

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-154

DECEMBER TERM, 2007

Timic Corporation and	}	APPEALED FROM:
McLean Enterprises Corporation	}	
	}	
v.	}	Windsor Superior Court
	}	
	}	
Arleen J. Boyle and William J. Boyle	}	DOCKET NO. 65-1-06 Wrcv

Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Defendants in this construction-contract dispute appeal pro se from a superior court order awarding attorney's fees and costs and prejudgment interest to the plaintiff contractor. We reverse and remand.

Defendants Arleen and William Boyle purchased a lot in a housing development owned by plaintiff McLean Enterprises Corporation, and subsequently entered into a contract for the construction of a home with the contractor retained by McLean, plaintiff Timic Corporation and its owner John Gelineau (contractor). Various requests by the Boyles for more expensive materials and the addition of certain features, including a garage, altered the purchase price several times, which ultimately exceeded \$300,000. During a walk through in May 2004, defendants identified certain features with which they were dissatisfied. At the closing the following month, defendants withheld \$15,000, due for the garage, from the final payment. Defendants later identified a number of additional alleged defects in the construction, including a crack in the concrete floor of the garage.

Contractor eventually filed this action, alleging breach of contract and several additional claims. Defendants answered and asserted a number of counterclaims, including breach of contract and defective workmanship. Following a bench trial, the court issued a written decision in January 2007. The court rejected all of the claims except those centered around the parties' respective claims for breach of contract and defendants' claim of defective workmanship. In this regard, the court found that \$15,000 was due and owing to contractor for the construction of the garage. Indeed, the court noted that defendants did not dispute this amount, but rather claimed that they were entitled to an offset for breach of contract and defective workmanship in a number of areas which, after deducting the \$15,000, entitled them to damages of approximately \$20,000. The court reviewed in detail each of the alleged offset items, finding that most were not supported by the evidence. The court found, however, that defendants were entitled to offset \$1000 for the removal of stumps which contractor had failed to remove as required by the

contract, \$4500 to rectify certain defects in the chimney, and \$800 for various “repair items” for a total offset of \$6300. In addition, the court found that defendants had not “receiv[ed] the garage [floor] they bargained for,” which was four inches thick rather than six inches as specified in the contract. Accordingly, the court ordered contractor to either replace the floor at its own expense within four months of the judgment or reimburse defendants for the work in the amount of \$6570. Despite awarding these offsets, the court found that defendants had not withheld the \$15,000 garage payment in “good faith” under 9 V.S.A. § 4007(a).<sup>1</sup>

In its final order the court thus awarded contractor \$15,000 for breach of contract and defendants a total of \$6300 for breach of contract and defective workmanship, together with an additional \$6570 if the contractor elected not to replace the garage floor. The total net judgment in favor of contractor, therefore, was either \$8700 or \$2130 depending upon contractor’s decision concerning the garage floor. In addition, the court awarded contractor attorney’s fees and costs under 9 V.S.A. § 4007(c),<sup>2</sup> plus prejudgment interest.

Thereafter, in response to contractor’s motion for costs and fees and defendants’ motion to alter or amend the judgment, the court issued a written order in March 2007, denying defendants’ motion to alter or amend, and awarding contractor costs of \$345, attorney’s fees of \$7787.50, and prejudgment interest of \$2628.34 on the net judgment of \$8700. The court further ordered defendants to notify contractor no later than March 30, 2007, whether they wanted contractor to replace the garage floor in accordance with the method set forth in the original order or whether they wished to perform the work themselves. A final judgment order incorporating these provisions issued on March 19, 2007. This appeal followed.

Defendants’ principal argument on appeal is that contractor cannot be “the substantially prevailing party” under § 4007(c) when its net recovery on a claim of \$15,000 was as little as \$2130. The argument is unfounded. Defendants are correct, to be sure, that our holding in Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, ¶ 14, 178 Vt. 77, makes clear that an award of attorney’s fees under § 4007 “does not flow automatically from the calculation of the net victor.” By the same token, however, nothing in our decision suggests that the decision flows from a simple comparison between the damages sought and the amount ultimately awarded. On the contrary, we emphasized that the issue does not turn on “simple mathematic[s]” and that the determination is ultimately one committed to the sound discretion of the trial court. Id. ¶¶ 11-12. Thus, the fact that in Crosbie the court declined to award attorney’s fees to a contractor whose \$15,000 award was offset by \$4000 for defective construction is not determinative of other cases, which must be resolved on their own particular facts and circumstances.

The difficulty we confront here is the absence of any clear findings by the trial court on the issue. Although the court cited § 4007(c) in its follow-up order awarding attorney’s fees and costs, it made no express finding that contractor was the “substantially prevailing” party and,

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<sup>1</sup> This section of the prompt payment act provides that “[n]othing in this chapter shall prevent an owner . . . from withholding payment in whole or in part under a construction contract in an amount equalling the value of any good faith claims against an invoicing contractor or subcontractor, including claims arising from unsatisfactory job progress, defective construction, disputed work or third-party claims.”

<sup>2</sup> This section provides: “Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover payment within the scope of this chapter shall be awarded reasonable attorney’s fees in an amount to be determined by the court or arbitrator, together with expenses.”

more significantly, articulated no clear basis for its decision. The court's sole statement in this regard was that it awarded attorney's fees to contractor "having concluded that [defendants] did not have a good faith basis for withholding payment." The court, however, made no effort to harmonize this finding with its conclusion that defendants were entitled to offset up to \$12,570 against the \$15,000 withheld payment based upon contractor's breach of contract and defective construction, nor did it establish the logical nexus between its finding that defendants lacked good faith and its conclusion that contractor was entitled to attorney's fees under § 4007(c).

Nor, finally, did the court provide a clear basis even to determine the precise amount of the respective awards to contractor and defendants for purposes of addressing the attorney's fee issue. Defendants claim that contractor failed to replace the garage slab as provided in the final judgment and that they therefore became entitled to offset the additional \$6570 allowed by the court to perform the work themselves. Contractor acknowledges that it did not perform the extra work on the garage, but asserts that defendants failed to state by March 30, 2007, whether they wanted contractor to replace the slab, as provided in the order, and that defendants therefore waived their right to be reimbursed. This issue obviously turns on facts outside the record and cannot be resolved by this Court at this time.

Accordingly, we are left uncertain as to the precise facts and reasons for the court's decision to award attorney's fees under 9 V.S.A. § 4007(c), and we therefore conclude that the matter must be remanded to the trial court for additional findings and conclusions on this issue. See EBWS, LLC v. Britly Corp., 2007 VT 37, ¶ 35 (remanding to trial court for findings and conclusion as to whether plaintiff was substantially prevailing party under § 4007(c)); Bonanno v. Bonanno, 148 Vt. 248, 251 (1987) ("On review, the trial court's findings will be deemed insufficient when we are left to speculate as to the basis of the trial court's decision.").

Defendants' remaining claim is that the trial court erred in awarding prejudgment interest on \$8700, representing the net recovery to contractor after a setoff of \$6300, rather than on \$2130, the net award after an additional setoff of \$6570 for the garage floor. As noted, the record is unclear as to the final net award to contractor. Accordingly, the court is directed on remand to make this determination and award prejudgment interest accordingly.

Reversed and remanded for further proceedings consistent with the views expressed herein.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice