

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 395-12-20 Wncv

ALLAN HERRING,
Plaintiff,

v.

STEVE DEYO,
Defendant.

RULING ON RULE 59 MOTIONS

In this case, Plaintiff Allan Herring sought damages for work performed for Defendant Steve Deyo related to the construction of Mr. Deyo's new Berlin home. Following a bench trial, the court issued a decision on the merits awarding Mr. Herring \$10,000 in damages (100 hours of work at \$100/hour), substantially less than the \$34,800 sought, plus statutory interest. The court did not award a statutory penalty or attorney fees. Final judgment was entered on May 24, 2022. Both parties filed Rule 59 motions shortly thereafter.

Mr. Herring argues: (1) the findings as to 2019 work other than on the wastewater system substantially underestimate the work actually performed as demonstrated by the evidence; (2) under 9 V.S.A. § 4004, Mr. Deyo waived any challenge to the 2019 invoices; (3) a statutory penalty should have been assessed because Mr. Deyo could not have withheld the entire compensation for 2019 work in good faith; and (4) for much the same reasons, attorney fees should have been granted, at least in part. Mr. Deyo argues: (a) the oral contract was void under the statute of frauds, 12 V.S.A. § 181; (b) a new trial should be granted because Mr. Herring's claim can only be construed as equitable in nature (quantum meruit) and no evidence on the value (versus contract rate) of Mr. Herring's performance was presented; and (c) regardless, the court's findings are speculative to the extent that they reflect inferences from gaps in the evidence. Both motions are denied for the following reasons.

Statutory waiver of defenses, 9 V.S.A. § 4004

Mr. Herring argues that Mr. Deyo waived any challenge to his 2019 invoices by not promptly objecting to them in writing under 9 V.S.A. § 4004. Assuming without deciding that Mr. Herring's interpretation of § 4004 is correct, the court declines to enforce it in these circumstances. Mr. Herring never raised this issue pretrial or at the trial. It was first raised after final judgment was entered, long after when Mr. Deyo would have had a fair chance to address it. That is too late. The matter is waived.

Statute of frauds, 12 V.S.A. § 181; quantum meruit

As the findings reflect, the parties had an oral agreement that Mr. Herring would provide construction services at \$100/hour, and he provided those services in both 2018 and 2019. Mr. Deyo argues that the oral agreement is void under the statute of frauds and therefore Mr. Herring's claim could only have been for quantum meruit damages.

The statute of frauds issue is waived both because Mr. Deyo altogether failed to plead it and because he otherwise failed to raise the matter at or before trial.

The court further rejects it because it simply misunderstands how the statute of frauds works. Mr. Herring's performance, according to the oral agreement, already occurred prior to suit in reliance on the parties' oral agreement. Generally, performance in reliance on an oral contract takes that contract outside the statute of frauds. See *Contractor's Crane Serv., Inc. v. Vermont Whey Abatement Auth.*, 147 Vt. 441, 449 (1986) (“[I]f a party relies on an oral promise, fully performing its end of the bargain, then a written promise is not required if it would be fraud to allow the promisor to deny the contract”). This is precisely the case here. The statute of frauds has no applicability.

Findings as to 2019 work and related damages

Mr. Herring argues that the evidence should have supported findings to the effect that he worked substantially more than 60 hours on matters other than the wastewater system in 2019. Mr. Deyo objects to what he characterizes essentially as unsupported inferences from gaps in the evidence (because, for example, there was no evidence that someone else did some of the work, then Mr. Herring must have done it). The court responds to these arguments in two ways.

First, there was testimony to the effect that about half the stumps were removed in 2018, and the undisputed 2018 invoicing was dramatically lower than the 2019 invoicing. This evidence influenced the court's assessment of how many hours really were worked in 2019.

Second, the evidence as to work performed in 2019, and hence damages, was far from “precise.” Rather, there were no credible contemporaneous records of the work performed, there were credibility problems on both sides, and there was a wide gulf between the parties' portrayals of events. A difficult record, however, does not necessarily indicate the lopsided, winner-take-all outcome that both parties now seek post-judgment. Rather, the court accepts the record it was given and does the best it reasonably can within the boundaries of that evidence. Countless cases reflect trial courts' need for flexibility in such situations. See, e.g., *Shahi v. Madden*, 2008 VT 25, ¶ 17, 183 Vt. 320 (“Litigants are not required to ‘present precise figures of damages’ and juries are routinely asked to make far more difficult calculations on the basis of far less certain information than at issue in this case.” (citation omitted)); *Waterbury Feed Company, LLC v. O'Neil*, 2006 VT 126, ¶ 27, 181 Vt. 535 (“We have noted that, where damage calculations are based on approximations or estimates not supported by documentation, such shortcomings do not negate them as evidence, but may impact their weight as evidence.”); *Murphy v. Stowe Club Highlands*, 171 Vt. 144, 158 (2000) (“As we noted in a similar construction case, ‘this was a case in which the jury could reach virtually any amount within very wide limits.’” (citation omitted)).

The court is not persuaded by either party's arguments to modify its findings.


Statutory penalty and attorney fees

The court awarded no statutory penalty or attorney fees in this case. Mr. Herring asks the court to reconsider those rulings. However, he brings nothing new to the court's attention, and the court sees no reason to modify those rulings. They are explained sufficiently in the decision on the merits.

Order

For the foregoing reasons, the parties' Rule 59 motions are denied.

SO ORDERED this 21st day of June, 2022.



Robert A. Mello
Superior Judge