

Naylor v. Cusson, No. S0142-05 CnCv (Katz, J., July 16, 2008)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

STATE OF VERMONT  
Chittenden County, ss.:

SUPERIOR COURT  
Docket No. S0142-05 CnCv

NAYLOR

v.

CUSSON

#### ENTRY

Plaintiff Naylor brought this action against Defendants Cusson and Ducharme to recover payment for construction work Naylor performed for them on their house. Prior to filing suit, Plaintiff obtained a writ of attachment on his contractor's lien in the amount of \$20,000 and recorded it against Defendants' property. Plaintiff was subsequently awarded judgment by this court in the amount of \$25,000, plus interest, pursuant to the Vermont Contractor's Lien Law, 9 V.S.A. § 1921 *et seq.*, in addition to \$2,210 in consequential damages. Plaintiff was also awarded his attorney fees and costs in the amount of \$15,373.92, pursuant to the Vermont Prompt Payment Act, 9 V.S.A. § 4005(d), along with a prejudgment penalty of one percent per month. Defendants appealed this judgment to the Vermont Supreme Court and subsequently filed for Chapter 7 bankruptcy. The Supreme Court affirmed the judgment and remanded the issue of attorney fees and costs.

Plaintiff was granted relief from the automatic stay by the bankruptcy court, allowing him to pursue the "non-bankruptcy law remedies and

enforcement” against Defendants’ property. Plaintiff thereafter filed a motion seeking to enforce the earlier fee award, along with a request for additional fees incurred in the appeal and the bankruptcy action. Defendants were discharged in bankruptcy in August of 2006, but filed a motion to reopen their cases to determine the secured status of Plaintiff’s contractor’s lien, which was granted in January of this year. Defendants’ re-opened bankruptcy case is currently pending.

Plaintiff argues that he is entitled to essentially all legal fees he has incurred in his attempt to collect payment for the work performed on Defendants’ house pursuant to the Vermont Prompt Payment Act. 9 V.S.A. § 4005(d). In relevant part, the act provides that “[i]f an owner, contractor or subcontractor unreasonably withholds acceptance of the work or fails to pay retainage as required by this section, the owner, contractor or subcontractor shall be subject to the interest, penalty and attorneys' fees' provisions of sections 4002, 4003 and 4007 of this title.” Section 4007, in turn, provides that “the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter shall be awarded reasonable attorneys' fees in an amount to be determined by the court or arbitrator, together with expenses.” According to Plaintiff, the analysis ends there.

A bankruptcy filing changes things, however, due to the breadth and scope of the bankruptcy court’s power to discharge debts. Upon receiving a discharge in bankruptcy, a debtor is relieved of “all debts that arose before the date of the order for relief under [Chapter 7].” 11 U.S.C. § 727(b). The bankruptcy code defines “debt” as “liability on a claim.” 11 U.S.C. § 101(12). A “claim,” in turn, is a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” *Id.* § 101(5)(A). The definition is broad, so that “all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy.” *In re Jensen*, 995 F.2d at 929.

At least one court has held that a statutory award of attorney fees, based on a mechanic’s lien statute similar to Vermont’s, is not discharged in bankruptcy, but survives as an *in rem* “charge against the property.” *Duckett v. Olsen*, 699 P.2d 734, 737 (Utah 1985) (citing Utah Code Ann. § 38-1-18). Here, Plaintiff’s contractor’s lien against Defendants’ property is secured in the amount of \$20,000, and no more. This amount is not sufficient to satisfy

the \$25,000 award on the contract, much less the over \$53,000 in attorney fees Plaintiff seeks.

A bankruptcy discharge extinguishes a creditor's means of pursuing an action against a debtor in personam, and leaves only the option of pursuing an action in rem. Stoddard v. Locke, 43 Vt. 574, (1871); Johnson v. Home State Bank, 501 U.S. 78, 84 (1991). Here, while Plaintiff would likely have been entitled to seek his fees absent the bankruptcy filing, Defendants' Chapter 7 discharge extinguished his right to do so, over and above the amount secured by the \$20,000 lien. There is no evidence that Plaintiff has obtained any additional lien against Defendants' property to secure his claim to the \$53,000 in attorney fees. Therefore, the claim was discharged and Defendants are entitled to their economic "fresh start," as contemplated by the Bankruptcy Code. In re Hyman, 502 F.3d 61, 66 (2nd Cir. 2007); Johnson, 501 U.S. at 84.

Plaintiff's motion for attorney fees and costs is therefore DENIED.

Dated at Burlington, Vermont, this \_\_\_\_ day of May, 2008.

---

M. I. Katz, Judge