IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CARNES COMPANY, INC.,

Plaintiff,

OPINION AND ORDER

02-C-0208-C

v.

STONE CREEK MECHANICAL, INC.,

Defendant.

- -

Defendant Stone Creek Mechanical, Inc. has filed a motion for reconsideration of the order entered herein on July 18, 2003, in which I found it liable for damages to plaintiff Carnes Company, Inc. for its failure to pay plaintiff for energy recovery units it ordered from plaintiff. Defendant objects to both the findings of fact and the conclusions of law. In effect, it wants to re-argue the entire case.

Defendant asks the court to amend eight findings of fact set out in the July 18, 2003 order that it contends are erroneous. The request will be denied, with one minor exception, because the additional facts that defendant wants added are irrelevant to the decision. For example, it is not relevant to any dispute in the case that defendant submitted its purchase

order to plaintiff on March 1, 2001, as it contends.

Defendant wants the court to add the finding that plaintiff "accepted the purchase order on June 27, 2001 and was responsible for providing [defendant] with 50 energy recovery units for a total cost of $640,000." Br. in Supp. of Def.'s Motion to Amend, dkt. #92, at 7. Although I made both findings (in the July 18 opinion and order, I found that "plaintiff accepted defendant's purchase order for 50 units by letter dated June 27, 2001," Dkt. #85, at 2 and in the December 13, 2002 order on defendant's motion for partial summary judgment, I concluded that when plaintiff accepted defendant's offer, it made itself responsible for providing 50 energy recovery units for a total cost of $640,000), neither finding is particularly relevant in light of defendant's actions in taking over Chase & Associates' portion of the contract and defendant's subsequent modification of the parties' agreement.

Defendant proposes as an additional fact that plaintiff delegated certain duties to Chase & Associates. This is undisputed; I concluded in December that this was the effect of the purchase agreement that plaintiff accepted. Again, however, defendant rendered the delegation irrelevant when it took over the performance of the duties.

Defendant goes on to propose that plaintiff "knew prior to accepting [defendant's] purchase order that Chase could not perform the work [plaintiff] had delegated to it for the dollar amount assigned." Br., dkt. #92, at 7. I did not find this as a fact because the record

does not support it. Plaintiff's officers testified that they did not know whether Chase could perform the work; Thomas James testified that he was aware that certain items required under the purchase order were going to cost more than the assignment amount but that he did not know what agreements were in place between Chase and plaintiff. It is not surprising that plaintiff did not have this knowledge; its officers had no impetus to inform themselves about the prices Chase was going to charge. They believed at the time that plaintiff's only responsibility was to perform its portion of the purchase order, leaving Chase's performance a matter for it and defendant to work out. They did not know that the court would reach a different conclusion about the legal effect of the parties' agreement.

Even if defendant could prove that plaintiff knew Chase could not perform the delegated work, the relevance of this knowledge is questionable. Plaintiff undertook to provide 50 energy recovery units for $640,000; it continued to ship the units until defendant failed to pay for the units it had received. At no time before plaintiff shipped the last units did defendant ever say that it would hold plaintiff responsible for payment of the excess costs it had incurred because of Chase's failures. Worth mentioned to plaintiff's representative, Barry Surkin, on October 22, 2001, that he was concerned about the costs for the items assigned to Chase and that he would have sued Chase if he could have. He said nothing about looking to plaintiff to pay those costs.

It is the case that plaintiff knew at some point after accepting defendant's purchase

order that Chase was not performing properly. Thomas James wrote Chase on July 13, 2001, to warn Chase that it would be held responsible for field installation if it failed to provide the coils for the energy recovery units materials in time for them to be installed at the factory. Again, this is immaterial to the question of defendant's obligation to pay plaintiff for the units it shipped to defendant.

Defendant proposes as a fact that plaintiff never gave notice to defendant that it was questionable whether Chase could perform the duties delegated to it for $113,000. This is true but irrelevant. Defendant was working with Chase before plaintiff entered the picture; defendant was taking responsibility for ordering items for which Chase was nominally responsible before plaintiff had accepted defendant's purchase order. If anyone knew that Chase could not perform its duties for $113,000, it was defendant. Why would plaintiff have given notice to defendant of something it knew?

Defendant has no evidence to support its proposed facts that Worth ordered curbs for the energy recovery units at the direction of Chase & Associates and assisted in obtaining coils at plaintiff's request. The evidence does support the fact that plaintiff (through James) asked Worth for help in "improving the coil ship date," but none to support defendant's proposals.

Defendant asks the court to include a finding that defendant advised plaintiff about its "problems" with Chase before October 31, 2001, but there is no evidence to support a

finding that defendant advised plaintiff about any problems other than those associated with Chase's billing. Defendant wrote Chase on September 23, 2001, to advise it that its billings for materials would exceed $113,000 and sent a copy of this letter to plaintiff. On October 18, 2001, Worth told Barry Surkin (plaintiff's representative) that the costs for the items assigned to Chase were reaching $325,000.

Defendant notes an error in the findings in the July 18 order, when I wrote that Gregory Cichon could not understand how Worth would have known how to spell his name before allegedly sending a fax to him on July 9, 2001. Cichon might not have understood this but in fact defendant had received a letter dated June 29, 2001, that referred to Cichon. This finding should be deleted from the July 18 order. Its deletion makes no difference to the outcome of the case.

Finally, defendant asks the court to find as fact that defendant submitted invoices from subcontractors and suppliers and cancelled checks in support of its request for damages. It is true that defendant did submit some checks that appeared to have been cashed. However, most of the checks it submitted were not cancelled. It is also true that defendant submitted invoices. Again, however, it is impossible to determine the accuracy of those invoices or defendant's liability for the amounts billed. Worth admitted in his testimony that the actual payments he made and the amounts for which he considers himself responsible do not correspond to the amounts billed. Trial Tr., dkt. #76, page 3-36 to 3-44.

Moreover, it is irrelevant how much defendant paid for items it ordered on behalf of Chase. Until defendant had reason to believe that plaintiff had breached the contract, defendant was not authorized to "cover" for plaintiff. When it ordered items that Chase should have been providing, it had no reason to think that plaintiff was obligated to reimburse it for any costs it incurred that exceeded the $113,000 allocated to Chase under the purchase order.

Because I have addressed the issues in the July 18 order that defendant wishes to reargue and I am not persuaded that the conclusions I reached were wrong, I will not discuss defendant's arguments in support of its motion for reconsideration. (Given the parties' history, it is likely that defendant will appeal this case. For the benefit of the court of appeals in tracing the course of conduct between the parties, I am attaching a time line to this order.) I will turn to plaintiff's request for an award of attorney fees and costs.

In compliance with this court's directive, plaintiff filed an itemized statement of the attorney fees and costs it incurred in this litigation, together with a statement of interest defendant owed it on unpaid invoices for the sale of energy recovery units. Defendant does not dispute the amount of interest claimed but takes issue with the amount of attorney fees for which plaintiff is seeking reimbursement.

Defendant's primary argument is that plaintiff is entitled only to fees incurred in collecting the money due it on its invoices. Defendant objects to any award of fees for work done in responding to defendant's November 6, 2001 letter setting forth the reasons it

believed plaintiff had breached the contract between the parties, for the conference between counsel regarding the return of controls and other equipment that defendant had purchased and plaintiff had refused to return, for plaintiff's efforts to file a claim against defendant's bond, for plaintiff's defense of an action filed against plaintiff by defendant in the Eastern District of Pennsylvania or for its defense of defendant's counterclaim in this action and for any work performed in connection with the improper appeal it filed in this case. Also, defendant contends that the fees sought are not reasonable and that plaintiff is not entitled to reimbursement for "fees" for work that was clerical in nature.

Paragraph 4 of the terms and conditions set out on plaintiff's invoices provides that "Buyer shall reimburse Seller, upon demand, for any costs of collection incurred by Seller, including reasonable attorneys' fees." Defendant is correct when it asserts that this language is to be construed to cover collection costs only. However, defendant's idea of "collection costs" is unduly restrictive. Defendant would confine it to the cost of collecting the money due on the invoices, which defendant says consisted of little more than identifying its invoices at trial and the supporting business records for the invoices. One might think from this argument that defendant had never refused to pay the invoices or taken the position that it was entitled to setoffs against the money due plaintiff for costs it had incurred because of plaintiff's alleged breach of the contract.

I agree with defendant that plaintiff cannot recover the cost of obtaining a ruling that

defendant must pay for units ordered that were never shipped or for materials plaintiff purchased to fulfill its contract with defendant that it was unable to use because of defendant's breach. The "costs of collection" referred to on the invoices covers only the costs of collecting the amount of the invoices. However, "collecting" the amount of the invoices includes efforts to collect from defendant's bond, defending against defendant's counterclaim for breach of contract and litigating the affirmative defenses that defendant asserted to defeat plaintiff's claim to the money due on the invoices. They are not auxiliary claims unrelated to collection.

Defendant relies on two cases involving the purchase of securities, Jackson v. Oppenheim, 533 F.2d 826, 831 (2d Cir. 1976), and Kaiser v. Olson, 105 Ill. App. 3d 1008, 1016, 435 N.E.2d 113 (Ct. App. 1981). In Jackson, the Court of Appeals for the Second Circuit held that a seller of securities could recover the costs of collecting on a promissory note securing the purchase but not the costs of defending against the buyer's counterclaim challenging the legitimacy of the securities sale. The court was reluctant to read the note broadly enough to cover the costs of defending the security law claim in light of the unsettled nature of New York law on that point and the general "American rule" against awarding fees against a losing party. In its view, the language "costs of collection" was not express enough to have placed the buyer on notice that he would have to indemnify the buyer for the costs incurred in defending "a separate claim regarding validity of the underlying sale transaction

under the federal securities law." Jackson, 533 F.2d at 831. Kaiser is similar to Jackson. It too involved a purchase agreement for stock. The sellers sued to collect the amount due on the sale; the purchasers counterclaimed for rescission of the purchase agreement on the ground that the sellers had not registered the securities or obtained an exemption from registration. The trial court found for the sellers in all respects and awarded them attorney fees for all the time spent defending against the counterclaim as well as collecting the amount due on the sale. The appellate court upheld the trial court on the merits but overturned its decision on attorney fees, finding that when the parties contracted, their intention was that "the language 'all costs of collection * * * in collecting this note' meant the ordinary costs of collection which would be incurred merely by the nonpayment of the note." Kaiser, 435 N.E.2d at 1016. "The standard to be applied is that of 'reasonable expectations;" that meaning that a reasonably intelligent person acquainted with the operative usages of the word the operative usages of the words and knowing all the circumstances would give them." Id. (citing 4 Williston on Contracts, § 603 at 342, 344 (3d ed. 1961)).

Courts seem to take a different approach in cases not involving securities. In Kruse v. Kuntz, 288 Ill. App. 3d 431, 683 N.E.2d 1185 (1996), the Illinois Supreme Court awarded attorney fees to an auctioneer that had received a check for the winning bid for farm equipment, only to have the check bounce. The purchaser signed a written statement, promising to pay the full amount by a certain date, plus attorney fees. When he failed to

meet the deadline, the auctioneer sued; the purchaser counterclaimed for rescission of the contract and filed a third-party claim against his bank. The court held that the auctioneer could recover attorney fees incurred in defending against the counterclaim because the claim was "necessitated" by the purchaser's actions to avoid his contractual actions. Id. at 436, 683 N.E.2d at1189. In Harter v. Iowa Grain Co., 220 F.3d 544 (7th Cir. 2000), an arbitration dispute, the plaintiff sued The Andersons, a corporation that owned grain elevators, alleging that defendant had sold "hedge-to-arrive" contracts illegally. The contracts provided for arbitration; the matter went to arbitration; and plaintiff was ordered to pay contract damages as well as attorney fees. The court of appeals upheld the arbitration award and the district court's award of attorney fees incurred for proceedings following the arbitration, finding that although the Federal Arbitration Act does not provide for attorney fees, the contractual agreement between the parties did. It included language providing that the seller of the contract [plaintiff] would "be liable for The Andersons' attorney fees, cost of collection, plus interest." Id. at 558. The court viewed defending against a motion to vacate an arbitration award as a cost of collection. Neither in Harter nor in Kruse did the courts discuss the expectations of the parties; presumably the courts thought the contract language was sufficient to put the debtors on notice that they would have to absorb the costs of litigating their liability to their creditors.

The Court of Appeals for the Eighth Circuit has held that when "note provisions allow

a creditor to charge a debtor for the costs of collection, including attorney fees, such fees may include all costs attributable to collecting the debt." Duryea v. Third Northwestern National Bank, 606 F.2d 823, 826 (8th Cir. 1976) (upholding award of fees for defending against suit brought to prevent collection of note on ground that defending against suit is no different from defending against counterclaim asserted in suit to collect debt). Again, the court did not discuss the reasonable expectations of the contracting parties but seemed to assume that they would have read "costs of collection" as covering costs incurred in defending against allegations that the underlying agreement was invalid.

Defendant has not cited any Wisconsin case that would bar an award of attorney fees incurred by a creditor that has succeeded in fighting off various affirmative defenses and defending against a counterclaim in order to prevail on its claim for money due under a contract. It cites Borchardt v. Wilk, 156 Wis. 2d 420, 456 N.W.2d 653 (Ct. App. 1990), but the question in that case was whether debtors who prevailed on a counterclaim for fraud and misrepresentation were relieved of their obligation to pay attorney fees incurred by the note holder in suing debtors and recovering almost $9,500 plus $6,000 in fees. Finding the attorney fee provision ambiguous, the court of appeals reduced the amount of attorney fees payable to the note holder in proportion to the amount recovered on the note less the amount recovered on the counterclaim.

In this case, defendant made unconscionable efforts to frustrate plaintiff's efforts to

collect its debt, including preparing fraudulent documents. Defendant brought suit against plaintiff in Pennsylvania in what was clearly an attempt at preempting any attempts by plaintiff to collect its debt through the courts. It persisted in using the fraudulent documents in trial in this court and asserting unmeritorious counterclaims against plaintiff.

After reviewing the itemization of fees, I am prepared to award plaintiff all of the fees charged by Haley Palmersheim for its work on the suit in this court. The itemization reveals that counsel spent the equivalent of eleven weeks (442 hours) on this case. Although this is a considerable amount of time, I cannot say that it was not required by the vigorous defense of defendant's position that it owed plaintiff no money. Defendant's counsel filed extensive briefs and gave no quarter at any point in the litigation in this court. Defeating defendant was far more difficult than pursuing a "simple collection case," as defendant likes to characterize the matter. The hours that the Haley Palmersheim lawyers expended seem reasonable in relation to the difficulty of the task. Their rates per hour are comparable to the rates charged by other lawyers in the Madison area for work of similar difficulty.

It is appropriate to award plaintiff the fees expended by Fox Rothschild in defending against defendant's preemptive strike in Pennsylvania. Plaintiff would have been unable to collect from defendant had it not been able to defeat defendant's claims that plaintiff's wrongdoing relieved defendant of any obligation to pay plaintiff. The hours spent are reasonable and the rates seem reasonable for the Philadelphia area.

As for the fees charged by Sweeney & Sweeney, however, I have some concerns. It appears that the firm has charged for clerical work. For example, it has itemized such work as "hand deliver to post office for mailing certified mail" and "put together research file in redrope folder." Also, it appears that the firm has included time relating to the futile appeal of the grant of defendant's motion for partial summary judgment and time related to the negotiation of the return of certain controls. I will give Sweeney & Sweeney one week in which to delete from its request (1) any work of a clerical nature; (2) any time relating to the appeal of the order granting defendant's motion for partial summary judgment; and (3) any time devoted to negotiating the return of the controls. In addition, I do not believe that defendant should have to reimburse time spent by Sweeney & Sweeney in helping Haley Palmersheim's lawyers become familiar with the case, so I will direct the firm to delete all time spent in that endeavor.

Defendant has not objected to any of the costs sought by plaintiff, making it unnecessary to review them.

ORDER

IT IS ORDERED that defendant Stone Creek Mechanical, Inc.'s motion for reconsideration of the order entered on July 18, 2003, is DENIED. The July 18 order is amended to delete the sentence on page 12, beginning "He cannot" and ending "before July

9." In all other respects it remains as written. Plaintiff Carnes Company's request for an award of attorney fees incurred in the collection of money owed it for energy recovery units is GRANTED, with the final amount to be determined after Sweeney & Sweeney has submitted its revised itemization of costs and Haley Palmersheim has submitted an itemization of the fees and costs incurred since it filed its original itemization on August 1, 2003. Counsel may have until December 15, 2003, to file and serve their submissions.

Entered this 4th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge

CARNES COMPANY, INC. v. STONE CREEK MECHANICAL, INC.

TIME LINE

- May 2000 - Defendant awarded contract for heating, ventilation and air conditioning of three schools.
- May 2000 - June 27, 2001 - Defendant learns that Chase & Associates cannot supply Venmar energy recovery units; begins negotiations with plaintiff to provide units and schedule for production.
- June 20, 2001 - Plaintiff sends Chase its final production sequence for forwarding to defendant, showing July 31 as the start of production for the first four units.
- Sometime before June 27, 2001, Worth orders all curbs that plaintiff will need for manufacture of units. (Under the purchase agreement, Chase was responsible for curbs.)
- June 27, 2001 - Plaintiff accepts defendant's purchase order for 50 units and sends acceptance to defendant, noting that it would provide the units and assign the rest of the purchase order to Chase.
- June 28, 2001 - Worth calls plaintiff to ask for expedited production of ten units in addition to nine units plaintiff had scheduled for delivery by August 24, 2001. Plaintiff agrees.
- Late June and July 2001 - Worth ordering coils and variable frequency fans that had been Chase's responsibility and working to expedite delivery.
- July 10, 2001 - Worth calls plaintiff to express appreciation to plaintiff for its performance and to promise he will have half the coils at the plant by mid-July and the rest by the end of July.
- July 16, 2001 - Worth returns June 27, 2001 acceptance to plaintiff with his signed acknowledgment, after deleting amounts allocated to plaintiff and to Chase and deleting one paragraph of the acceptance.
- July 25, 2001 - Cichon writes Worth to advise him that if plaintiff did not receive coils by July 27, plaintiff would halt production on defendant's units.
- August 2, 2001 - Cichon writes to Worth again, repeating the need for the prompt delivery of the coils.
- August 4, 2001 - First coils delivered to plaintiff.
- August 21, 2001 - Plaintiff ships first units to defendant.
- August 22, 2001 - Plaintiff sends invoice for first units; terms of payment net 30 days.

- September 13, 2001 - Worth calls plaintiff to say that defendant would not send any payment for units until he had received "as built" submittals from plaintiff. He told plaintiff to send the submittals to Chase and not to him. Plaintiff sends out submittals to Worth, Chase and Barry Surkin that day by overnight mail.
- September 14, 2001 - UPS delivers submittals to Worth.
- September 18, 2001 - Worth calls plaintiff's accounts payable supervisor, to say that he will not pay plaintiff until he receives submittals.
- September 2001 - Chase starts submitting bills to defendant that exceed $113,000.
- September 2001 - Throughout month, Cichon and Worth speak about remaining units on various occasions. Worth expresses no dissatisfaction to plaintiff about quality of units or timeliness of shipments.
- October 2, 2001 - Having received no payment from defendant on any invoices, Cichon tells Worth that plaintiff will stop production if defendant does not send payments. Worth tells Cichon he will send two checks on October and checks for the next two invoices the following week and continuing until all payments are current.
- Shortly after October 2 - Worth sends plaintiff checks of approximately $64,695 in payment of August 21 and August 27 invoices.
- October 12, 2001 - No payment received from defendant for third and fourth invoices as promised.
- October 18, 2001 - Plaintiff advises defendant it is "on hold" for future shipments for failure to make payments.
- October 19, 2001 - Worth calls head of plaintiff's credit department, threatening to cancel order and saying that he had sent two checks just to be nice but had no obligation to pay another two invoices.
- October 22, 2001 - Worth calls plaintiff to say that he is meeting with Barry Surkin and wants to resolve all billing and cost issues before paying anything. Worth tells Surkin about his concern that the costs for the items assigned to Chase were reaching $325,000.
- Between October 22 and October 25, 2001 - Cichon calls school district to say that it had been shipping products to defendant for which defendant was not paying and that it has put defendant on a shipping hold and will soon be putting it on a production hold.
- One day after call to school district - Worth calls Cichon to say that he is going to pay plaintiff, that he has no problems with plaintiff and will pay according to plaintiff's terms in 30 days on all future invoices.
- October 25, 2001 - Cichon writes Worth, summarizing their telephone conversation. On the same day, Worth writes plaintiff, agreeing to issue payment for two invoices

in exchange for plaintiff's expedited production of energy recovery unit #2 and to accept additional expediting costs of $1,367.00 to insure shipment of the unit on or before November 5, 2001. He states that plaintiff's submittals will be approved on October 29, 2001, resulting in the release for payment of any invoices over 30 days, old and he promises that he will send payment for those invoices on or before November 17, 2001 and for all future invoices 30 days net.

- October 26 to November 11, 2001 - Worth supposedly out of country.
- Between October 26 and November 11, 2001 - Plaintiff removes the shipping hold and expedites production of four units that it ships to defendant.
- Before November 11, 2001 - Worth writes to plaintiff's parent company, saying that defendant will send no further payments to plaintiff "as a result of the actions noted above." He supports the letter with documents purportedly sent to plaintiff at various times during the summer.