IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HENRY W. WHITE, INC.,)
Plaintiff,)
v.) C.A. No. CPU4-11-002439
GINO L. PENZA t/a CIAO PIZZA and t/a CIAO'S ITALIAN GRILL AND)))
PIZZERIA,)
Defendant.	Ć

Submitted: July 25, 2012 Decided: August 2, 2012

Douglas A. Shachtman, Esquire The Shachtman Law Firm 1200 Pennsylvania Avenue, Suite 302 Wilmington, Delaware 19806 Attorney for Plaintiff John V. Work, Esquire Law Office of John V. Work, P.A. 800 N. King Street, Suite 303 Wilmington, Delaware 19801 Attorney for Defendant

<u>DECISION ON PLAINTIFF'S MOTION TO AMEND THE JUDGMENT</u> <u>AND APPLICATION FOR ATTORNEYS FEES</u>

I. Facts & Procedural Posture

This is an action for breach of contract, quantum meruit, and unjust enrichment based on an alleged contract between the parties. On April 7, 2011, Plaintiff filed the Complaint. On June 6, 2011, Defendant filed an Answer. On April 23, 2012, the Court held a trial on Plaintiff's Complaint. Both Mr. White and Mr. Penza testified at trial. The parties also submitted several items of evidence into the record for the Court's consideration. After the trial, the Court ordered the parties to submit their closing arguments in the form of memoranda of law. The parties submitted the requested legal memoranda.

On June 27, 2012, the Court issued a Memorandum Opinion and Order after trial. In this Order, the Court found that Plaintiff met its burden to prove its breach of contract claim by a preponderance of the evidence. Accordingly, the Court entered judgment in favor of Plaintiff in the amount of \$17,000.00, plus reasonable attorney's fees and interest at the contract rate of 18.00%. The Court based its finding on the \$17,000.00 in compensatory damages on the conclusion that on May 8, 2010, Mr. White and Mr. Penza executed an agreement that Mr. Penza owed \$17,000.00 on the contract. The Court further found that this agreement was – in effect – a global contract modification encompassing all work performed and corresponding payment owed between the parties up to May 8, 2010. Finally, the Court directed Counsel for Plaintiff to submit an Affidavit of Attorney's fees for Court review and approval, documenting the specific amounts expended by Counsel in litigating this dispute.

On July 11, 2012, Plaintiff filed this Motion to Amend the Judgment pursuant to CCP Civil Rule 59(d). In this Motion, Plaintiff argues that the Court did not rule on Plaintiff's request for \$9,927.80 in compensatory damages Plaintiff alleged he suffered as a result of Defendant's breach because he was forced to take out a \$8,500.00 loan with a 36.00% yearly interest rate to pay subcontractors for work performed on the contract at issue in this case. Plaintiff argues that because Defendant testified that he knew that Plaintiff was using subcontractors to complete the contracted for work, Defendant should have known that if he failed to make payment under the contract, Plaintiff would have to take out a loan to pay subcontractors used on the job because Plaintiff was not sufficiently liquid to pay the subcontractors out of pocket.

On July 12, 2012, Plaintiff filed an Affidavit of Attorney's fees. In this Affidavit, including Plaintiff Counsel's client ledger for this case, Plaintiff requested that attorney's fees be awarded in the amount of \$14,022.64.

On July 25, 2012, Defendant filed a Response to Plaintiff's Motion to Amend. First, Defendant argues that the Motion was not timely filed. Second, even assuming the Motion was timely filed, Defendant argues that notwithstanding the breach of contract, Plaintiff was paid a substantial amount of money under the contract, and should have paid his subcontractors with that money. Further, Defendant argues that Plaintiff was not entitled to take out a loan with a usury 36.00% interest rate. Also on July 25, 2012, Defendant filed a letter indicating that he did not intend to file a formal opposition to Plaintiff's Affidavit of Attorney's Fees.

II. <u>Discussion</u>

a. Plaintiff's Motion to Alter or Amend the Judgment.

CCP Civil Rule 59(d) governs motions to alter or amend judgments, and provides that "[a] motion to alter or amend the judgment shall be served and filed not later than 10 days after entry of the judgment." CCP Civil Rule 6(a) governs computation of time for purposes of mandatory time period under eleven days, and provides that: "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and other legal holidays shall be excluded from the computation." Assuming a motion to alter or amend the judgment is timely filed under these rules, on motion to alter or amend judgment, Plaintiff must establish one of the following: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available, or (3) the need to correct clear error of law to prevent manifest injustice.¹

9. The Motion to Alter or Amend the Judgment was timely filed. The Court issued the decision at issue on June 27, 2012. Plaintiff filed the Motion on July 11, 2012. Not counting the day the judgment was entered, intermediate weekends, and July 4th, as required by CCP Civil

¹ A.S. v. R.S., 2010 WL 2708539, at *1 (Del. Fam. Ct. May 12, 2010).

Rule 6(a), the Motion was filed on the 9th day after judgment, and therefore was timely filed within the ten day window provided by CCP Civil Rule 59(d).

- 10. On the substance of the Motion, for the reasons that follow, the Court finds the Motion must be denied.
- 11. First, the Court already addressed the issue of compensatory damages in its decision after trial. On Page 11 of the Court's decision, the Court detailed Mr. White's testimony and the exhibits presented regarding the loan. Specifically, the Court stated:

Mr. White testified that as a result of Mr. Penza's alleged failure to pay the contracted for sum, Mr. White had to take out a loan with Citifinancial, Inc. in the amount of \$8499.99. This loan agreement has a 36% annual interest rate, which calculates to \$9,927.81 over the life of the loan. Mr. White testified that he borrowed this money in order to pay subcontractors and to cover other costs. Mr. White admitted that there is nothing in the August 3, 2009 or any other contract between the parties indicating that he would be using subcontractors. Mr. White explained that he commonly uses subcontractors on construction projects, and does not include subcontractor information in his general contracts. Mr. Penza testified during his case in chief that he orally instructed Mr. White to obtain "the best" electric and plumbing subcontractors. However, Mr. Penza also testified that Mr. White never told him that Mr. White planned on or actually took out a loan in order to pay subcontractors.

agreement/contract modification between the parties that \$17,000 constituted "full payment for the contract," and awarded damages to Plaintiff in this amount. While the Court did not expressly address the loan agreement, subsumed within this finding was the Court's conclusion that Mr. White and Mr. Penza contemplated all aspects of the contract when they entered into the May 8, 2010 global contract modification, *including Mr. White's ability to pay subcontractors*. Therefore, the Court finds that Plaintiff is not entitled to the additional compensatory damages requested in this Motion, because it was not entitled to recover these damages under the terms of the contract.

22. Even assuming that the loan and Plaintiff's ability to pay subcontractors was not contemplated at the time of the May 8, 2010 agreement, Plaintiff's request for such damages is denied because these damages do not arise naturally from the breach, nor were they reasonably foreseeable. In actions for breach of contract, "the non-breaching party is entitled to recover 'damages that arise naturally from the breach or that were reasonably foreseeable at the time the contract was made." "Contract damages 'are designed to place the injured party...in the same place as he would have been if the contract had been performed." The parties do not dispute that Defendant has paid Plaintiff \$159.013.00⁴ owed under the contract at issue. The "breach" here, is a partial breach — Defendant failed to make full payment under the contract. Defendant had no knowledge regarding the general liquidity of Plaintiff's business such that Defendant would have any expectation as to whether failure to pay would render Plaintiff unable to pay his subcontractors. It was also not reasonably foreseeable or a natural consequence of the breach for Plaintiff to take out a personal loan at the usury interest rate of 36.00%.

b. Plaintiff's Application for Attorney's Fees.

In the Court's June 27, 2012 decision, the Court found that Plaintiff was entitled to recover reasonable attorney's fees incurred in the litigation of this action. Accordingly, the Court ordered Counsel for Plaintiff to file an Affidavit of Attorney's Fees setting forth the amount sought for attorney's fees, and the basis for computing this amount. Plaintiff filed the appropriate affidavit, seeking \$14,022.64 in attorney's fees, and attaching the client ledger and applicable calculations in support of this affidavit. After consideration of the Affidavit, client ledger,

² Paul v. Deloitte & Touche, LLP, 947 A.2d 140, 146 (Del. 2009) (quoting Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 264-65 (Del. 1995)).

³ Id. (quoting Huggins v. B. Gary Scott, Inc., 1992 WL 179482, at *1 (Del. Super. June 25, 1992)).

⁴ Joint Exhibit # 1, Tab 26.

calculations, and applicable law governing reasonableness of attorney's fees, the Court hereby finds that Plaintiff's request for attorney's fees in the amount of \$14,022.64 to be reasonable.⁵

III. Conclusion

For the reasons set forth in this Memorandum Opinion and Order, it is hereby ordered that Plaintiff's Motion to Alter or Amend the Judgment is DENIED.

It is hereby further ordered that Plaintiff's Request for Attorney's Fees is hereby GRANTED in the amount of \$14,022.64.

IT IS SO ORDERED this 2nd day of August, 2012.

John K. Welch,

Judge.

⁵ General Motors Corp. v. Cox, 304 A.2d 55 (Del. 1973); Delaware Lawyers' Rules of Professional Conduct, Rule 1.5(a).