

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-476

JUNE TERM, 2003

	}	APPEALED FROM:
	}	
New England Partnership, Inc.	}	Washington Superior Court
	}	
v.	}	DOCKET NO. 35-1-95 WnCv
	}	
Rutland City School District	}	Trial Judge: Mary Miles Teachout
	}	
	}	

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

This case presents the second appeal in a contract dispute between New England Partnership, Inc. (NEPI), an architectural firm, and the Rutland City School District. See New England Partnership, Inc. v. Rutland City School District, 173 Vt. 69 (2001). Both parties challenge the court's factual findings on the amount of contingent compensation due NEPI, if any, under the contract, as well as its decision on NEPI's claim for attorney's fees and prejudgment interest. We affirm the order on the contingent compensation and attorney's fees due NEPI, vacate the decision denying prejudgment interest on the contingent compensation award, and reverse the court's denial of prejudgment interest on the basic services fee award, and remand the case back to the trial court.

The District hired NEPI to provide architectural services in connection with a plan to construct a new high school and to remodel other District buildings. After construction was delayed for reasons explained in our opinion in the first appeal, see id. at 71-72, the parties entered into an addendum agreement. The addendum agreement allowed NEPI additional compensation over the base price in the contract under certain conditions. Paragraph six of the addendum sets forth the relevant contract provision:

Owner agrees to pay Architect additional contingent compensation over that already set out above. The contingent compensation will be 50% of the amount, if any, by which the high school GMP¹, as adjusted through completion of bidding, is lower than the October 13, 1992 estimate, attached hereto, up to a maximum contingent compensation of \$50,000.00. For example, if the adjusted GMP is \$50,000.00 lower than the October 13, 1992 estimate, Architect will receive \$25,000.00, if the adjusted GMP is \$101,000.00 or more lower than the October 13, 1992 estimate, Architect will receive only \$50,000.00. The calculation of the contingent compensation will be made at the completion of bidding and payment shall be made out of initial bond proceeds.

id. at 72-73 (emphasis added). This provision was intended to give NEPI a bonus if constructing the high school cost less than the cost of construction provided in the 1992 estimate. For a variety of reasons, certain components of the high school project were modified after the parties entered into the addendum agreement. After bidding on the project was complete, NEPI submitted a bill to the District to collect the contingent compensation it believed was due under the addendum. The District refused to pay the bill, and the present lawsuit ensued.

The parties disagree about the figures to use for the "high school GMP," as adjusted. The trial court found it reasonable to interpret the agreement to mean that if the building that NEPI designed as of October 1992 could be constructed for less money than estimated at that time, the architectural firm would receive a bonus. Thus, to make a valid comparison,

the court decided that certain adjustments were required to the " high school GMP" because the final bid for the project reflected post-addendum changes, some of them in the project' s scope. The court found that to obtain the correct " high school GMP" it had to add back to the final bid certain items eliminated from the projects, but not others. The partes disputed the items to be added back.

The court divided the so-called add-back items the parties disputed into four categories, and concluded that the costs of only the first two categories should be added back into the " high school GMP" to make the comparison valid. The trial court did not identify with any specificity, however, what items it included in those categories. As a result, we remanded the matter back to the trial court for it to " enter findings identifying the specific items, and their prices, which composed the four add-back categories, and to provide the reasoning supporting making such add-backs to the ' high school GMP.' " Id. at 75.

The court issued additional findings of fact on the contingent compensation issue after our remand. The court found that paragraph six was ambiguous because it did not clearly identify the two figures requiring comparison and how those figures should be derived to determine whether any additional compensation was due NEPI. The court discussed the four categories of items again, and set forth a list of items in categories one and two, combined together, that it concluded must be added back into the " high school GMP." The court did not enumerate the items it declined to add back or divide them into the remaining two categories. Ultimately, it decided that the District owed NEPI \$22,154 in contingent compensation.²

Both parties take exception to the court' s decision on paragraph six. NEPI contends that the addendum is unambiguous, and that it is entitled to \$50,000 because the savings on the new high school were greater than the court found. NEPI claims the court erred by adding back the items it did because those items properly belong to category three, which the court excluded from the add back. The District cross appeals, claiming that the court correctly found paragraph six ambiguous, but that it did not assign certain add-back items to the proper category, and thus the court erroneously excluded those items in its final analysis. The District also claims that we should reject NEPI' s argument because it did not provide sufficient record citations to support its claim.

We first address NEPI' s claim that the contract is not ambiguous as the trial court found. We review this issue de novo because contract ambiguity is a question of law. Isbrandtsen v. N. Branch Corp., 150 Vt. 575, 577 (1988); see also Thompson v. Dewey' s S. Royalton, Inc., 169 Vt. 274, 276 (1999) (Supreme Court' s review of trial court' s legal conclusions is nondeferential and plenary). A contract provision is ambiguous if its language can support a " different interpretation from that which appears when it is read in the light of surrounding circumstances, and both interpretations are reasonable." Isbrandtsen, 150 Vt. at 579. The trial court in this case found ambiguity in paragraph six because its language could support more than one reasonable interpretation in light of the circumstances surrounding the paragraph' s creation. The problem is created by the use of the undefined term " adjusted." The phrase " high school GMP, as adjusted through the completion of bidding" could mean what NEPI asserts, namely, that the " high school GMP" may be adjusted for bid savings only (i.e., savings resulting from a lower bid than originally estimated). The phrase could also mean, as the District contends, that the high school GMP must be adjusted for both bid savings and changes to the design so that a valid comparison can be made. Because we agree with the trial court that both interpretations are reasonable, we find no error in its conclusion that the contract term was ambiguous.

We now address, and reject, the parties' competing claims on what items should or should not have been added back to the " high school GMP" to calculate the number that must be compared to the " October 1992 estimate" according to paragraph six. The items about which the parties disagree appear on at least one of three exhibits entered into evidence. Each of the three exhibits represent certain design and construction components either added to or eliminated from the final high school project. The exhibits themselves are not self-explanatory, and supporting testimony is therefore necessary to understand them. Unfortunately, neither party provided the Court with the transcript citations we need to ascertain whether the trial court committed clear error in assigning a particular item to a particular category as both sides allege. The party claiming error on appeal must demonstrate how the lower court erred and why reversal is the correct remedy. In re S.B.L., 150 Vt. 294, 297 (1988). A party' s failure to provide the Court with adequate citations to the record to demonstrate the claimed error below risks having that party' s claim denied on appeal because we do not search the record for errors not adequately referenced in the brief. Id.; Quazzo v. Quazzo, 136 Vt. 107, 111 (1978).

That rule has particular applicability to the claims here because, as the trial court explained, the evidence, which was both documentary and testimonial, on what should be added back or not was conflicting. Where evidence is conflicting, we leave it to the fact finder to assess its weight and credibility. Kasnowski v. Dep't of Employ. Sec., 137 Vt. 380, 381 (1979) (credibility of witnesses and weight to accord evidence is matter for trier of fact). So long as evidence supports the court's findings, they will stand on appeal. Id. There is no dispute that the items on the list the trial court prepared on remand were in the evidentiary record. Thus, in the absence of transcript citations demonstrating error in the court's findings, we find no reason to disturb them. Consequently, we affirm the court's decision awarding NEPI \$22,145 in contingent compensation.

We next address the parties' claims on attorney's fees due NEPI. As part of the original order the trial court found that the contract granted NEPI attorney's fees equal to one-third of any judgment arising from the lawsuit. We affirmed the trial court's ruling on attorney's fees in the first appeal. See New England P' ship, 173 Vt. at 80. On remand, the trial court adjusted the judgment to reflect, in part, our decision to reverse the trial court's ruling that the District did not owe NEPI an additional \$28,000 for basic services under the contract. Thus, to conform to the parties' agreement, the court calculated one-third of the adjusted judgment to determine the correct amount of attorney's fees on remand. On appeal, NEPI claims, without any supporting authority in the record, that it is entitled to forty-two percent, rather than one-third, of any judgment. The District counters that the court erred by increasing the award on remand because NEPI failed to produce evidence to support the fees. We conclude that neither party has demonstrated clear error in the trial court's finding that the contract allows NEPI to collect one-third of the judgment as attorney's fees. Indeed, we affirmed the award made on that basis in the first appeal. Id. In light of that fact, the court correctly adjusted the fee award to reflect the adjusted judgment, which increased by \$28,000 due to the basic services fee issue. We therefore find no error.

The remaining two claims NEPI advances pertain to the court's denial of prejudgment interest on the \$28,000 basic services fee issue we reversed in the prior appeal and the contingent compensation we affirm in this order. NEPI claims it is entitled to interest on both amounts at the rate of 12% per annum. Originally, the court awarded NEPI prejudgment interest on the contingent compensation amount, and fixed the rate at 6% per annum rather than the statutory rate of 12%. We reversed the court on the interest rate it used because it was contrary to statute. See id. at 78. On remand, the trial court revisited the issue of prejudgment interest and denied NEPI interest altogether.

We once again reverse the court's prejudgment interest decision on the contingent compensation. Our earlier decision addressed the issue NEPI presented to us only, which was whether the court abused its discretion awarding interest at a rate lower than the Legislature provided. See id. There was no contest in the first appeal about whether the court erred in the first instance by awarding interest, and therefore our remand pertained to the rate of interest only. The court was not authorized to revisit the interest issue in its entirety, and we must therefore vacate its decision to deny interest on remand because the matter was not properly before the court. See Coty v. Ramsey Assocs., Inc., 154 Vt. 168, 171-72 (1990) (on remand, lower court must limit its to actions to directions in Supreme Court's mandate and may not revisit decided issues unless mandate so directs).

For a different reason we reverse the issue of prejudgment interest on the fee for basic services. Prejudgment interest is available as of right when damages are liquidated or reasonably ascertainable. Estate of Fleming v. Nicholson, 168 Vt. 495, 501 (1998). The purpose is "to fully and accurately compensate the plaintiff where the plaintiff has been deprived of a definite sum of money for a definite period of time." Id. at 501 n.2. If damages do not meet that standard, the court has discretion to award prejudgment interest. Id. at 501. The trial court found that the dispute over the \$28,000 in basic services resulted from an ambiguous contract provision, and because NEPI drafted the contract, it created the ambiguity that led to the present litigation. It found that NEPI did not have a clear right to the \$28,000, and decided that a discretionary award of interest was not warranted. We disagree that NEPI had no clear right to the fee for basic services, and hence prejudgment interest on that amount. In the prior appeal, we found the trial court's decision denying NEPI the \$28,000 was not reasonably supported by the court's findings. New England P' ship, 173 Vt. at 78. Although we agreed with the court that the contract provision was ambiguous, we found that once the ambiguity was resolved, NEPI's entitlement to the \$28,000 clearly flowed from the credible evidence of record and the absence of any contrary evidence. Id. Under the circumstances, the \$28,000 was a liquidated and "reasonably ascertainable" amount. Indeed, the parties never disagreed as to the amount in dispute, but simply whether the District still owed NEPI that amount. Because the amount was reasonably ascertainable, the court was required to award NEPI prejudgment interest on the \$28,000 award.

The trial court's order is affirmed in all respects, except we vacate the court's denial of prejudgment interest on the contingent compensation award, reverse its denial of prejudgment interest on the basic services fee award, and we remand the matter to the trial for further proceedings consistent with this entry order.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned

Footnotes

1. The "GMP" is the guaranteed maximum price for the high school project.
2. The court calculated that amount as follows. The figure representing the "October 1992 estimate," was \$9,001,500. The court calculated the "high school GMP" as \$8,957,193, as adjusted to make a valid comparison. The difference of those two figures is \$44,307. Under paragraph six, NEPI is entitled to half of that amount.