

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-019

JULY TERM, 2018

Jim Sheldon d/b/a Jim Sheldon Excavating &	}	APPEALED FROM:
Concrete v. Donald S. Schwarzkopf* &	}	
Margaret Schwarzkopf*	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 761-11-13 Rdcv

Trial Judge: Helen M. Toor

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

This case concerns a dispute over landscaping and excavation work done on a newly constructed home. Defendant homeowners Donald and Margaret Schwarzkopf appeal the superior court’s decision, following a bench trial, awarding plaintiff contractor Jim Sheldon \$10,000 plus attorneys’ fees and denying defendants’ claims of defective work. We affirm.

The following is a summary of the salient undisputed facts. In 2012, plaintiff submitted a winning \$255,000 bid to do work on the new home, including, in addition to landscaping and excavation work, putting in driveways, sidewalks, drainage, and underground lines. The lengthy fixed-price contract, which was prepared by the engineering firm that designed the site work, allowed defendants to retain 10% of each invoice submitted by plaintiff until completion of the work. Jim Secor, an engineer from the firm that designed the site work, acted as defendants’ representative on the project, with his duties and responsibilities set forth in the contract. One of his roles was to review contractor invoices and approve them once he confirmed that the work had been done. The terms and conditions of the contract could be modified only by a change order, although Secor could approve minor deviations through a field order. The work was to begin in April of 2012 and to be completed by mid-July of that year.

Plaintiff submitted two bills to defendants in December 2012. One was a final bill for completion of the contract work, which included \$10,000 in retained payments plus an additional \$7240 for previously agreed-upon separate charges. The other was for additional landscaping work amounting to approximately \$39,000. Secor approved the final bill for the contract work and asked Donald Schwarzkopf if he wanted to pay that while they worked out the bill for the extra work. Secor suggested that any “back charges” on the final contract invoice could be taken off the invoice on the extra work. Secor did not approve the bill for the claimed additional landscaping work. Schwarzkopf paid plaintiff the \$7240 for the previously agreed-upon separate charges included in the final contract invoice, but he informed plaintiff that several issues needed to be worked out, including the sloping of the concrete slab in the garage, before the \$10,000 retainage could be paid. Schwarzkopf also expressed surprise at the \$39,000 bill for the extra work, suggesting that he owed nothing more beyond what was agreed to in the contract.

Plaintiff engaged counsel to pursue payment of the invoices. On three occasions, defendants attempted to pay plaintiff \$7500 for the balance of the contract work while assuring plaintiff that his acceptance would not constitute a waiver of any further claims, but plaintiff refused the proffered payments, stating that he was not interested in negotiating on the amount he believed defendants owed him.

In October 2013, plaintiff filed suit, seeking payment for the contract retainage and the claimed extra-contractual landscaping work, as well as attorney's fees under the Prompt Pay Act (PPA). In addition to alleging a violation of the PPA, plaintiff alleged counts of breach of contract and unjust enrichment. In a July 2014 decision, the superior court granted defendants' motion to dismiss the breach-of-contract claim relating to the landscaping work, but it denied their motion to dismiss the unjust-enrichment claim arising from that same work. The court dismissed the breach-of-contract claim relating to that work because plaintiff had failed to submit the claim for additional work to Secor or obtain a change order, as required by the parties' contract. The court declined to dismiss the unjust-enrichment claim, however, stating that whether the claimed additional work fell outside the scope of the parties' contract required additional factual development.

In April 2015, defendants filed suit against plaintiff, alleging breach of contract for failing to correct defective work, for abandoning the job, and for fraudulently claiming extra payment for work that he had previously assured defendants would not result in any additional charges. Shortly thereafter, defendants filed a motion for summary judgment asking the court to dismiss plaintiff's remaining claims because he had sued them in the name of a corporation that had been deregistered. In August 2015, the superior court allowed plaintiff to substitute himself personally for the corporate plaintiff and consolidated the two actions.

Following a three-day bench trial in July 2017, the superior court concluded that: (1) plaintiff's unjust-enrichment case was barred because the claimed extra-contractual landscaping work fell within the parties' contract and plaintiff failed to obtain a change order pursuant to the contract and because plaintiff failed to establish that the extra work added any specific monetary value to defendants' home; (2) defendants owed plaintiff the \$10,000 retainage, but no interest or penalties under the PPA would be imposed because formal contractual requirements regarding a final inspection were never done; (3) defendants' could not prevail on their breach-of-contract claim regarding the sloping of the garage and barn floors because plaintiff acted in conformance with the contract terms and did not violate any industry standards concerning sloping or leveling; (4) no evidence supported defendants' consumer-fraud claim; and (5) plaintiff was the substantially prevailing party and thus entitled to attorneys' fees under the PPA, but no penalties or interest were due under the Act because defendants had a good-faith basis for withholding full payment of the retainage and no final inspection was ever held. Plaintiff sought approximately \$81,000 in attorneys' fees, but the court reduced that amount to \$41,548. Accordingly, the court awarded plaintiff a judgment of \$55,451, which included the principal award of \$10,000, plus costs and attorney's fees.

Defendants appeal, arguing that the trial court abused its discretion and/or misapplied the law: (1) by not enforcing the terms of the contract that protected their ability to compel plaintiff to address construction defects, which resulted in the court's erroneous determination that plaintiff was the substantially prevailing party; (2) by not compensating them for three of their claims of defective work by plaintiff; and (3) by ruling that plaintiff was the substantially prevailing party.

We first address defendants' second argument challenging the trial court's rejection of their claims of defective or unnecessary work by plaintiff. Defendants first claim error in the court's

rejection of their claim that plaintiff improperly sloped the concrete slab floors in the garage and barn, resulting in the pooling of water and causing the garage doors to freeze to the ground in cold weather. The trial court found that plaintiff installed what the contract specified—flat floors with no pitch; that the extremely detailed contract took precedence over defendants’ claim of an industry practice to put a slight pitch at the doorway; that defendants’ expert found areas of depression and minor inward sloping in the concrete floors, but he conceded that it was not possible to pour a completely flat slab, and that there were no industry standards for the sloping of residential concrete floors, and that plaintiff’s work was consistent with specifications applying to commercial concrete floors. In rejecting this claim, the trial court concluded that the evidence demonstrated that plaintiff acted in conformance with contract terms and violated no industry standards for slope or leveling. Defendants contend that this ruling is contrary to uncontroverted evidence.

We disagree. Donald Schwarzkopf acknowledged in a December 2012 email to plaintiff shortly after plaintiff presented him with the final invoice that “[t]he contract drawings indicate flat areas at the overhead doors, we did question this at the time and were told to keep the barn and garage floors flat.” Secor told Schwarzkopf in an email a week earlier that he and plaintiff “had discussed keeping the slope at doors flat but we don’t want to see the ponding.” Secor testified at trial that the specifications simply called for a flat slab and that “nothing specifically indicated that there was a slope at the overhead door,” but that he “assume[d]” a slope “must be standard.” Defendants’ expert testified that “in custom and practice, you’re going to always pitch stuff away and out” to prevent the flow of water into the garage, but he acknowledged that there were no industry standards referencing specifications “for flatness and levelness” for residential buildings. He also testified that it was his “opinion” that, even without slope specifications in the plans and “even though flat slabs in the garage are acceptable,” industry custom and practice is “to have a slight cant at the door so that the water doesn’t wick inside.” This evidence was sufficient to support the court’s findings and its rejection of defendants’ claims of defective work in laying the concrete slab floors in the garage and barn. See In re Costco Stormwater Discharge Permit, 2016 VT 86, ¶ 4, 202 Vt. 564 (“[B]ecause the trial court determines the credibility of witnesses and weighs the persuasive effect of evidence, this Court will not disturb [its] factual findings unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous. The trial court’s findings will not be disturbed merely because they are contradicted by substantial evidence; rather, [an appellant] must show that there is no credible evidence to support them.” (alterations in original) (quotations and citation omitted)); Town of Bethel v. Wellford, 2009 VT 100, ¶ 5, 186 Vt. 612 (mem.) (“[W]here the trial court has applied the proper legal standard, we will uphold its conclusions of law if reasonably supported by its findings.”).

Defendants also challenge the trial court’s rejection of their claim that plaintiff overcharged them for additional topsoil. According to defendants, plaintiff violated the contract by placing a foot of topsoil in a center island on the property, instead of putting in existing subsoil and only four inches of topsoil, as called for in the contract. Defendants argue that plaintiff admitted violating the contract by placing a foot of topsoil in the center island, and that the trial court essentially rewrote the parties’ contract by not compensating them for plaintiff’s purchase and use of topsoil beyond that called for in the contract. In rejecting this claim, the trial court found that although he did not agree to pay for additional work involved in providing the additional topsoil, Donald Schwarzkopf agreed to pay for the additional topsoil itself and that plaintiff used the topsoil to level the area. In claiming that plaintiff acknowledged putting a foot of topsoil in the center island, defendants point to plaintiff’s invoice for extra work for which they were not required to pay. Schwarzkopf approved payment of \$2400 for topsoil for the center island claimed in plaintiff’s final invoice for contractual work, which is the amount Schwarzkopf testified he overpaid for topsoil. That is also approximately the amount that it would cost for four inches of topsoil over the area of the center island, at \$28 per cubic yard, which was the price negotiated by

Secor on Schwarzkopf's behalf. We discern no basis in the record to disturb the trial court's ruling on this claim.

Given our affirmance of the trial court's ruling on defendants' claims of defective work, we need not consider their argument that the trial court erred by finding no evidence to support defendants' claim that plaintiff's defective work diminished the value of their home by \$100,000.

Next, defendants argue that the trial court erred by failing to enforce the contract provisions concerning final payment for services rendered, which, according to defendants, improperly granted plaintiff unconditional and immediate entitlement to the entire \$10,000 retainage, thereby handing him a principal merits victory and substantially-prevailing-party status under the PPA. Specifically, defendants assert that the court erred by awarding plaintiff the retainage even though he failed to abide by contract provisions requiring an agreement among the contracting parties that his work be substantially complete, that Secor issue a certificate of substantial completion, and that there be a joint final inspection of the work by defendants, Secor, and plaintiff. In defendants' view, it is reasonable to presume that plaintiff abandoned the contract's provision for a final inspection because he realized that defendants' concerns about defective workmanship had merit. Defendants contend that the PPA is inapplicable in this case because the retainage payment was not due until the contractual conditions precedent had been met, which never occurred here. Thus, according to defendants, the status of the retainage was not relevant to the trial court's determination as to who was the substantially prevailing party.

We decline to consider the gist of this nuanced argument—that an award of sums not due at the time of the filing of a lawsuit under the PPA cannot be the basis of substantially-prevailing-party status—insofar as defendants raise the argument for the first time on appeal. See Progressive Ins. Co. v. Brown, 2008 VT 103, ¶ 8, 184 Vt. 388 (“We have consistently held that we will not consider arguments on appeal that were not preserved in the trial court.”). The closest defendants came to raising this argument was a single sentence in their post-trial memorandum stating that they were denied the opportunity to address the defects in plaintiff's work due to his failure to abide by contractual notice and final-inspection requirements. Neither this statement nor their proposed fact, submitted along with their memorandum, that plaintiff admitted his failure to provide notice of substantial completion of his work gave the trial court an opportunity to rule on the argument raised here on appeal. Id. (stating that “[t]o properly preserve an argument, a party must present the issue with specificity and clarity” so that “the original forum is given an opportunity to rule on the issue prior to our review” (quotations omitted)). None of defendants' citations to the record in their reply brief demonstrate that this argument was preserved.

Regarding this argument, we note that the record supports the court's finding that plaintiff's final bill for contractual work effectively constituted notice that the contractual work was completed. Further, the contract called for the engineer, not plaintiff, to promptly make a final inspection of the work with the contractor and the owners. Moreover, notwithstanding defendants' protests to the contrary, defendants' multiple offers of \$7500 for the retainage were an attempt to settle what retainage was due. Plaintiff was not obligated to accept that offer, and his refusal to do so does not support defendants' speculation that he refused the offer to set up a PPA attorneys' fee award. We note that the trial court did conclude that due to the absence of a final inspection as called for in the contract, no penalties or interest would be awarded to plaintiff under the PPA on account of defendant's claimed delay in payment. But given the evidence that the work was complete, and was not defective, and given that neither defendants nor the engineer had ever called for a formal inspection, defendants were now required to pay the retainage to plaintiff.

Finally, defendants argue that the trial court abused its discretion in concluding that plaintiff was the substantially prevailing party. See Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, ¶ 12, 178 Vt. 77 (“While the mandatory language of [9 V.S.A.] § 4007(c) requires an award of attorney’s fees to a substantially prevailing party, the question of whether any party to a lawsuit substantially prevailed is left to the trial court’s discretion.”).

In its post-trial memorandum, defendants argued that they should be considered the prevailing party entitled to all of their attorneys’ fees because they established a good faith basis for withholding \$2500 of the \$10,000 retainage and they should prevail on their claims, which share a common core of facts. In its decision, the trial court determined that plaintiff was the substantially prevailing party because he recovered the disputed retainage, but it declined to award plaintiff penalties or interest under the PPA because defendants had a good faith basis for withholding final payment and no final inspection had occurred. See 9 V.S.A. § 4007(a)-(b) (providing that construction contract payments may be withheld in amount equaling value of good faith claims and that court shall award damages and penalty if it finds failure to comply with payment terms set forth therein). Following the trial court’s decision, plaintiff sought approximately \$81,000 in attorney’s fees. Defendants objected, arguing that plaintiff had only limited success and his attorneys’ fee billing was excessive. The court reduced the requested amount by nearly half based on its conclusion that two of plaintiff’s claims were untenable, but it reiterated that plaintiff was the substantially prevailing party because he had prevailed on his retainage claim and successfully defended against defendants’ claims of defective work.

On appeal, defendants argue that the trial court’s misplaced sympathies for plaintiff and the equities of the case demonstrate that that the court abused its discretion in concluding that plaintiff was the substantially prevailing party. We find no merit to this argument. Nothing in the record, including the court’s single statement about the value of defendants’ home, demonstrates that the court was biased towards plaintiff. Moreover, nothing in the record demonstrates that the equities favor defendants over plaintiff. Plaintiff was successful in obtaining the full \$10,000 retainage he claimed, although he was unsuccessful in obtaining compensation for his alleged extra-contractual work. Defendants were not successful in any of their claims of defective work. Under this scenario, the court acted well within its discretion in concluding that plaintiff was the substantially prevailing party. See The Elec. Man, Inc. v. Charos, 2006 VT 16, ¶¶ 11-12, 179 Vt. 351 (stating that purpose of PPA “is to provide protection against nonpayment to contractors and subcontractors” and “that allowing full attorneys’-fees recovery where there is a common core of facts is consistent with the language of the statute”).

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice