

STATE OF MAINE  
ANDROSCOGGIN, ss

SUPERIOR COURT  
DOCKET NO. CV-19-41

Thayer Corp., )  
)  
Plaintiff, )  
)  
v. )  
)  
410 Stillwater LLC, )  
)  
Defendant. )

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**Order on Motion for Attachment**

This matter comes before the court on Plaintiff’s motion for prejudgment attachment. The court has considered Plaintiff’s motion and all supporting documentation as well as Defendant’s opposition. Upon consideration of the affidavits, memoranda and all supporting documents, the court orders as follows.

Pursuant to M.R. Civ. P. 4A,

No property may be attached unless such attachment for a specified amount is approved by order of the court. . . . upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

The standard for attachment on trustee process is the same. M.R. Civ. P. 4B(c). Of particular note in this case,

[W]hether a party will receive an attachment depends on the party's proof, by a preponderance of the evidence, of both the likelihood of success in the underlying suit and the likelihood of recovering in that amount or greater. *Boisvert v. Boisvert*, 672 A.2d 96, 98 n.3 (Me. 1996).

*Estate of Summers v. Nisbet*, 2016 ME 88, ¶6. Thus, it is not enough for Plaintiff to establish that it is likely to succeed in some amount against Defendant; Plaintiff must establish a basis for the specific amount sought from that party. *See also Bowman v. Dussault*, 425 A.2d 1325, 1329 (Me. 1981).

In this case, the parties entered into a contract in 2017<sup>1</sup> for Plaintiff to provide HVAC services and construction at Defendant's new storage facility. *Exhibit C to Complaint and Thayer Affidavit*. The total contract price was \$127,000. The contract states that as follows:

Twenty-five percent (25%) of the project cost is due upon signing agreement. Upon amounts unpaid after thirty (30) days from invoice date, Thayer may stop work under this Agreement without notice, cancel this Agreement, and commence actions to preserve a lien on the Customer's property. Thayer will charge interest on unpaid balances over thirty days old. Thayer will be entitled to costs and attorneys' fees to collect amounts due.

*Exhibit C, ¶ 3, Terms and Conditions*. On December 12, 2017, Plaintiff billed Defendant for the 25% deposit of \$31,750, but Defendant never paid that. Despite the fact that it had not received the deposit, Plaintiff commenced work on the project. Sometime thereafter Defendant terminated the contract, although the parties dispute whether it had cause to do so. Plaintiff then sent Defendant an invoice dated May 14, 2018 for \$15,043.54<sup>2</sup> for "billed materials and labor to date." Defendant has not paid anything to Plaintiff on the contract.

Plaintiff filed suit, seeking \$54,095.88 on account annexed, for breach of contract, unjust enrichment, quantum meruit and violation of the Prompt Pay Act. That sum is comprised of the unpaid deposit amount of \$31,750, plus \$15,043.54, plus finance charges of 18% per annum through approximately November 2018. Plaintiff also seeks attachment, including attachment on trustee process, in that amount.

Defendant counterclaimed, alleging that the partial work that was completed was defective, alleging that the work done has a value no more than \$6,257. Defendant explains its position further in its response to the attachment motion.

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<sup>1</sup> The proposal from Plaintiff is dated November 6, 2017; Defendant signed it on December 4, 2017.

<sup>2</sup> The invoice said the total due was \$15,043.54 but then said "net due \$15,269.19" without any explanation. No explanation is provided in the affidavits or memoranda.

There seems little question that if Plaintiff is entitled to the \$31,750 deposit at this stage, that obligation must arise from the contract and does not represent a benefit conferred or work done. Plaintiff seems to be arguing that it is in the nature of liquidated damages that it is entitled to regardless of the amount of work performed. The court disagrees. The contract simply says that “[t]wenty-five percent (25%) of the project cost is due upon signing agreement.” The plain language makes it clear that this is a matter of timing of payment towards the contract, not forfeited damages in the event of early termination. Plaintiff could have refused to commence work until the deposit was paid, but chose not to do so. It is not entitled to it now.

That leaves the question of how much Plaintiff is entitled to at this point. Certainly Plaintiff billed Defendant for work to date in the amount of \$15,043.54. Even after Defendant counterclaimed and detailed that Plaintiff had not provided that much value in work and materials, however, Plaintiff gave no defense or detail of that amount. While it is clear that Plaintiff did some work, and that the work presumably has value, the court cannot say that is more likely than not *on this record* that Plaintiff will recover judgment in an amount more than \$6,257 plus interest and costs.

Therefore, it is Ordered:

**Attachment, including attachment on trustee process, may be made against Defendant 410 Stillwater, LLC, and its property, both real and personal, tangible and intangible, and not otherwise exempt from attachment and attachment on trustee process in the amount of \$10,280 (\$6,257 plus 18% interest for 3 years).**

This order may be incorporated on the docket of the case by reference pursuant to Me. R. Civ. P. 79(a).

Dated: 11/2/2020



Valerie Stanfill  
Justice, Maine Superior Court