

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MICHIGAN FENCE & SUPPLY COMPANY,

Plaintiff,

vs.

Case No. 2013-4498-CK

B&B CONSTRUCTION SERVICES, LLC,

Defendant.

OPINION AND ORDER

Defendant B&B Construction Services, LLC has filed a motion for attorney fees and costs pursuant to MCR 2.405 and for entry of judgment in the amount of \$64,412.97. Plaintiff Michigan Fence & Supply Company has filed a response and requests that the motion be denied.

Facts and Procedural History

Defendant is a general contractor. On March 2, 2011, Defendant submitted a bid to the Michigan Department of Transportation (“MDOT”) in connection with a construction project involving renovations to the Rosa L. Parks Bus Station in Detroit, MI (the “Project”). Once it obtained the Project one of Defendant’s employees, Mike Skomial, contacted Plaintiff’s estimator, Rob Roberts, and asked Plaintiff to submit a bid for some subcontractor work on the Project. Mr. Roberts and Mr. Skomial then reviewed the plans and specifications for the Project.

On March 17, 2011, Plaintiff submitted a bid to Defendant for the subcontract work and was later awarded the subcontract (the “Subcontract”). After beginning work on the Project, Plaintiff requested a change order. While the parties agree that the change order was sought to cover the installation of an interior gate, Defendant contends that the change order was sought to cover the expense of 1 of 4 gates while Plaintiff contends that the change order was sought to

cover the expense of 1 of 5 gates. Defendant allegedly sought approval for the change order from the project architect, the owner of the property and the Facilities Administration Director; however, the request was denied. Defendant did not take any additional action(s) to have the change order approved, such as litigation. Despite its request being denied and Defendant's refusal to pursue litigation on the issue, Plaintiff ultimately installed the gate in question.

On November 8, 2013, Plaintiff filed its complaint in this matter seeking to recover the cost of installing the gate in question. Specifically, Plaintiff's complaint includes claims for: Breach of Contract (Count I), Breach of Duty of Good Faith and Fair Dealing (Count II), Breach of Fiduciary Duty (Count III), and Account Stated (Count IV).

On April 2, 2014, Defendant filed its motion for summary disposition. On May 9, 2014, the Court granted Defendant's motion. On June 18, 2014, Defendant filed its instant motion for attorney fees and costs. Plaintiff has filed a response and requests that the request be denied.

Arguments and Analysis

Defendant's requested relief is sought pursuant to MCR 2.405(D)(1). MCR 2.405(D)(1) provides:

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1) If the adjusted verdict is more favorable to the offeree than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

In this case, Defendant contends that it offered to settle this matter for \$71,821.33, but that its offer was rejected. Further, pursuant to the May 9, 2014 Opinion and Order Plaintiff was only awarded \$70,230.79, which is less than the offer, and that as a result it is entitled to costs and attorney fees pursuant to MCR 2.405(D)(1).

In its response, Plaintiff contends that throughout this litigation it was undisputed that Defendant was liable for the underlying contract amount of \$71,821.33, and that the entire dispute was about whether Defendant was entitled to a setoff against the amount it owed. Accordingly, Plaintiff contends that Defendant's settlement offer amounted to a request for Plaintiff to dismiss the portion of its complaint that was in dispute. However, the fact remains that on December 26, 2013 Defendant offered to stipulate to the entry of a judgment in the amount of \$71,821.33, that Plaintiff failed to respond to the offer, and that the ultimate "verdict" in this case was for less than the amount Defendant offered. Consequently, the Court is convinced that the facts in this case present the exact type of situation MCR 2.405 was intended to operate.

In its response, Plaintiff requests that the Court deny Defendant's requests in the interests of justice pursuant to MCR 2.405(D)(3). ("The court shall determine the actual costs incurred. *The Court may, in the interests of justice, refuse to award an attorney fee under this rule.*") Plaintiff contends that because Defendant's proposal did not offer any sort of compromise as to any dispute, awarding attorney fees to Defendant would be unjust as contrary to the interests of justice. The Court is convinced that Plaintiff's contention is without merit. The facts in this case are similar to a situation in which a case is submitted to case evaluation, the panel finds that there is no cause of action, the plaintiff rejects the case evaluation, ultimately fails to obtain a favorable result and becomes liable for case evaluation sanctions. In that situation, the plaintiff was presented with an opportunity to abandon its claim(s) and avoid the risk of becoming liable for the opposing party's costs and attorney fees. If he/she chooses to go forward the plaintiff knowingly elects to risk becoming liable for such costs in exchange for the opportunity to obtain

a favorable result in connection with his/her claim(s). If the plaintiff ultimately fails to obtain a favorable result, it is proper to hold the plaintiff responsible for the risk it knowingly took.

In this case, Plaintiff could have stipulated to a judgment in its favor of \$71,821.33, but elected to risk obtaining less by prosecuting its claims, which is what ultimately happened. This is exactly the type of situation that MCR 2.405 was intended to apply to, and the Court finds that enforcing the rule in this case is in the interests of justice. Consequently, Plaintiff's contention is without merit.

Lastly, Plaintiff contends that under MCR 2.405 it had 21 days to accept the offer, and that as a result the offer was not rejected until January 15, 2014. As a result, Plaintiff contends that Defendant is only entitled to costs incurred after January 15, 2014. The term "actual costs" is defined as "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of a judgment." MCR 2.405(A)(6). In this case, the only costs and attorney fees necessitated by the rejection, which was effective on January 15, 2014, are those incurred after that date. Consequently, Plaintiff is only liable for those costs and attorney fees incurred after that date. In its motion, Defendant's requested amount includes \$442.00 that was incurred prior to January 15, 2014. As a result, the amount sought by Defendant must be reduced by \$442.00.

Conclusion

For the reasons set forth above, Defendant B&B Construction Services, LLC's motion for costs and attorney fees is GRANTED, IN PART. Plaintiff is hereby awarded a judgment in the amount of \$65,259.82, which represents the \$71,821.33 owed under the contract, less the setoff of \$1,591.34 and attorney fees and costs of \$5,817.82 that Defendant has incurred since January 15, 2014. Pursuant to MCR 2.602(A)(3), the Court states this matter REMAINS CLOSED.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: July 11, 2014

JCF/sr

Cc: *via e-mail only*

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