IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CHOICE FUELCORP INC., Plaintiff	: JURY TRIAL DEMANDED :
vs.	: NO. 21-00368
360 PAINTING OF NORTHEAST PA, Defendant	: CIVIL ACTION :

360 PAINTING OF NORTHEAST PA, Plaintiff	: JURY TRIAL DEMANDED :
vs.	: NO. 21-00431
CHOICE FUELCORP INC., Defendant	: CIVIL ACTION :

OPINION AND ORDER

I. Statement of the Case:

The consolidated actions captioned above came before the Court for a non-jury trial on April 11, 2023. Choice Fuel Corp., Inc. (hereinafter "Choice") contracted with 360 Painting of Northeast PA (hereinafter "360") for the total sum of $11,850.00, for the sanding, scraping, pressure washing, spot priming, and painting (two coats of paint) of three (3) above ground fuel tanks bearing tank numbers 3 and 7 and 18 (hereinafter the "Contract"). It is undisputed that primer and paint for the project was to be provided by Choice. 360 introduced into evidence a written proposal marked Exhibit 1, a written contract marked Exhibit 2, and a claimed balance due invoice in the amount of $4,600.00, dated October 12, 2020, marked Exhibit 3. Those Exhibits were undisputed. 360 introduced a collection of attorney fees invoices, collectively marked Exhibit 5.

360 claims that it entered into a supplemental oral contract with Choice for applicable of a third coat of paint (referred to at trial as the "topcoat") for the sum of $350.00. That top coat was never applied, and no claim on the oral contract was asserted by either party, at trial.

360 claims the balance due of $4,600.00, plus interest and penalties and attorney's fees

pursuant to Pennsylvania's Contractor and Subcontractor Payment Act, 73 Pa.C.S. Sections 501 through 516. Choice claims that the work provided by 360 was not good and workmanlike, that 360 failed to honor the two (2) year warranty set forth in Exhibit 2, and thus that 360 is not due the sums claimed.

A Magisterial District Judge rendered judgement on the consolidated matter on March 26, 2021 in the favor of 360 Painting, holding Choice to be individually liable for $4,809.71. Choice appealed to this Court. The case was scheduled for arbitration, and judgement was rendered in favor of 360 Painting by the board of arbitrators on May 26, 2022, in the amount of $7,130.00. Choice appealed the judgement on June 24, 2022.

II. Findings of Fact:

1. Choice FuelCorp (Choice) is a Pennsylvania corporation with an address at 2344 Sylvan Dell Road South Williamsport, Pennslyvania.
2. 360 Painting of Northeast PA (360) is a Pennsylvania business entity with a principal place of business at 66 South 5th Street Hughesville, Pennsylvania.
3. In August of 2020, 360 submitted a proposal to paint three (3) of Choice's fuel tanks, Tanks number 3, 7, and 18 for $3,850, $3,850, and $4,150 dollars respectively; a total of $11,850 for the entire project.
4. 360's proposal included identical Detailed Project Specifications which state "This includes pressure washing to clean and remove all loose and peeling paint prior to painting. We will also scrape and sand any areas where rust is present prior to painting. All bare areas will be spot primed. We will then apply (2) coats of the provided paint on the exterior walls of the tank and steps. All primer and paint is provided by the owner."
5. Choice accepted 360's proposal and both parties signed an agreement memorializing the acceptance of 360's proposal on August 27, 2020.
6. Before 360 began work on the project, Choice advised 360 that the work needed to be completed before a Department of Environmental Protection (DEP) inspection, due in late September, 2020.
7. 360's employees began working on the project on Tuesday September 8, 2020, the day after Labor Day.

8. 360's employees sanded, power washed, and spot primed the tanks, before applying the required finish coats of paint. 360's job supervisor was Dion Brown.
9. 360's employees initially used Carboline as the required finish coats of paint, with a paint spray gun. Carboline was chosen because it is high quality, and does not require mixing.
10. Choice purchased approximately 165 gallons of paint for the Contract.
11. Some time between September 8, 2020 and September 27, 2020 360 ran out of Carboline paint. Because securing additional Carboline paint may have taken weeks, and because the DEP inspection was due for late September, 2020, Choice purchased 35 gallons of Sherwin Williams 2-part epoxy paint, at the recommendation of 360.
12. Thereafter, 360 completed the required work, using the Sherwin Williams 2-part epoxy paint.
13. The fuel tanks were inspected on September 29, 2020, and passed that inspection.
14. Choice paid a 30% down payment and a progress payment totaling $7,200; the balance of the contract is $4,600.
15. It is undisputed that it is the industry standard for paint projects of this nature that the finish coat should be 6mm thick.
16. An employee of Choice, Richard E. Cole, observed that the paint coat on Tanks 7 and 3 were not 6mm thick. Additionally, Cole observed paint flaking and rust on Tank 3.
17. Sometime after September and after the DEP inspection, the owner of Choice, Jason Weiss, sent a text message to the owner of 360, generally to the effect that Weiss would not be paying 360 the balance of the contract, until the job was completed. The text of that message was not introduced into evidence at trial.
18. 360 did not return to the project as a result of the text message.
19. Thereafter, Richard E. Cole, performed approximately forty (40) hours of remedial work on Tanks 7 and 3.

III. Questions Presented:

1) Whether 360 established by a preponderance of the evidence that it completed work required by the Contract.
2) Whether Choice established by a preponderance of the evidence that 360 breached the written warranty set forth in Exhibit 2.
3) If 360 established by a preponderance of the evidence that it completed work required by the Contract, whether Choice established that it withheld $4,600.00 in good faith.
4) If 360 established by a preponderance of the evidence that it completed work required by the Contract, whether 360 is entitled to collect a penalty of 1% per month.
5) If 360 established by a preponderance of the evidence that it completed work required by the Contract, whether 360 is entitled to collect reasonable attorney's fees.

IV. Conclusions of Law:

1) 360 established by a preponderance of the evidence that it completed work required by the Contract.
2) Choice failed to establish by a preponderance of the evidence that 360 breached the written warranty set forth in Exhibit 2.
3) Choice has not established that it withheld $4,600.00 in good faith.
4) Because Choice failed to establish that it withheld $4,600.00 in good faith, 360 is entitled to collect a penalty.
5) Because 360 established by a preponderance of the evidence that it completed work required by the Contract, 360 is entitled to collect reasonable attorney's fees.

V. **Discussion:**

1) 360 has established by a preponderance of the evidence that it has completed the work required by the Contract.

Jerry Daugherty, the owner of 360, testified on behalf of 360. He explained the scope of the Contract documents, and the nature of the tasks which were the subject of the Contract. It is undisputed that Choice was hiring 360 effective August 27, 2020, to complete the sanding, cleaning, priming, and painting of three (3) above ground fuels tanks prior to a DEP inspection which was ultimately conducted on September 27, 2022. Over a period of about thirty (30) days, 360 undertook to complete the work. The testimony at trial was that 360 ran out of Carboline paint on Sunday September 25, just days before the DEP inspection. On that Sunday, Daugherty and other employees went to Sherwin Williams and secured a substitute epoxy paint. Since September 25 was a Friday, the Court infers that 360 ran out of paint on a Sunday in late September (likely the 27th) and that the DEP inspection was conducted in late September, thereafter. It was undisputed a trial that the three (3) tanks passed the DEP inspection, due to the work performed by 360.

Richard E. Cole testified on behalf of Choice. He explained that 360's job foreman, Dion Brown, frequently left the job site to provide transportation to children, run other errands, etc. Cole testified that Brown worked slowly, and that Cole would not use Brown on another job. Cole testified that, after the DEP inspection, Cole was required to "re-do" some of the work performed by 360, including some additional painting on Tank 7, and sanding, cleaning, and repainting a portion of Tank 3. Cole estimated that, in total, he spent approximately forth (40) hours performed remedial work on those two tanks, after the DEP inspection.

Choice introduced no testimony to suggest that Choice performed any remedial work after 360 completed its work, and before the DEP inspection. In fact, Cole testified that all his remedial work was performed after the inspection. Although the need for the remedial work described by Cole would undoubtedly support a claim under the written warranty set forth in Exhibit 2, Cole's testimony does not support Choice's contention that the Contract was not "completed." Rather, his testimony supports the inference that the Contract work was completed, but not completed to Choice's satisfaction.

2) Choice failed to establish by a preponderance of the evidence that 360 breached the written warranty set forth in Exhibit 2.

The Contract includes a provision entitled "Work Standard" providing that "All work is to be completed in a workman like manner according to standard practices." Pl. Ex. 2 at 2. Further, 360 "warrants labor and material for a period of two (2) years. If paint failure appears [360] [is to] supply labor and materials to correct the condition without cost."

The Court is sympathetic to Choice's claim that it should not be required to perform remedial work a few short weeks after 360 completed its work. However, any finding by the Court that Choice asserted a clear warranty claim against 360 before the remedial work was performed, or any finding by the Court regarding the value of the remedial work, would require the Court to speculate, and would not be rooted in the evidence at trial.

The Court finds credible the testimony by Cole that he performed approximately forty (40) hours of remedial work on Tanks 3 and 7, after the DEP inspection. However, there was no evidence at trial on the subjects of what notice of claimed defective work was provided by Choice to 360 in advance of Cole's work, or the reasonable value of Cole's work. Choice offered no documents nor any other evidence in support of its warranty claim. The only credible evidence on that issue was the testimony of Daugherty that he received a text message from Choice, telling him that he would need to return to Choice, to secure his final payment.

Choice introduced no testimony to suggest that Choice performed any remedial work after 360 completed its work, and before the DEP inspection. Under the warranty, the remedial work which was the subject of the testimony by Richard E. Cole should have been performed by 360, in response to a claim by Choice on the written warranty in Exhibit 2. The most reasonable inference which the Court can draw is that, after the DEP inspection, Cole became dissatisfied with the work performed by Dion Brown and those under his direction. Rather than provide notice of that dissatisfaction to 360 and demand remedial work under the warranty, Choice elected to perform the work themselves, and withhold the final payment. Although Choice's frustration is understandable, is does not negate their obligations under the Contract.

3) Choice failed to establish that it withheld $4,600.00 in good faith.

The penalty provision of Pennsylvania's Contractor and Subcontractor Payment Act (CASPA) is set forth at, 73 Pa.C.S. Sections 512(a)(1). That Section provides that, where it is judicially determined that an owner has failed to pay a contractor as required, the court **shall award** a penalty of 1% per month of sums wrongfully withheld. Section 512(a)(2) provides that the penalty will not apply if the court finds that the sum withheld bears a reasonable relation to the value of a claim held in good faith by the owner.

Here, the work performed by Choice was completed by multiple personnel, over four (4) weeks. The Contract sum attributable to Tank 3 was $3,850.00. Richard E. Cole testified that he performed approximately forty (40) hours of remedial work, nearly all of which was performed on Tank 3.

Had Choice made a written demand on the warranty, and withheld a sum which bore "a reasonable relation to the value" of the needed remedial work, this Court would likely find that Choice acted in a manner consistent with Section 512(a)(2). The evidence at trial suggests that Choice did not act to demand remediation work under the warranty, and that Choice withheld $750 in excess of the entire Contract sum attributable to Tank 3. Based upon the trial evidence, it is impossible for the Court to find that the fair value of the forty (40) hours of work performed by Cole was $4,600.00, since that sum represents 39% of the total of the entire Contract, performed by multiple personnel, over four (4) weeks, on three (3) tanks. Because Choice failed to establish that it withheld $4,600.00 in good faith, the language of 73 Pa.C.S. Sections 512(a)(1) provides that the Court "shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld."

Because there is no evidence on the record as to the value of Cole's remedial work[1], the Court has no basis upon which to establish that any amount of the $4,600.00 may have been held in good faith. For that reason, this Court's evaluation of the amount not held in good faith is equal to the amount withheld, $4,600.00

1 While Cole testified that he performed approximately forty hours of remedial work, when asked to put a value of that work on the record Cole testified that he had "no idea."

4) Because Choice failed to establish that it withheld $4,600.00 in good faith, 360 is entitled to collect a penalty.

CASPA requires the Court to assess interest to an owner, contractor or subcontractor who fails to provide payment:

> "If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld."
>
> 73 P.S. § 512(a)(1).

When asked to place a value on his forty (40) hours of remedial work, Cole testified that he had "no idea" how to do so. For that reason, the Court has no basis upon which to establish that any amount of the $4,600.00 may have been held in good faith. For that reason, this Court's evaluation of the amount not held in good faith is equal to the amount withheld, $4,600.00. The Court will assess a penalty of 1% of that sum ($46) per month from the date of the invoice marked Exhibit 3.

5) Because 360 established by a preponderance of the evidence that it completed work required by the Contract, 360 is entitled to collect reasonable attorney's fees.

The attorney's fees provision of Pennsylvania's Contractor and Subcontractor Payment Act is set forth at, 73 Pa.C.S. Sections 512(b). That Section provides that "the substantially prevailing party in any proceeding to recover any payment under this act **shall be awarded** a reasonable attorney fee in any amount to be determined by the court."

Because 360 is the substantially prevailing party, the Act requires this Court to assess an attorney fee. The amount must be reasonable, in the judgment of the Court.

360 introduced Exhibit 5 and the expert testimony of John Smay, Esquire, in support of its claim for attorney fees. Exhibit 5 contains no detail regarding the number of attorney hours spent on each task. The fees attributable to some of the tasks (i.e. preparation of the Complaint) appear to be far in excess of the sum which would normally be incurred for those activities, in a modest collection case. While many of the steps in this litigation may be attributable to the conduct of Choice rather than the conduct of 360, there was no evidence at trial which supports a finding that the litigation was novel or complex. In the opening statements at trial, both counsel referred

to the matter as being "straightforward." In the view of this Court, "straightforward collection case" is an apt description of the evidence a trial. At trial, 360 introduced the testimony of only one (1) fact witness, no expert testimony, and had only three (3) Contract Exhibits, all of which were accepted by Choice as accurate. In the absence of any contrary evidence, this Court finds that 360 incurred $15,397.32 in attorney fees in the prosecution of a routine collection case, over a $4,600.00 invoice. The Court finds that a reasonable attorney fee in this matter would be $2,300.00, which is 1/2 of the sum due and owing

ORDER

And now, this 14th day of April, 2023, for the reasons more fully set forth above, judgment is entered in favor of 360 Painting of Northeast PA and against Choice Fuel Corp., Inc., for the sum of $8,280.00, calculated as follows:

a.	Past due sum set forth in Plaintiff's Exhibit 3.	$4,600.00
b.	Penalty of 1% ($46) per month from October 12, 2020 to April 12, 2020	$1,380.00
c.	Attorney's fees	$2,300.00

BY THE COURT,

William P. Carlucci, Judge

cc: Brandon R. Griest, Esquire
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