

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE / MECHANICS LIEN SECTION**

CODA, LLC,)	
)	
Plaintiff,)	
v.)	
)	
CATHERINE WESSELINK; CATHERINE E. WESSELINK LIVING TRUST 6/1/2001,)	
)	
Defendants.)	No. 2007 L 02388 (Transferred to Chancery)
)	
<hr style="width: 40%; margin-left: 0;"/>)	
CATHERINE WESSELINK; WESSELINK LIVING TRUST 6/15/94; CATHERINE E. WESSELINK LIVING TRUST 6/1/2001,)	Honorable Thomas R. Mulroy
)	
Counter-Plaintiffs,)	
)	
v.)	
)	
CODA, LLC,)	
)	
Counter-Defendant.)	

OPINION AND JUDGMENT ORDER

This case demonstrates the problems that can arise between an architect and its client in the sensitive project of designing a new home. The case came to trial because Plaintiff, the architect, and Defendant, its client, could not agree on the plans for Defendant’s home. Disputes like this one are common in Plaintiff’s industry, and satisfying the customer is part of the architect’s job. While it is the client’s responsibility to be reasonable and cooperative in the approval of the plans, ultimately, the client must be happy with the designs and should not have to settle for a design that she does not like.

Although Plaintiff had many contractual obligations, the key component was to provide Defendant with an acceptable plan for the design of her new home. The evidence showed that

Defendant worked with Plaintiff to communicate her ideas and desires for her new home but did not approve the plans Plaintiff presented. Defendant gave Plaintiff the contractually required notice of termination and engaged another architect, who was able to present a home design that Defendant approved almost immediately. Defendant did not breach the parties' contract.

When Defendant refused to pay a \$7,500 invoice she received from Plaintiff, Plaintiff recorded a mechanic's lien on the Property for \$57,000 on November 16, 2006. (Joint Trial Exhibits V. I Ex. J4) Plaintiff claims that Defendant owes it damages for breaching the parties' contract when Defendant terminated Plaintiff. The contract has a liquidated damages clause that, if enforceable, would permit Plaintiff to recover its full 18% contractual fee as though it had completed plans acceptable to Defendant and had successfully and properly supervised construction of the home it designed.

Following trial and pursuant to Section 7 of the Illinois Mechanics Lien Act ("IMLA"), Plaintiff amended its lien to increase the amount to \$70,450. *See* Ex. C to Second Amended Complaint; *see also* 770 ILL. COMP. STAT. 60/7 (2010) ("Such claim for lien . . . as to such owner may be amended at any time before the final judgment.") Plaintiff recorded the amended lien on November 3, 2009 with the Cook County Recorder of Deeds. Plaintiff calculates the amount of its mechanic's lien by multiplying the \$695,000 ultimate construction cost of the home by a compensatory fee of 11%, for a total of \$76,450. Plaintiff received a total of \$6,000 in prior project payments (Joint Trial Exhibits V. I Ex. D4; V. II Ex. P13, P23; R. 304:7-19; 306:10-308:15), which it credits to Defendant.

Count I of the Second Amended Complaint is for foreclosure of this lien. Plaintiff's Count II, for breach of contract, seeks liquidated damages of \$119,100 (18% of the \$695,000

construction cost minus payments) or, in the alternative, an unpaid 11% professional fee of \$70,450, increased by prejudgment interest and court costs.

This cause is now before the Court for ruling on Counts I and II of the Second Amended Complaint and Count III of the Amended Counter-Complaint. Count III of the Amended Counter-Complaint seeks attorney's fees and costs pursuant to Section 17 of the IMLA (770 ILL. COMP. STAT. 60/17 (2010)). The Amended Counter-Complaint had three other counts, seeking relief under the Architecture Practice Act, the Consumer Fraud and Deceptive Business Practices Act, and for Breach of Contract, which are not before the Court. For the reasons stated below, the Court finds for Defendants on Counts I and II of the Second Amended Complaint. The Court finds for Counter-Defendant on the attorney's fees portion of Count III of the Amended Counter-Complaint but awards Counter-Plaintiff its costs.

FINDINGS OF FACT

1. CODA ("Plaintiff"), an architectural firm, brought suit against Catherine Wesselink ("Defendant") and the Catherine E. Wesselink Living Trust 6/1/2001 ("Trust") for foreclosure of a mechanic's lien and breach of contract relating to services rendered by Plaintiff to Defendant in the design of Defendant's home at 1041 Blackthorn Lane, Northbrook, Illinois ("Property").

2. The Trust is the record owner of the Property.

3. Defendant is a co-trustee of the Trust with her father, David Wesselink ("David").

4. Defendant is also an owner of the Property by virtue of her status as the beneficiary for whom this real estate was originally purchased in 2000.

5. Plaintiff was to be both architect and construction manager of Defendant's project to construct a new single-family residence pursuant to the parties' contract.

6. Plaintiff agreed to provide Defendant with Plaintiff's architectural design and construction management services to build a two-story, colonial-style home of approximately 3,000 square feet with four bedrooms and 3 ½ bathrooms in place of an existing 1041 Blackthorn Lane residence.

7. Defendants agreed to pay Plaintiff an 18% percent professional fee for the project (Exhibit J1, p. 2), which was to be calculated from the actual final cost of the constructed new residence.

8. The parties' contract ("Contract") provided that Plaintiff's design proposals would be modified "based on (o)wner feedback" and that Plaintiff would "transmit design work . . . prior to meetings to expedite the review process." (Exhibit J1, p.1)

9. The Contract provides that Plaintiff's fee would be paid in exchange for Architectural and Construction Management Services.

10. Under the Contract, Plaintiff was to perform both design and build services. (Exhibit J1, pp. 1-2)

11. The "build services" included supervising construction, coordinating bids, reviewing subcontractor's contracts with owners, managing subcontractors, approving subcontractors' work and invoicing.

12. The Contract does not contain an allocation of compensation among the design, demolition and construction components of the Contract. The parties' agreement was for Plaintiff to perform all three functions for one fee.

13. The Contract provided for payment as follows:

The Owner shall pay CODA a total sum of 18% of the Construction Budget as compensation, Fees, for the Architectural and Construction Management Services. The Fees shall be payable in the following installments:

\$1,000.00 Retainer upon awarding of this Contract
\$5,000.00 of the Fees upon the approval of the Schematic Designs
\$6,500.00 of the Fees based upon the Construction Budget Upon Submitting for Permit
\$2,500.00 of the Fees Based upon the Construction Budget Upon Issuance of Permit
10% of the Fees upon the demolition of the existing home
10% of the Fees upon backfill of the foundation
40% of the Fees based upon the Construction Budget Upon completion of Rough Installation
Balance of the Fees Upon completion of the Project

(Exhibit J1, p. 2-3)

14. The Contract is Plaintiff's standard form contract, to which Defendant made no changes.

15. The "Termination of Contract" provision states as follows:

If CODA, LLC fails to perform the work as outlined above, Owner shall provide the CODA, LLC two weeks [sic] notice of cancellation of contract. If the CODA, LLC performs the work as outlined above, the cancellation of contract shall be void. If the contract is canceled due to CODA, LLC [sic] failure to perform services, Owner shall not be responsible for payment of any work not completed. If Owner elects to cancel contract without cause, Owner shall be responsible for compensating CODA, LLC in full to compensate for liquid damages. By executing this document, it is agreed upon that both parties provided information in the drafting of the terms of the contract.

(Exhibit J1, p. 3)

16. The term "without cause" is not defined in the Contract.

17. The term "liquid damages" is not defined in the Contract.

18. Defendant signed the contract on May 15, 2005.

19. The "whole point" of the schematic process was for Plaintiff to receive

Defendant's comments on each proposed design and continue to revise the proposed design until Defendant had approved it.

20. Plaintiff revised its designs repeatedly and submitted them to Defendant for her review. Defendant never gave her final approval to any of the plans Plaintiff submitted.

21. Scott Krone (“Krone”), CODA principal, testified that the \$350,000 proposed budget in the Contract was simply a proposed figure, and if the actual cost decreased, Plaintiff’s fee would decrease.

22. Krone testified that the term “liquid damages” means “expenses and overhead and costs” incurred on behalf of the project.

23. Plaintiff introduced no evidence of expenses, overhead, and costs incurred in excess of payments received by it.

24. Plaintiff worked on the house design and presented many ideas and drafts to Defendant, but Defendant did not approve any of them.

25. For example, at a meeting on March 15, 2006, Defendant advised Plaintiff of additional changes to the plans: (a) add another wall on the first floor of the home, (b) remove a center column in the garage and change the garage from two doors to one door, (c) switch a bathroom and a closet in the master bedroom, and (d) possibly change the Jack-and-Jill bathroom.

26. After many discussions and plans presented, in May 2006, Defendant asked Plaintiff for full-sized drawings so that she could have them reviewed by Posthumus, another architect whom she ultimately hired and who designed Defendant’s home.

27. On May 16, 2006, when Plaintiff learned that “another architect ... was involved specifically to address the front elevation and potential changes to the plan,” Plaintiff “immediately stopped working on the plans.” (Exhibit J11)

28. On May 15, 2006, one day before Plaintiff stopped working on the plans, Defendant had not approved Plaintiff's plans.

29. Defendant sent a \$5,000 payment to Plaintiff as the result of Plaintiff's invoice. The \$5,000 check does not contain any statement indicating Defendant approved the design. (Exhibit D4)

30. Plaintiff's \$5,000 invoice does not identify any particular schematic that was approved by Defendant. (Exhibit P23)

31. Although Plaintiff normally obtains its clients' written approval of design plans, it did not obtain written approval from Defendant.

32. Plaintiff never made any notation of Defendant's approval of its plans.

33. The parties understood that David, Defendant's father and the person who recommended Plaintiff to his daughter, was authorized to speak for Defendant, his daughter, with respect to the Contract. David and Plaintiff had a working relationship.

34. David participated in many meetings involving Defendant and Plaintiff.

35. Plaintiff copied David on numerous items of correspondence sent to Defendant.

36. Defendant hired Posthumus to draft a home design. She approved his design almost immediately.

37. The house designed by Posthumus was an entirely different house than the one Plaintiff designed.

38. In late September 2006, Plaintiff informed David that it would not build the house designed by Posthumus. In response, David notified Krone that Defendant would end their contractual relationship and that Defendant would send Plaintiff a letter confirming the termination.

39. Following the September conversation, on October 16, 2006, Defendant sent Plaintiff a “two weeks’ notice of termination of the parties’ Contract letter” confirming Plaintiff’s termination. (Exhibit J12)

40. Plaintiff spent 15 hours at the hourly rate of \$75.00 per hour, for a total value of \$1,125.00, in connection with the Posthumus design until Defendant terminated Plaintiff on October 16, 2006. (Joint Trial V. I Ex. D5 p. 2 ¶ 15) Plaintiff does not specifically seek compensation for this work.

41. Plaintiff made no attempt to cure under the terms of the contract.

42. The final cost for the home designed by Posthumus included furnishings and landscaping not included in the services and goods to be provided under Plaintiff’s Contract.

43. Defendant paid \$7,550 to Plaintiff. (Exhibit D4) This amount included a \$1,000 retainer, a \$5,000 progress payment, and \$1,550 for a topographical survey.

44. Plaintiff could not determine what its profits would have been had it completed the project. (T. 216:18-21)

45. Plaintiff expended a total of \$7,298.50 on Defendant’s project, excluding its legal fees related to this litigation. (Exhibit D8)

46. Plaintiff does not keep time records for services that it renders.

47. Plaintiff transmitted a September 26, 2006 invoice for \$7,500 by e-mail dated September 28, 2006, stating, “please find attached an invoice for the work that we complete(d) for the previous design.” (Exhibit J10)

48. Plaintiff’s \$7,500 invoice was “for work completed.” (Exhibit J5)

49. According to Plaintiff, the \$7,500 bill was for the balance of the work that Plaintiff had done to the point in time that Plaintiff was terminated. This bill was for time that

Plaintiff spent on the project and was not a payment due under the schedule contained in the Contract.

50. Krone testified that the \$7,500 invoice was issued because “we needed to be compensated for our time” and “we need to be compensated for what we’ve done.”

51. The Contract does not contain a \$7,500 “progress payment.”

52. Plaintiff alleged that it prepared construction budgets (Exhibit P3), prepared scope-of-work documents for subcontractors not hired (Exhibit D7), consulted with Catherine Wesselink regarding available options, components and fixtures (T. 176: 15-19), reviewed design work prepared by another architect (T. 237:21-238:3) and obtained a topographical survey. (Exhibit P13)

53. When Defendant refused to pay Plaintiff’s \$7,500 bill, Plaintiff recorded a lien against Defendant’s property in the amount of \$57,000, representing 18% of the entire proposed construction budget contained in the Contract, less \$6,000 previously paid ($\$350,000 \times .18 - \$6,000 = \$57,000$). (Exhibit J4)

54. Plaintiff thereafter recorded an amended claim for lien in the amount of \$70,450.

55. The \$70,450 increased lien amount is 11% of the \$695,000 actual construction cost, less \$6,000 in payments. Plaintiff determined that it was entitled to 11% because it allocated the 18% contract fee between the Design and Build phases of the Project, and Plaintiff felt that it had completed over 50% of the work on the Project. Plaintiff determined that an 11% fee corresponded with the work it had completed. The lien does not specifically account for the \$7,500 invoice, nor does Plaintiff seek this compensation apart from the percentage fee it claims is due.

CONCLUSIONS OF LAW

1. The central issue in this case was whether Catherine Wesselink properly terminated her contract with CODA. The Court evaluated and relied on the testimony of the witnesses. The Court found the testimony of Catherine Wesselink and David Wesselink highly credible.

Breach of Contract

2. Under its count for breach of contract, Plaintiff seeks either (1) \$119,100, which represents liquidated damages of 18% of the total construction cost of \$695,000 minus \$6,000 in payments, or alternatively, (2) \$70,450, which represents “compensatory damages” of 11% of the \$695,000 total construction cost minus \$6,000 in payments.

3. The parties’ contract provided that Defendant could cancel the contract without responsibility for any work not completed if (1) Plaintiff did not perform the work required of it by the contract, and (2) Defendant gave two weeks’ notice of the cancellation.

4. The Court finds that Defendant properly cancelled the contract and did not breach the contract.

5. Defendant did not breach the Contract when she terminated Plaintiff because she was dissatisfied with its service and design plans and because she had never approved the plans that Plaintiff presented to her. As required by the Contract for proper cancellation, CODA did not prepare designs that Defendant approved, and Defendant provided the required two weeks’ notice of cancellation.

6. Plaintiff waived any right it may have had under the Contract to cure by failing to attempt to do so after either the verbal notice of termination or after the written letter confirming that termination.

7. Since Defendant properly terminated Plaintiff's services and did not breach the contract, the Court need not rule of the validity of Plaintiff's contractual damage clause entitled "liquid damages."

8. In the absence of a breach by Defendant, Plaintiff was entitled only to be paid for the work that it had completed.

9. The Contract provided for periodic payments. When Defendant terminated Plaintiff, Plaintiff was preparing to submit for permit. Plaintiff had already received a \$1,000 retainer and \$5,000 progress payment despite Catherine's non-approval of the designs.

10. Plaintiff's claim for 11% of the total construction cost is based on its estimate that it had performed over 50% of the work required of it under the contract. However, the contract allocated payment based on stages of the work. The contract further provided a \$75.00 per hour fee for any agreed upon additional services or investigation of additional work. Plaintiff's argument that it is entitled to over 50% of its fee is in direct conflict with the clear contract language, which set forth the amount Plaintiff would receive following completion of certain stages of the work.

11. Plaintiff failed to prove that it had not been compensated for work performed in excess of payments that it previously received.

12. The Court finds for Defendant on Count II of the Second Amended Complaint.

Foreclosure of Mechanic's Lien

13. Plaintiff's amended mechanic's lien seeks \$70,450 plus statutory interest. The Court finds that the services Plaintiff provided were lienable, but Plaintiff failed to establish its right to 11% of the total construction cost as a "professional fee."

14. The Illinois Mechanic's Lien Act provides that "'improve' means . . . perform any services or incur any expense as an architect . . . for or on a lot or tract of land for any such purpose." 770 ILL. COMP. STAT. 60/1(b) (2010).

15. Plaintiff's services fall within the scope of work protected by the IMLA.

16. The Court has found that Defendant did not breach the parties' contract and that Plaintiff seeks compensation based on Plaintiff's estimated percentage of the fee that corresponds to completed work. As noted above, the Court finds that Plaintiff failed to carry its burden of proof as to the compensation that it claims is due. It failed to prove that it has not been compensated for the work it performed.

17. The Court finds for Defendant's on Plaintiff's Count I for foreclosure of mechanic's lien.

Section 17 Costs and Attorney's Fees

18. Defendant seeks costs and attorney's fees under Section 17 of the IMLA. She argues that despite knowing that it was entitled to no more than \$7,500 from Defendants, Plaintiff filed a lien for \$57,000. Defendant argues that Plaintiff's filing of a lien that it knew to be overstated was constructively fraudulent. Consequently, she argues, Plaintiff's action against her was brought without just cause or right, entitling her to attorney's fees and costs under Section 17 of the IMLA.

19. Section 17 of the IMLA provides, in relevant part, as follows:

(c) If the court specifically finds that a lien claimant has brought an action under this Act without just cause or right, the court may tax the claimant the reasonable attorney's fees of the owner who contracted to have the improvements made and defended the action, but not those of any other party.

(d) "Without just cause or right", as used in this Section, means a claim asserted by a lien claimant or a defense asserted by the owner who contracted to have the improvements made, which is not well grounded in fact and warranted by existing

law or a good faith argument for the extension, modification, or reversal of existing law.

770 ILL. COMP. STAT. 60/17(c), (d) (2010).

20. The overstated lien is not invalidated due to overstatement because there was no intent to defraud.

21. Section 7 of the IMLA provides, “No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefore under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud.” 770 ILL. COMP. STAT. 60/7 (2010).

22. Recent case law has clarified that “an express showing of an intent to defraud must be established by evidence in addition to and apart from an overstatement included in a lien.” *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood, LLC*, 387 Ill. App. 3d 906, 913 (1st Dist. 2009). Intent to defraud is required even under a constructive fraud theory. *Id.*

23. Defendant argues that Plaintiff filed a lien claim that was constructively fraudulent because it was in substantial excess of the value of the work actually performed. Plaintiff acknowledges that the amount of its lien was based on a percentage fee of the total construction cost of a home that it neither designed nor built.

24. The Court finds that the overcharge in Plaintiff’s lien was not made with intent to defraud. Defendant introduced no evidence of Plaintiff’s intent to defraud. Plaintiff made a good-faith claim that Defendant breached a contract with a valid liquidated damages provision, and the Court disagrees.

25. The Court finds that Plaintiff did not bring its action without just cause or right, and thus Defendant is not entitled to recover attorney’s fees.

26. Defendant is entitled to costs pursuant to Section 17 of the IMLA, which provides that “[t]he costs of proceedings as against all parties to the suit shall be taxed equitably against the losing party . . .” 770 ILL. COMP. STAT. 60/17(a) (2010). Because the Court found for Defendant on Plaintiff’s Count I for foreclosure of mechanic’s lien, Defendant is entitled to recover her costs from Plaintiff.

IT IS HEREBY ORDERED:

- (1) Judgment is entered in favor of Defendants on Count I of Plaintiff’s Second Amended Complaint for foreclosure of mechanic’s lien;
- (2) Judgment is entered in favor of Defendants on Count II of Plaintiff’s Second Amended Complaint for breach of contract;
- (3) Judgment is entered in favor of Counter-Defendant on Count III of Counter-Plaintiff’s Counter-Complaint for attorney’s fees pursuant to Section 17 of the Illinois Mechanic’s Lien Act;
- (4) Counter-Plaintiff is entitled to costs pursuant to Section 17 of the Illinois Mechanic’s Lien Act; and
- (5) Plaintiff’s mechanic’s lien on the Property shall be removed within four business days of the date of entry of this order.

ENTERED:

Date: February 16, 2010

Judge Thomas R. Mulroy