SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-006791 05/16/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

FILED: 05/22/2006

WHITEWING I I, L L C ROGER E BRODMAN

v.

STANTEC CONSULTING INC, et al.

DAN CAMPBELL

MINUTE ENTRY

8:50 a.m. This is the time set for oral argument on Plaintiff's Application for Attorneys' Fees and Costs and Plaintiff's Proposed Form of Judgment and Defendant's Motion to Strike Affidavit of Gregory Bamford. Plaintiff is represented by counsel, Roger Brodman. Defendant Roadway Systems is represented by counsel, Dan Campbell and Tamara McKane.

A record of the proceedings is made by CD/videotape in lieu of a court reporter.

Said motions are argued to the Court.

IT IS ORDERED taking this matter under advisement.

9:09 a.m. Matter concludes.

LATER:

This matter has been under advisement. The Court has considered Plaintiff's Proposed Form of Judgment, Plaintiff's Application for Attorneys' Fess and Cost, Defendant's Motion to Strike Affidavit of Gregory Bamford and the briefs. The Court finds and rules as follows.

The jury instructions, following well-established legal principles, stated, "The damages you [the jurors] award for breach of contract or negligent performance must be the amount of money that will place Whitewing in the position Whitewing would have been in if the contract had been performed." Thus, whether under a breach of contract theory or a negligence theory or both, Whitewing can only recover what it in fact had to pay to bring the sewer line to the standard demanded by the City of Chandler. In discussions with the Court before jury deliberations on whether to dismiss one count or the other as duplicative, Whitewing conceded as much. That the jury in effect awarded in the alternative does not mean that Whitewing can recover separately on both theories. Put simply, the damages award is $69,213.50 on Count I. Thus, references to Count II and its amount will be deleted from the judgment.

The damages in this case were liquidated. "A claim is liquidated if the plaintiff provides a basis for precisely calculating the amounts owed." *John C. Lincoln Hospital v. Maricopa County*, 208 Ariz. 532, 544 ¶ 39 (App. 2004). Here, Whitewing could precisely calculate its out-of-pocket costs from Defendant's failure to perform. The mathematics involved in this case were not complicated: the issue boiled down to how much it cost Whitewing to satisfactorily finish the sewer line that Roadway contracted to build, a simple arithmetic calculation. Regardless of whether the jury awarded the full sum, decided not to accept some portion of the claim, or chose to apportion comparative liability, the damages are liquidated.

The jury, by awarding damages for breach, necessarily found that the sewer line was not built as required by the contract. Defendant presented no evidence that Chandler's standards for the project exceeded those prescribed by the relevant building codes. Thus, the Court must presume that Chandler rejected the line because it failed to meet the code requirements, and so recovery is available against the bonds.

Hanover is not liable for any construction that predated the bond. However, Plaintiff can come after it for any damages arising during the life of the bond, regardless of whether another bond was also in effect; there is no requirement that the damages during that period be prorated. Based on the jury verdict, it must be presumed that the verdict covered the entirety of the work.

Arizona law, A.R.S. § 32-1152(E), provides that attorneys' fees cannot bring the insurer's liability under a bond to more than its face value, but is silent as to whether interest and costs may be added. The consensus among jurisdictions that have addressed the issue allows for interest and costs to be recovered in full. *See* the cases cited in 12 Am.Jur.2d, Bonds § 48. Thus, interest and costs should be awarded in proportion to the insurers' liability under their respective bonds.

For the purpose of the Application for Attorneys' Fees, the Court presumes that the whole of the damages awarded to Plaintiff falls under contract.

Plaintiff's division of fees between Roadway and Stantec seems arbitrary. The working principle seems to be that any charge attributable to both should be assessed to Roadway. The more appropriate course would be to treat the pre-settlement litigation as a unity and divide the fees equally between the two defendants. Thus divided, Roadway's share, including half of the pre-settlement fees and the entirety of the post-settlement fees except those specifically pertaining to the settlement, comes to $93,155.74.

There is nothing relevant in the affidavit of Gregory Bamford. As Roadway Systems, Inc. is a corporation, its officers are not liable for its obligations, however opulent their homes may be (even assuming that Mr. Bamford is an expert in real estate appraisal). Thus, his affidavit will be stricken.

Therefore, IT IS ORDERED:

1. Granting Defendant Roadway Systems, Inc.'s Motion to Strike Affidavit of Gregory Bamford.

2. Denying Defendant Roadway's objection to the Plaintiff's Form of Judgment and Application for Attorneys' Fees and Costs.

3. Awarding Plaintiff Whitewing $93,155.74 in attorneys' fees, $5,979.98 in costs and $69,213.50 in damages.

4. Approving the form of Judgment as amended all in accordance with formal written Order signed by the Court on May 16, 2006 and entered (filed) by the Clerk on May 18, 2006.