

STATE OF MAINE
Cumberland, SS

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CUMBERLAND, SS
CLERK'S OFFICE

SUPERIOR COURT
Civil Action
Docket No. RE-05-004 ✓

2005 MAY -5 P 2:30

TED-017-5176

ERNEST OSBORN d/b/a
YANKEE DEVELOPMENT CORP.,
Plaintiff and Counterclaim
Defendant

v.

**DECISION AND ORDER ON
MOTION FOR ATTACHMENT**

PHILIP SULLIVAN and CHERYL
SULLIVAN,
Defendants and Counterclaim
Plaintiffs

JUL 25 2005

I. STATUS OF CASE

This case is before the court on a Motion for Attachment by Paul and Cheryl Sullivan on their counterclaim against plaintiff.¹ The court has reviewed the pleadings and submissions and heard counsel at oral argument.

II. BACKGROUND

Ernest Osborn, entered into a contract during the spring of 2003 with Philip and Cheryl Sullivan to build a cottage for the defendants on Frye Island. Plaintiff claims that he performed 98% of the work and furnished all the necessary materials on or before September 15, 2004, and that the defendants still owe him \$30, 927.62.

The Sullivans barred plaintiff from the construction site by a letter dated September 29, 2004 because the house was not finished.

The defendants filed a counterclaim against Osborn alleging: (I) breach of contract; (II) breach of the Maine Home Construction Contracts Act, 10 M.R.S.A. § 1486, *et seq.*; (III) fraud; and (IV) negligence. According to the defendants the cottage was not

¹ The Sullivans also filed a Motion to Dismiss the complaint that has been withdrawn by counsel in light of the amended complaint filed by Osborn.

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done by the contractually specified deadlines, they had to hire another contractor, and they had to pay the sub-contractors that Osborn did not; in effect paying twice for some work.

The Sullivans claim that fixing all the things Osborne did not do will result in an additional cost of \$39,781. Additionally, the Sullivans claim lost rental income in the amount of \$15,000. The defendants filed a motion for attachment in the amount of \$57,000.

The parties disagree as to how much money will be required to complete the contract. The Sullivans claim it will be more than \$39,000 and have found a contractor who will do it for approximately \$46,000.²

Osborne claims that the remaining work can be done for approximately \$6,000³ and that he also completed work that was not included in the contract. He also alleges that it was the Sullivans who first breached the contract in the fall of 2003 when only one-third of the contractually scheduled payment was paid to Osborn. Osborn also claims that if the Sullivans did not breach the contract in 2003, then the contract was definitely breached when the Sullivans kicked him off the worksite in September 2004, well after the agreed-to date of completion. Osborn also disputes the claim for lost rental income as he was told this was only going to be a family vacation home⁴ and that loss of rental income is not a foreseeable damage item.

III. DISCUSSION

A party seeking an attachment must demonstrate that it will "more likely than not ,

² See affidavit of Anthony Torra dated April 19, 2005.

³ Affidavit of Ernest C. Osborn dated April 4, 2005, exhibit A attached.

⁴ Affidavit of Ernest C. Osborn dated April 4, 2005, ¶ 8.

... recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance" available. M.R.Civ.P. 4A(c). Under this standard, the "moving party must show a greater than 50% chance of prevailing." M.R.Civ.P. 4A, Advisory Committee's Note, Feb. 15, 1992, amendment. The court must find that the moving party will succeed by a preponderance of the evidence. *Jacques v. Brown*, 609 A.2d 290, 292, n.3 (Me 1992), *see also Wilson v. DelPapa*, 634 A.2d 1252, 1254 (Me. 1993) (trial court assigns weight to evidence in affidavits to determine plaintiff's likelihood of success). M.R.Civ.P. 4A(c) requires that parties seeking an attachment show not only that they are reasonably likely to recover a judgment from the defendant, but also that they are reasonably likely to recover a judgment in an amount at least equaling the amount of the requested attachment. *Jacques*, 609 A.2d at 292, n.3. *See Atlantic Heating Co., Inc. v. Lavin*, 572 A.2d 478, 479 (Me. 1990) (affidavits lacking specific facts are inadequate to support attachment).

The court has examined the record and affidavits and finds, at best, that the evidence is in balance. It is not clear that the defendants / counterclaim plaintiffs are more likely than not to succeed on the merits.

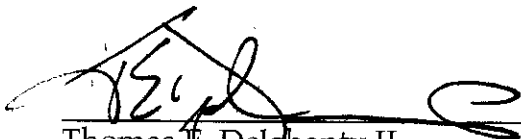
IV. ORDER

The clerk will make the following entry as the Decision and Order of the court:

1. Defendants' Motion to Dismiss is withdrawn, no Order is required.
2. Counterclaim plaintiffs' Motion for Attachment is denied.

SO ORDERED.

Dated: May 5, 2005


Thomas E. Delahanty II
Justice, Maine Superior Court

ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP - PLAINTIFF

SUPERIOR COURT

CUMBERLAND, ss.

Docket No PORSC-RE-2005-00004

Attorney for: ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT
CORPENCE SAWYER - RETAINED 01/11/2005
SAWYER SAWYER & MINOTT PA
PO BOX 1177
WINDHAM ME 04062

DOCKET RECORD

vs

PHILIP G SULLIVAN - DEFENDANT

Attorney for: PHILIP G SULLIVAN
DEBORAH MANN - RETAINED 02/09/2005
JENSEN BAIRD ET AL
10 FREE STREET
PO BOX 4510
PORTLAND ME 04112

Attorney for: PHILIP G SULLIVAN
MARCIA G CORRADINI - RETAINED 02/09/2005
JENSEN BAIRD ET AL
10 FREE STREET
PO BOX 4510
PORTLAND ME 04112

CHERYL A SULLIVAN - DEFENDANT

Attorney for: CHERYL A SULLIVAN
DEBORAH MANN - RETAINED 02/09/2005
JENSEN BAIRD ET AL
10 FREE STREET
PO BOX 4510
PORTLAND ME 04112

Attorney for: CHERYL A SULLIVAN
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Filing Document: COMPLAINT
Filing Date: 01/11/2005

Minor Case Type: MECHANICS LIENS

Docket Events:

01/11/2005 FILING DOCUMENT - COMPLAINT FILED ON 01/11/2005
SUMMARY SHEET FILED ON MARCH 11, 2005. AD

01/11/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
ATTORNEY - RETAINED ENTERED ON 01/11/2005
Plaintiff's Attorney: LAWRENCE SAWYER

01/12/2005 CERTIFY/NOTIFICATION - CLERK CERTIFICATE ISSUED ON 01/12/2005
COPY FILED

02/07/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - PROOF OF SERVICE FILED ON 02/07/2005

02/07/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - PROOF OF SERVICE SERVED ON 01/25/2005
UPON CHERYL A. SULLIVAN BY DELIVERING TO PHILIP SULLIVAN, HUSBAND AT 200 RED CEDAR STE 203
BLUFFTON SC 29910. (LJ)

02/07/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - PROOF OF SERVICE FILED ON 02/07/2005

02/07/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - PROOF OF SERVICE SERVED ON 01/25/2005
UPON PHILIP G SULLIVAN AT 200 RED CEDAR STE 203 BLUFFTON SC 29910. (LJ)

02/09/2005 Party(s): PHILIP G SULLIVAN, CHERYL A SULLIVAN
MOTION - MOTION TO DISMISS FILED ON 02/09/2005
OF DEFENDANT'S WITH PROPOSED ORDER . GM

02/09/2005 Party(s): PHILIP G SULLIVAN
ATTORNEY - RETAINED ENTERED ON 02/09/2005
Defendant's Attorney: DEBORAH MANN

Party(s): CHERYL A SULLIVAN
ATTORNEY - RETAINED ENTERED ON 02/09/2005
Defendant's Attorney: DEBORAH MANN

02/09/2005 Party(s): PHILIP G SULLIVAN
ATTORNEY - RETAINED ENTERED ON 02/09/2005
Defendant's Attorney: MARCIA G CORRADINI

Party(s): CHERYL A SULLIVAN
ATTORNEY - RETAINED ENTERED ON 02/09/2005
Defendant's Attorney: MARCIA G CORRADINI

02/11/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUPPLEMENTAL FILING - AMENDED COMPLAINT FILED ON 02/11/2005
OF PLAINTIFF (JBG).

02/16/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
MOTION - MOTION TO AMEND PLEADING FILED ON 02/16/2005
WITH MEMORANDUM OF LAW, DRAFT ORDER (GM)

02/16/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUPPLEMENTAL FILING - AMENDED COMPLAINT FILED ON 02/16/2005
WITH EXHIBIT A (GM)

02/18/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
MOTION - MOTION TO AMEND PLEADING GRANTED ON 02/17/2005
THOMAS E DELAHANTY II, JUSTICE
ANSWER TO BE FILED WITHIN 21 DAYS. 2-18-05 COPY MAILED TO LAWRENCE SAWYER ESQ AND MARCIA
CORRADINI ESQS

02/18/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
OTHER FILING - OPPOSING MEMORANDUM FILED ON 02/18/2005
PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS (GM)

03/02/2005 ASSIGNMENT - SINGLE JUDGE/JUSTICE ASSIGNED TO JUSTICE ON 03/02/2005
THOMAS E DELAHANTY II, JUSTICE

03/09/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - CIVIL SUMMONS FILED ON 03/09/2005

03/09/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - CIVIL SUMMONS SERVED ON 03/01/2005
UPON DEFENDANT CHERYL A. SULLIVAN. (LJ)

03/09/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - PROOF OF SERVICE FILED ON 03/09/2005

03/09/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
SUMMONS/SERVICE - PROOF OF SERVICE SERVED ON 03/01/2005
UPON DEFENDANT PHILIP G SULLIVAN. (LJ)

03/10/2005 Party(s): PHILIP G SULLIVAN, CHERYL A SULLIVAN
RESPONSIVE PLEADING - ANSWER TO AMENDED PLEADING FILED ON 03/10/2005
OF DEFENDANTS WITH COUNTERCLAIM (JBG). 3/11/05 SUMMARY
SHEET FOR COUNTERCLAIM FILED.

03/11/2005 ORDER - SCHEDULING ORDER ENTERED ON 03/11/2005
THOMAS E DELAHANTY II, JUSTICE
DISCOVERY DEADLINE IS NOVEMBER 11, 2005. ON 03-11-05 COPIES MAILED TO DEBORAH MANN, MARCIA
CORRADINI, LAWRENCE SAWYER, ESQS.

03/11/2005 DISCOVERY FILING - DISCOVERY DEADLINE ENTERED ON 11/11/2005

03/14/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
RESPONSIVE PLEADING - REPLY/ANSWER TO COUNTERCLAIM FILED ON 03/14/2005
OF PLAINTIFF ERNEST OSBORN. (LJ)

03/17/2005 Party(s): PHILIP G SULLIVAN, CHERYL A SULLIVAN
MOTION - MODIFY ATTACH/TRUSTEE PROCESS FILED ON 03/17/2005
COUNTERCLAIM PLAINTIFFS, PHILIP G. SULLIVAN AND CHERYL A. SULLIVAN MOTION FOR ATTACHMENT
INCLUDING TRUSTEE PROCESS AND MEMORANDUM OF LAW IN SUPPORT; AFFIDAVIT OF PHILIP SULLIVAN
WITH EXHIBITS A AND B; REQUEST FOR HEARING ON MOTION; ATTORNEY'S CERTIFICATE OF MARCIA
CORRADINI. AD

04/07/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
OTHER FILING - OPPOSING MEMORANDUM FILED ON 04/07/2005
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR ATTACHMENT AND TRUSTEE PROCESS. (LH)

04/07/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP
OTHER FILING - AFFIDAVIT FILED ON 04/07/2005
AFFIDAVIT OF ERNEST C OSBORN WITH EXHIBIT A AND B. (LH)

04/25/2005 Party(s): ERNEST OSBORNE D/B/A YANKEE DEVELOPMENT CORP, PHILIP G SULLIVAN, CHERYL A SULLIVAN
ADR - NOTICE OF ADR PROCESS/NEUTRAL FILED ON 04/25/2005
ADR CONFERENCE SCHEDULED FOR THURSDAY JULY 7, 2005 @ 10:00 AM. (LH)

04/25/2005 Party(s): PHILIP G SULLIVAN, CHERYL A SULLIVAN
OTHER FILING - AFFIDAVIT FILED ON 04/25/2005
OF ANTHONY TORRA WITH EXHIBIT A. AD

05/05/2005 Party(s): PHILIP G SULLIVAN, CHERYL A SULLIVAN
MOTION - MOTION TO DISMISS WITHDRAWN ON 05/05/2005
THOMAS E DELAHANTY II, JUSTICE
MOTION WITHDRAWN BY COUNSEL IN LIGHT OF AMENDED COMPLAINT. ON 05-05-05 COPIES MAILED TO
RONALD SCHNEIDER, JOHN PATERSON AND PETER THOMPSON, ESQS. AD

05/05/2005 Party(s): PHILIP G SULLIVAN, CHERYL A SULLIVAN
MOTION - MODIFY ATTACH/TRUSTEE PROCESS DENIED ON 05/05/2005
THOMAS E DELAHANTY II, JUSTICE
THE CLERK WILL MAKE THE FOLLOWING ENTRY AS THE DECISION AND ORDER OF THE COURT. 1.
DEFENDANTS' MOTION TO DISMISS IS WITHDRAWN, NO ORDER IS REQUIRED. 2. COUNTERCLAIM
PLAINTIFFS' MOTION FOR ATTACHMENT IS DENIED. ON 05-05-05 COPIES MAILED TO RONALD
SCHNEIDER, JOHN PATERSON AND PETER THOMPSON, ESQS. AD MS. DEBORAH FIRESTONE, GOSS
MIMEOGRAPH, THE DONALD GARBRECHT LAW LIBRARY AND LOISLAW.COM, INC. AD

A TRUE COPY

ATTEST:


Clerk