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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-265

FEBRUARY TERM, 2009

Timic Corporation and McLean Enterprises Corporation	}	APPEALED FROM:
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 Arleen and William Boyle appeal pro se from the trial court's order, following a remand, that awarded attorney's fees to plaintiff-contractor under 9 V.S.A. § 4007(c). They argue that the court erred in finding: (1) that contractor was the "substantially prevailing party" and that the Boyles did not act in good faith in withholding payment; and (2) that they waived the right to have contractor repair their garage floor or offset the cost of this repair from the amount owed to contractor. We affirm.

Many of the underlying facts are set forth in our first decision. See Timic Corp. v. Boyle, No. 2007-154 (Vt. Dec. 19, 2007) (unreported mem.). Briefly restated, the Boyles entered into a contract for the construction of a home. The Boyles were dissatisfied with some of the contractor's work and withheld $15,000 due for the garage from the final payment. Contractor later filed suit, and the trial court found that the Boyles owed contractor $15,000 for the construction of the garage, offset by $6300 owed to the Boyles for non-garage related problems. The court also found that the Boyles had not received the garage floor that they bargained for as it was four inches thick rather than six inches as specified in the contract. The court ordered contractor to either replace the floor at its own expense within four months of the judgment or reimburse defendants $6570 for the work. Notwithstanding these offsets, the trial court found that the Boyles had not withheld the $15,000 owed the contractor in good faith under 9 V.S.A. § 4007(a), and it awarded attorney's fees and costs to the contractor under 9 V.S.A. § 4007(c). On appeal, the Boyles argued in part that the contractor could not be the "substantially prevailing party" because its net recovery on a claim of $15,000 was as little as $2130. We rejected this argument, but nonetheless reversed and remanded the case to the trial court. We held that the trial court failed to make an express finding that contractor was the substantially prevailing party and that it articulated no clear basis for its decision to award attorney's fees to contractor.

Following a hearing on remand, the trial court issued a written order providing an additional explanation for its attorney's fee award. The trial court first cited findings from its prior order as support for its conclusion that contractor was the substantially prevailing party. It explained that in May 2004, when the parties were doing a walk-through of the property, the Boyles identified certain problems, but that these problems did not include the garage floor. They similarly did not mention any problems with the garage several months later when the work was completed and the crew had left the job site. In July 2004, contractor sent a bill to the Boyles for $15,057 ($15,000 due for the garage and a $57 late fee). The Boyles paid only the late fee. Contractor sent another bill for $15,755 on December 19, 2004, reflecting extras that had been requested by the Boyles and provided by contractor. The Boyles paid $755 of that bill. That winter, a hairline crack was discovered in the garage floor. Contractor contacted the concrete contractor and asked him to contact the Boyles about addressing this issue. In the summer of 2005, contractor and the concrete contractor discussed with the Boyles a plan to install a new floor, not because the existing slab was defective or of poor quality workmanship, but for the sole purpose of getting paid. The Boyles' expert inspected the property in June 2005, and he did not observe any structural deficiencies in the concrete slab. The expert also noted that cracks were inherent in all concrete slabs. The court found that the Boyles had failed to prove that the crack was the result of defective workmanship.

Based on these findings, the court concluded that the Boyles did not have a good faith basis to withhold the garage payment after receiving the invoice. It reiterated that at the time the invoice was sent in July 2004, the Boyles made no complaint about the garage floor, nor did they observe a crack in the floor until the first winter. After waiting for a year for payment, contractor offered to replace the floor so that he would be paid. The court stated that the only reason it had previously made a provision for the replacement of the floor was because of contractor's offer, not because of any defective workmanship. The court also concluded that the Boyles' other unrelated claims of defective workmanship, cited by the Boyles as grounds for withholding the garage payment, were unfounded. These claims amounted to approximately $17,402. In light of all these considerations, the court found that contractor was the substantially prevailing party and that he was entitled to attorney's fees. The court also concluded, based on additional evidence provided, that the Boyles had waived their right to have contractor replace the garage floor or to claim an additional offset for fixing the garage floor themselves. The Boyles appealed from this order.

The Boyles first argue that the court erred in awarding attorney's fees to contractor. They maintain that they acted in good faith by withholding the $15,000 payment. They cite the court's findings that the slab should have been six inches thick rather than four, and its statement that contractor's offer to fix the floor "tends to acknowledge" that the Boyles did not receive the garage that they bargained for. According to the Boyles, the trial court made no effort to reconcile such contrary findings with those it selectively chose to support its decision. The Boyles also assert that the court erred in concluding that the money they withheld applied only to the garage. They acknowledge that different proposals and agreements existed for different parts of the project, but they nonetheless maintain that all of contractor's work was part of "one big project," and that the funds were withheld for "the entire job," not just the garage.

Pursuant to 9 V.S.A. § 4007(a), an owner may withhold "payment in whole or in part under a construction contracting an amount equalling [sic.] the value of any good faith claims

against an invoicing contractor . . . including claims arising from unsatisfactory job progress, defective construction, disputed work or third-party claims." In this case, as recounted above, the trial court concluded that the Boyles had no good faith grounds to withhold the $15,000 due for the garage. The court found that the work was not defective. While the concrete slab was not as thick as agreed-upon, this fact was not known at the time that payment was withheld. As the court pointed out, the Boyles did not express any dissatisfaction with the garage during the walk through, at the time the work crew left, or at the time of the invoice. The court also referred to its earlier rejection of the Boyles' assertion that other claims of defective workmanship, unrelated to the garage, justified their behavior. In light of these considerations, the trial court acted reasonably in finding that the Boyles improperly withheld payment for the garage from contractor.

We similarly reject the Boyles' claim that the court erred in finding that contractor was the "substantially prevailing party" and thus entitled to attorney's fees under 9 V.S.A. § 4007(c). As the Boyles recognize, the trial court has discretion in determining whether any party to a lawsuit substantially prevailed. Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, ¶ 12, 178 Vt. 77. In this case, the Boyles sought damages based on numerous claims of defective workmanship, most of which were unfounded. They withheld payment for the garage notwithstanding the fact that they voiced no complaint about the work at the time of the invoice. On the other hand, contractor had prevailed on his claim for $15,000 for the garage, offset by certain funds owed the Boyles. The trial court identified the basis for its decision, and given its findings, we cannot say that the court abused its discretion in determining that contractor was the substantially prevailing party.

The Boyles next argue that the trial court erred in finding that they waived their right to have contractor repair the garage floor or to offset the amount owed contractor by doing the work themselves. They point to the court's January 26, 2007 judgment order that directed contractor to "either replace the slab within the next four months . . . or let [the Boyles] undertake the work thereby reducing the judgment by $6570." They argue that the burden was on contractor to decide what to do, a point they assert was reiterated by the trial court in a March 2007 order. According to the Boyles, the trial court's entry order, which placed the burden on them to inform the contractor of their choice by a date certain, was inconsistent with prior orders and in direct contradiction to a judgment order issued by the court on the same date. The Boyles contend that they reasonably believed that they should abide by the judgment order rather than the court's entry order. They thus maintain that they did not waive their rights as the trial court found.

We reject these arguments. "A waiver is a voluntary relinquishment of a known right." Waterbury Feed Co. v. O'Neil, 2006 VT 126, ¶ 9, 181 Vt. 535 (mem.) (citation omitted). It is true, as the Boyles assert, that the court initially placed the burden on contractor to decide whether to install a new garage floor. Nonetheless, the court made clear in its March 2007 entry order that the Boyles must inform contractor in writing by a date certain if they wanted contractor to install the new floor or instead take the offset. This provision was specifically included in response to a filing by the Boyles. The Boyles objected to the method of fixing the garage floor described in the proposed judgment order, indicating that they wanted to consult with their engineer and then work with contractor toward reaching an agreement on this issue. The court rejected this approach, and instead issued the order above, which was designed to end the controversy that had arisen over how the garage floor would be replaced. While the Boyles

argue that they reasonably relied upon the court's judgment order rather than its entry order, the trial court concluded otherwise. It rejected the Boyles' assertions that they did not understand the difference between the court's judgment order and its entry order, as well as their assertion that they did not understand that they needed to notify contractor in writing regarding their position. The trial court found that the Boyles had taken various positions on the matter since issuance of the court's orders, positions that could not be reconciled. It is the role of the trial court, not this Court, to evaluate the credibility of witnesses and weigh the evidence. Cabot v. Cabot, 166 Vt. 485, 497 (1997). We agree with the trial court that the language in the March 2007 entry order clearly and unambiguously stated that it was incumbent upon the Boyles to make a choice and notify contractor of their decision by a certain date. They failed to do so and they therefore waived their right to have contractor replace the garage floor or claim the additional offset.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice