STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
Docket No. S1571-99CnC

ENGLEBERTH CONSTRUCTION, INC.)
)
v.)
)
HOME TWO, INC.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for final hearing on the Plaintiff's contract claim on September 17, 2001. Plaintiff was represented by Michael Marks, Esquire. Defendant was represented by Thomas F. Heilmann, Esquire.

FINDINGS OF FACT

Plaintiff is a Vermont corporation engaged in the construction business. Plaintiff often serves as a general contractor in construction projects. In this case, Plaintiff was a sub-contractor to the Defendant. Defendant is a Vermont corporation engaged in the construction business.

Defendant Home Two, Inc. (hereinafter Home Two) was the general contractor on a project to construct Beacon Row Town Houses in June of 1998. On June 9th, 1998, Home Two provided specifications to Plaintiff, Engleberth Construction, Inc. (hereinafter Engleberth) for framing work in connection with one of the units. On June 16th, 1998, Engleberth sent Home Two a letter containing a fixed price proposal for completing the work according to the specifications at a fixed price of $31,750.00.

On June 19th, 1998, Jack Wallace, president of Home Two, talked to Paul Urie of Engleberth by telephone. Mr. Wallace explained that the contract was not accepted by Home Two because it was too high. They discussed changes that might bring the price within the construction budget for the project. On June 22, 1998, Paul Urie on behalf of Engleberth sent a new letter to Home Two entitled "Beacon Row Town Houses - Framing Labor." The content of the letter is as follows:

> As a follow up to our telephone conversation on Friday, June 19th, Engleberth Construction, Inc. is pleased to provide you with the following labor and material rates:

Foreman:	$25/Hour
Carpenter:	$23/Hour
Laborer:	$17/Hour

5% of the labor cost charges as Fee to cover small tools supplied by Engleberth Construction, Inc.

15% Fee for miscellaneous materials.

A dumpster is to be provided by others.

Engleberth Construction, Inc. will commit to providing 5 to 6 men to frame one town house Building for a maximum of five (5) weeks. The mix of people will be one foreman, three to four carpenters, and laborers as needed for cleanup.

All work is to be invoiced every two (2) weeks.

Please let me know your intent as soon as possible to allow time to have a crew ready for Monday, June 29th, 1998.

Give me a call if you have any questions.

Sincerely,
Paul Urie,
Project Manager

Using the figures and estimates in the letter, Mr. Wallace calculated the labor costs under this proposal at approximately $28,140.00. He talked again with Mr. Urie on the telephone and explained that his budget for this work was $25,000.00. They both agreed that it was likely that the labor costs would come in under the $25,000.00 budgeted amount. Mr. Urie and Mr. Wallace never specifically agreed on whether there was a ceiling or "not to exceed" price governing their contract.

Work started on the week of July 6th. Engleberth sent Home Two invoices every two weeks. As the work progressed, Home Two asked Engleberth to undertake extra work above and beyond the job specifications, and Engleberth agreed and provided the extra work.

The invoices sent by Engleberth did not specify what work was done on a daily basis, and did not break out time spent on the original contract specifications as opposed to the extra work. Home Two did not keep track of hours spent or work performed on the original contract as opposed to the extra work. The invoices sent by Engleberth provided summaries of the hours spent per week and the type of worker provided, multiplied by the hourly rate.

Invoice #1 was dated July 21st, 1998 in the amount of $5,396.00. It was paid by Home Two on August 24th, 1998.

Invoice #2, dated August 10th, 1998 in the amount of $8,829.90 was paid by Home Two on September 23rd, 1998.

Invoice #3, dated August 27th in the amount of $8, 224.13 reflected work through August 10th. It was later paid on October 21st, 1998.

By mid-August, Engleberth had completed the original contract and was working on extras. In early September, Mr. Wallace had a telephone conversation with Mr. Urie about the fact the contract would be ending soon and the need to keep track of extras.

On September 21, 1998, the Engleberth crew had completed all of its work, including both the original contract work and the extra work, and left the job site.

Paul Urie testified on behalf of Engleberth that after the June 16th proposal for a fixed price contract was rejected, he prepared the second offer contained in the June 19th letter which eliminated a project supervisor and placed upon Home Two the responsibility of supervising the laborers, and was a contract to provide labor services only on an hourly basis under the direction of Home Two and with no ceiling. His position on behalf of Engelberth was that all work, including the extras, were to be billed at the contract hourly rate for labor services.

Jack Wallace, president of Home Two, testified that the June 19th letter contains all the components necessary to determine that there was a "not to exceed" contract with a ceiling of $28,140.00 for the work on the contract specifications. Home Two had already paid Engelberth $4,519.79 over and above that, and he testified that this excess payment represented a reasonable value for the extra services performed.

As of September 21, 1998, when the Engelberth crew left the job, Home Two had received three invoices totalling $22,450.11 reflecting work through August 10th.

During the month of October, Home Two received the following invoices:

#4	9/10	$8,823.68
#5	9/25	$8,277.68
#6	10/15	$1,932.00

The prior total of $22,450.11 plus these three invoices adds up to $41,483.47.

Invoice #4 has never been paid. Invoice #5 was paid in December of 1998, and Invoice #6 was paid in June of 1999.

In September of 1999, Engelberth sent a letter requesting payment of the unpaid Invoice #4 in the amount of $8,823.68. Home Two responded with a letter stating that Engelberth had given a "revised estimate of a maximum of $28,140 for the original scope of the work," that Engelberth had billed $41,483.47 and been paid $32,659.79 to date, that Home Two agreed that "extra work was requested and performed, but poorly tracked by both parties," and that Home Two considered that the amount of $4,519.79 already paid over and above the $28,140.00 ($32,659.79 - 28,140.00 = 4,519.79) "in our view approximates the extra work." Mr. Wallace pointed out that Home Two had paid out to Engelberth more already than Home Two had been paid by the owner since the original allocation under the project budget was $25,000, and he invited a discussion between Engelberth and himself and the owner "to come to some form of solution."

Engelberth has incurred $3,633.00 in attorney's fees and costs in the matter.

CONCLUSIONS OF LAW

1. Contract Claim

The first question is whether a contract was formed between the parties, and if so, what were its terms. Both parties agree that there was a contract; they disagree as to its terms. Engelberth claims that after its first fixed price proposal was not accepted by Home Two, it made a second proposal, contained in its letter of June 22, 1998, to perform the work on an hourly rate basis only, with no fixed price and no guaranteed cap. It contends that this letter contains the terms of the contract. Home Two claims that the June 22, 1998 letter contains terms of a contract with a guaranteed maximum price of $28,140.00, calculated by multiplying the stated terms: maximum of 5 weeks @ 40 hrs/week with 1 foreman, 4 carpenters, 1 laborer, and the resulting 5% small tools charge = $28,140.00.

There is no question that the first proposal for a fixed price contract, contained in the June 16th letter, was rejected. The facts also show that no agreement was reached, and thus no contract was formed, during the June 19th follow-up telephone conversation.

The parties are in agreement that the June 22nd letter forms the basis for their contract. The facts show that after the telephone conversation following the June 22nd letter, the parties had agreed on two things: they had a contract based on the June 22nd letter, and they expected the actual cost of the work to come in *under* the calculations contained in that letter. "Parties [to a contract] may have different understandings, intentions and meanings. Even though the parties manifest mutual asset to the same words of agreement, there may be no contract because of a material difference of understanding as to the terms of the exchange." Restatement 2nd of Contracts, Section 20 "Effect of Misunderstanding", Comment c. This raises the question of whether the parties actually had different understandings, intentions, and meanings, or whether they had the same understandings, intentions and meanings as of the end of June of 1998, but one party is explaining its understandings, intentions and meanings differently in hindsight as a result of the fact that the cost did not come in under projected cost. The facts support the latter conclusion.

Several factors lead the court to the conclusion that the contract formed was a contract based on hourly rates for labor, without a maximum price. First, the letter of June 22, 1998 specifies hourly rates as the fundamental basis of the contract. No ceiling price is specified, and there is some lack of clarity about the exact number of hours of different workers at different rates. Thus, although Mr. Wallace was able to estimate a hoped-for maximum cost, there is nothing in the letter that expresses a mutual intent that a maximum price was part of the contract terms. In their follow-up telephone conversation, Mr. Wallace and Mr. Urie discussed the possibility of coming in under the projected cost, but they did not specifically reach an agreement to allocate the risk of coming in over the projected cost to Engelberth by establishing a designated maximum price for the contract work.

In addition, although both parties agreed that there were two types of work to be performed (fulfillment of the job specifications, and extra work), their course of conduct does not support a conclusion that they had an agreement for a maximum price on the contract work portion of the job. Neither party kept records in a manner to make a distinction between the labor cost allocated to the specification work as opposed to the extra work. This conduct on the part of both parties substantiates the conclusion that all work was being performed on an hourly basis only without a maximum price. Otherwise, there would reasonably have been record-keeping and discussions so that both parties could determine when the ceiling cost was reached based on the specifications, and which work was being done on an extra basis.

Furthermore, the third invoice, dated August 27, 1998, brought the total cost as of August 10, 1998 up to $22,450, which was getting close to the hoped-for maximum cost, and the workers were still on the job. Home Two did nothing at that point to question or clarify what work constituted the specification work and what constituted the extra work, but simply kept the Engelberth crew working nearly another month, to September 21, 1998, without questioning the invoices or requesting a breakdown of specification work and extra work.

When Home Two finally sent Engelberth a letter stating its position, in September of 1999 (one year later) in response to Engelberth's request for payment, it did not state that it had understood from the start that there was a not-to-exceed contract price of $28,140. Rather it referred to the $28,140 figure as having been a "revised estimate". By the language of the letter, it acknowledged that the reason for Home Two's reluctance to pay was that the cost had exceeded the amount that Home Two could get from the owner under the contract with the owner, and that Home Two was now hoping to work out "some form of solution" with Engelberth.

For all of the foregoing reasons, the court concludes that there was no agreed-upon maximum price in the parties' agreement. They agreed that Engelberth would work for Home Two on a subcontract based on hourly labor rates (plus a small tools cost) in performing work on both the original contract specifications and extra work subsequently requested. The work was performed, and billed at the contract rates. Plaintiff has proved by a preponderance of the evidence that it is entitled to the amount unpaid of $8,823.68, plus interest since October 31, 1998.

2. Prompt Pay Act

Plaintiff is also seeking $2,117.68 in penalties and $3,633.00 in attorneys' fees based on the Prompt Pay Act, Chapter 102 of Title 9. Vermont Statutes Annotated. Defendant argues that Plaintiff made no claim for these remedies prior to trial, and is therefore not entitled to them. Plaintiff argues that its pleading for payment under a construction contract was sufficient to encompass statutory remedies under the Prompt Pay Act. The court agrees with the Defendant, for the reasons set forth in Defendant's Post-Trial Memorandum, that the Prompt Pay Act creates statutory rights and a statutory cause of action that are separate from and in addition to any breach of contract claim, even though they are factually related to it. Defendant was entitled to notice prior to trial that the Plaintiff was seeking additional recovery based on these statutory rights and remedies. The court also agrees, for the reasons set forth in Defendant's Post-Trial Memorandum, that allowing the Plaintiff to amend its pleading after the evidence has been presented, or even on the eve of trial, to add these claims prejudices the Defendant in preparation for trial. Therefore, Plaintiff's request for penalties and attorney's fees based on the Prompt Pay Act is denied.

ORDER

Plaintiff's attorney shall prepare a judgment Order based on these Findings and Conclusions. Objections shall be filed within five days of filing of the proposed order.

Dated at Burlington this 29th day of November, 2001.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge