

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JIM BILLADO ROOFING, LLC, :
 Plaintiff, :
 v. :
 :
CUSTOM COPPER & SLATE, LTD., :
 Defendant. :

Civil No. 1:08-CV-97

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to instruct you as to the applicable law.

It is your duty as jurors to follow the law, and not question it, and to apply that law to the facts as you find them from the evidence in the case.

The lawyers may have referred to some of the rules of law in their arguments. If, however, any difference appears between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice to any party. Sympathy and emotion should play no part in your deliberations. Your deliberations should be well-reasoned, impartial and unemotional. You must decide

this case by applying the principles of law, which this Court defines for you, to the facts of this particular case as you objectively find them.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

Corporations

As you know, the plaintiff and defendant are corporations. You should consider this case, however, as an action between persons. A corporation is entitled to the same treatment as a private individual. All persons, including corporations, stand equal before the law.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact proved.

The evidence in the case consists of the sworn testimony of the witnesses, admitted exhibits, and any stipulated facts.

Any evidence to which an objection was sustained or stricken by the Court must be disregarded.

Evidence - Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence - such as the testimony of an eyewitness. The other is indirect or circumstantial evidence - the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is no distinction between direct or circumstantial evidence. You may find the facts by a preponderance of all the evidence in the case, both direct and circumstantial.

Deposition Testimony

During the trial of this matter, certain testimony was presented by playing a video of a deposition, consisting of sworn answers to questions asked of the witness by one or more attorneys for the parties in the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way as if the witness had been present and had testified from the witness stand.

Credibility of Witnesses - Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, the manner in which the witness testifies, by the character of the testimony given, or by contrary evidence.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, which is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You may give the testimony of each witness such weight, if any, you think it deserves, and accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Verdict - Unanimous - Duty to Deliberate

The verdict must represent the considered judgment of each juror. All of you must agree with the verdict. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, without violence to individual judgment. You must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges of the facts.

INSTRUCTIONS OF LAW

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You determine the facts in this case. By these instructions, I am not indicating how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

In this case, both the plaintiff and defendant have claims. The burden is on the party making the claim to prove every essential element of its claim by a preponderance of the evidence. To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of witnesses, regardless of who may have called them, and relevant exhibits in evidence, regardless of who may have produced them.

Breach of Contract Claims

Both the Plaintiff Jim Billado Roofing, LLC ("Billado") and the Defendant Custom Copper & Slate, LTD. ("Custom Copper") claim the other party breached the contract. Billado claims Custom Copper breached the contract by failing to pay for work Billado performed. Custom Copper claims Billado breached the contract by failing to perform its duties under the contract - that is, by failing to complete work on time and in a good and workmanlike manner.

To prevail on its breach of contract claim, each party must prove the following elements by a preponderance of the evidence:

- (1) that a contract existed between the parties;
- (2) the terms of the contract;
- (3) that the other party breached the contract;
- (4) that the non-breaching party suffered damages as a result of the breach; and
- (5) the amount of the damages.

The parties agree they entered into and are bound by a contract, so the first element is already proved. The terms of the contract have been discussed during the course of this trial, and you have been given the contract as an exhibit.

You must determine whether Billado or Custom Copper has proved by a preponderance of the evidence that the other breached the contract. A person or corporation breaches a

contract when the conduct of that person or corporation does not comply with the terms of the contract as agreed to by the parties.

Next, a party claiming breach of contract must prove by a preponderance of the evidence that its damages are the proximate result of the other party's breach. This element is proved if you find the damages were either a direct result or a reasonably probable consequence of the breaching party's conduct.

Lastly, a party claiming breach of contract must prove by a preponderance of the evidence the amount of its damages. I will instruct you further on assessing damages below.

Plaintiff's Prompt Payment Act Claim

I will now instruct you on Plaintiff's claims under the Vermont Prompt Payment Act. Vermont law includes legal requirements governing the payment by contractors, such as Custom Copper, to subcontractors, such as Billado. Under these laws, regardless of any other agreement contained in any contract, Custom Copper must inform Billado Roofing of the due dates for any receipt of payment from the owner, in this case, the federal government. If you find that Custom Copper did not perform this obligation, then you are instructed that Custom Copper is required to perform the rest of its payment obligations as if the federal government were required to make payments to Custom Copper within 20 days of the receipt of any invoice.

Once Custom Copper has received payment from the federal government, or 20 days after any invoice sent to the federal government if that rule applies, Custom Copper was then required by the statute to make payment to Billado Roofing in direct proportion to the amount of work performed for which Custom Copper received payment within 7 days from Custom Copper's receipt of payment from the federal government or receipt of an invoice from Billado Roofing, whichever is later. If Custom Copper did not pay Billado Roofing within the requisite period of time, Custom Copper is liable under the Vermont Prompt Payment Act for any amounts not paid.

In this case, Custom Copper is claiming that any non-payment to Billado was justified. The Vermont Prompt Payment Act provides that a contractor may withhold payment in "good faith," including for defective construction and disputed work, without violating the statute. "Good faith" in the context of contract disputes is often defined as a "promise not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement." Therefore, you may find by a preponderance of the evidence that Custom Copper had a "good faith" basis to withhold payment from Billado.

Instructions on Awarding Damages

I will now instruct you on how to properly measure damages. These instructions are for your use only in the event that you find either party has proven their claims under the standards stated above. The fact that I have included this instruction should not be seen as an indication that I believe the claims to be meritorious.

The purpose of damages in this case is to award just and fair compensation for the loss, if any, that resulted from a violation of a party's rights. If you find either party has proven its claims, then you must award sufficient damages to compensate that party for damages proximately caused by the other party's actions. These damages are known as compensatory damages. Compensatory damages for breach of contract are designed to place the damaged party in as good a monetary position as he or she would have been if performance on the contract had been rendered as promised. Compensatory damages are not designed to punish or reward a party.

The damages in this case are monetary. No one is seeking damages for physical injuries, mental anguish, pain and suffering, or any other intangible that is difficult to quantify. In other words, the parties claim they lost money and seek to recoup that loss.

Because the damages are economic, the parties must prove them to your satisfaction in dollars and cents. You may not

award damages that are speculative in nature. In other words, if awarding a particular element of damage requires you to guess about future events, it is improper.

Court Costs, Attorney's Fees and Interest

If you find either party is entitled to any damages, you may not include in your award any sum for court costs, attorney's fees or interest. The Court will calculate these damages.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

Your foreperson will indicate the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign it.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

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Judge Murtha, we have reached a verdict.

Foreperson

Date

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VERDICT OF THE JURY

Please read and answer the following questions.

Breach of Contract Claim

1. Do you find Jim Billado Roofing, LLC ("Billado") has proved by a preponderance of the evidence that Custom Copper & Slate, Ltd. ("Custom Copper") breached the contract?

Yes _____ No _____

- a. If your answer is "Yes" proceed to question 2.
- b. If your answer is "No" proceed to question 3.

2. What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Billado for the breach of contract by Custom Copper?

Answer in dollars and cents, or "None".

Vermont's Prompt Payment Act

3. Do you find that Billado has proved by a preponderance of the evidence that Custom Copper violated Vermont's Prompt Payment Act?

Yes _____ No _____

a. If your answer is "Yes" proceed to question 4.

b. If your answer is "No" proceed to question 5.

4. What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Billado for Custom Copper's violation of Vermont's Prompt Payment Act?

Answer in dollars and cents, or "None".

Breach of Contract Counterclaim

5. Do you find that Custom Copper has proved by a preponderance of the evidence that Billado breached the contract?

Yes _____ No _____

a. If your answer is "Yes" proceed to question 6.

b. If your answer is "No" stop here and do not proceed to Question 6.

6. What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate Custom Copper for the breach of contract by Billado?

Answer in dollars and cents, or "None".

Foreperson

Date