-price contract against unforeseen costs. In any case, the very specific labor rates agreed to by the parties would control over a preliminary, more general description of the rate. See State v. Spitsyn, 174 Vt. 545, 547 (2002) (specific governs over the general). Agreeing on a $45/$35 labor rate does not by itself bind Polli to pay his workers that amount.

Polli's unambiguous obligation was to charge, and Burns' obligation

was to pay, the $45/$35 rates. Recovery for any as-yet uncompensated work performed under the contract must be based on the contractual rates. See Cass-Warner Corp. v. Brickman, 126 Vt. 329, 335-37 (1967); Lamb Engineering and Construction v. Nebraska Public Power District, 103 F.3d 1422, 1430-31 (8th Cir. 1997). Evidence of the reasonable value of the work performed is inadmissible to establish that under the contract Burns should not have to pay the $45/$35 rates, and such argument will not be permitted. It would tend to push the jury in the direction of rewriting the contract into one "more fair." The jury, if any, will be instructed accordingly.

It does not necessarily follow, however, that all testimony by Burns' expert, even on the reasonable value of Polli's work, will be inadmissible for all purposes. Polli does not address how the expert's testimony on his management and building practices is irrelevant to Burns' counterclaims of fraud, negligence, breach of the covenant of good faith and fair dealing, etc. Mr. Rabideau's reflections on Polli's conduct of the job here may very well be pertinent. Whether these counterclaims will ultimately defeat Polli's contractual right to recover for work performed obviously remains to be seen.

Plaintiff's motion is GRANTED IN PART, DENIED IN PART.

Done at Burlington, Vermont, _____, 2008.

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M. I. Katz, Judge