

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-315

FEBRUARY TERM, 2008

James Paqua d/b/a J.P. General Contracting and Construction	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
Mark Shea and Lisa Shea	}	DOCKET NO. 74-2-06 Bncv

Trial Judge: John P. Wesley

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

Plaintiff contractor appeals from a superior court order granting defendants’ motion for attorney’s fees under the Prompt Payment Act. Plaintiff contends the order was improper because the motion was untimely. We affirm.

This case arose out of a construction dispute between plaintiff, a general contractor, and defendant homeowners. Plaintiff filed suit for nonpayment of a construction invoice, and defendants counterclaimed. Based on a jury verdict, the court entered judgment against plaintiff on all counts, and in favor of defendants on their counterclaim, awarding damages of \$65,448.21. Judgment was entered on June 8, 2007. Thereafter, citing 9 V.S.A. § 4007(c) of the Prompt Payment Act, which authorizes an award of attorney’s fees in construction disputes to the “substantially prevailing” party, defendants filed a motion for attorney’s fees. The motion was faxed to the court and opposing counsel on June 22, 2007, the fourteenth day after the judgment, and hard copies were mailed that same day, although not received until several days later.

Plaintiff opposed the motion on the ground, among others, that it was not timely filed with the court under V.R.C.P. 54(d)(2)(B) and 5(e). The former provides: “Unless otherwise provided by statute or order of the court, the motion [for attorney’s fees] must be filed and served no later than 14 days after entry of judgment.” V.R.C.P. 54(d)(2)(B). The latter specifies that filings with the court by mail or commercial carrier shall not be timely “unless the papers are received within the time fixed for filing.” V.R.C.P. 5(e). Section 5(e) also provides that, “[o]n request of a party, for good cause shown, the judge may authorize electronic filing with the clerk in a particular case.” In his reply to plaintiff’s opposition, defendants’ counsel asserted that he had been preoccupied with his son’s illness at the time of the filing and had sought and obtained permission from the clerk’s office to file the motion by fax, as long as it was followed up by

mail. Counsel also noted that the parties had regularly communicated with each other by fax throughout the litigation and, in at least once instance, plaintiff's counsel had faxed the court a request for a charge conference. Hence, counsel argued that the court had impliedly consented to electronic filing. Alternatively, counsel moved for permission to utilize electronic filing under § 5(e), or for an enlargement of time under V.R.C.P. 6(b), which permits the court to enlarge time after the expiration of a specified time period where the failure to act was the result of excusable neglect.

In July 2007, the court issued a written order granting the motion and awarding attorney's fees in the amount of \$47,175.18. In response to plaintiff's claim that the motion was untimely, the court noted the provision of V.R.C.P. 5(e) authorizing facsimile filings but indicated that it was "unnecessary to engage in a lengthy analysis of this issue." "Suffice it to say," the court continued, "that Rule 54(d)(2)(B) grants broad discretion as to the period for filing requests for attorney's fees, and Plaintiff can demonstrate no prejudice whatever in connection with a request to which, by law, Defendant is entitled as further discussed below." This appeal followed.

Plaintiff renews its claim on appeal that the motion for attorney's fees was untimely and therefore improperly granted. Although we find no cases construing the court's authority to enlarge time under V.R.C.P. 54(d)(2)(B), plaintiff has not, in fact, directly challenged the court's conclusion that it enjoyed broad discretion under this section to enlarge the time for filing nor has it asserted that the court's decision to do so was an abuse of discretion. As noted, the rule plainly subjects the fourteen-day filing period to the proviso "[u]nless otherwise . . . order[ed] [by] the court," and we will generally not disturb a court's decision to enlarge the time for filing absent an abuse of discretion. Shields v. Gerhart, 163 Vt. 219, 221 (1995). As the court here found, plaintiff has not shown that it was prejudiced in any respect by the facsimile filing on the last day of the filing period and the simultaneous mailing on the same date, nor has it shown that the court's ruling undermines in any way the interests of justice or the sound administration of the courts. Accordingly, we find no abuse of discretion, and hence no basis to disturb the judgment.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice