

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

DART PROPERTIES, INC.,

Plaintiff,

vs.

Case No. 2013-2284-CK

NATIONAL COMFORT PRODUCTS, INC.,
FAMILY HEATING & COOLING, INC., and
FIRE & INC MECHANICAL, INC.,

Defendants.

and

NATIONAL COMFORT PRODUCTS, INC.,

Third Party Plaintiff,

vs.

THOMAS AND BETTS CORPORATION, and
REZNOR CORPORATION,

Third Party Defendants.

OPINION AND ORDER

Defendant Family Heating and Cooling, Inc. (“Defendant Family”) has filed a motion for recovery of costs and attorney fees against Plaintiff Dart Properties II, LLC. Plaintiff has filed a response and requests that the motion be denied.

Facts and Procedural History

In 2005 or 2006, Michael Buffmyer, Plaintiff’s Facilities Manager recommended the replacement of 1,500 furnaces in four of Plaintiffs properties. After meeting with one of Defendant National Comfort Products, Inc.’s (“Defendant National”) sales representatives, Mr.

Markee contacted Defendant Fire & Ice Mechanical, Inc. (“Defendant Fire”) and Defendant Family to purchase and install Defendant National’s furnaces. Plaintiff’s contracts with Defendant Family and Defendant Fire (collectively, “Defendant Contractors”) contained a 10 year express warranty on the furnaces’ heat exchangers.

In 2011/2012 Plaintiff allegedly discovered that hundreds of the furnaces it had purchased contained defective heat exchangers. As a result, Plaintiff replaced all of the furnaces manufactured by Defendant National.

On June 10, 2013, Plaintiff filed its complaint in this matter asserting claims for, *inter alia*, improper installation against Defendant Contractors. On February 7, 2014, the Court entered its Opinion and Order granting Plaintiff’s motion for leave to file an amended complaint.

On February 14, 2014, Plaintiff filed its first amended complaint in this matter. In its amended complaint, Plaintiff alleges the following claims: Breach of Contract and Breach of Express Warranties As to the Heat Exchangers against Defendant National (Count I); Breach of Implied Warranty of Merchantability against Defendant National (Count II); Breach of Implied Warranty of Fitness for a Particular Purpose against Defendant National (Count III); Failure of Warranty to Satisfy its Essential Purpose against Defendant National (Count IV); and Breach of Express Warranty as to Heat Exchangers against Defendant Contractors (Count V). Plaintiff’s first amended complaint did not include its previous claims related to the installation.

Defendant Contractors subsequently each filed a motion for summary disposition as to Count V, the only counts against them. In addition, Defendant Fire sought sanctions regarding Plaintiff’s previously dismissed installation claims.

On May 30, 2014, the Court entered its Opinion and Order granting Defendant Fire’s and Defendant Family’s motions for summary disposition of Count V and denying Defendant Fire’s

request for sanctions. Defendant Family has since filed a motion for recovery of costs and attorney fees.

Arguments and Analysis

In its motion, Defendant Family contends that it is entitled to sanctions in connection with Plaintiff's improper installation and breach of warranty claims. Specifically, Plaintiffs seek costs and attorney fees pursuant to the bond filed in this case pursuant to MCR 2.109, sanctions for frivolous claims pursuant to MCR 2.114, and for taxable costs pursuant to 2.625.

With respect to whether Plaintiff's installation claims against Defendant Family were frivolous, Defendant Family concedes that Plaintiff inspected furnaces installed by Defendant Family and found some evidence that there were potential problems with the installation. Based on those inspections, Plaintiff filed its installation claims. While Plaintiff ultimately abandoned its installation claims, Plaintiff asserts that it did so in order to require Defendant National to prove that the installation was improper in connection with its affirmative defense. Accordingly, Plaintiff's decision to abandon its improper installation claims was a matter of litigation strategy. Moreover, while Plaintiff decided to abandon the installation claims, the merit of those claims has never been addressed by the Court. For these reasons, the Court is convinced that Defendant Family is not entitled to sanctions pursuant to MCR 2.114 as to Plaintiff's installation claims.

With regards to the warranty claims that were dismissed by the Court in its May 30, 2014 Opinion and Order, the claims were based on the legal question as to which entity provided the warranty in question. Specifically, the parties agreed that a warranty was provided but disputed which defendant was providing the warranty as the documents did not clearly identify the warranting party. While the Court ultimately held that Defendant Family did not provide the warranty, a legitimate legal question was at issue. Consequently, the Court is satisfied that

Plaintiff's breach of warranty claims against Defendant Family was not frivolous or filed in bad faith. Consequently, Defendant Family's request for attorney fees pursuant to MCR 2.114 must be denied.

The next issue before the Court is whether Plaintiff is entitled to sanctions pursuant to MCR 2.109. As the Court held at the August 4, 2014 hearing, MCR 2.109 provides, in pertinent part "the court may order the opposing party to file with the court clerk a bond with surety sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court..." While MCR 2.109 provides the Court with a mechanism to ensure that funds are available in the event sanctions are appropriate, the court rule does not require the court to ultimately award sanctions. Consequently, Defendant Family's contention that MCR 2.109 is an independent basis for sanctions is without merit.

Defendant Family also contends that it is entitled to recover taxable costs pursuant to MCR 2.625. MCR 2.625 provides, in pertinent parts:

(A) Right to Costs.

(1) *In General.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

F) Procedure for Taxing Costs.

(1) Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk as provided in this subrule.

(2) When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk, within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C),

(a) a bill of costs conforming to subrule (G),

(b) a copy of the bill of costs for each other party, and

(c) a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys.

In addition, the party presenting the bill of costs shall immediately serve a copy of the bill and any accompanying affidavits on the other parties. Failure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs.

In its response, Plaintiff contends that Defendant Family's request for costs is premature as the May 30, 2014 Opinion and Order does not constitute a judgment as there are claims remaining in this matter against Defendant National. In support of its contention, Plaintiff relies on MCR 2.604(A), which provides:

(A) Except as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

While MCR 2.604(A) provides that an order/decision entered prior to the adjudication of all of the claims involving all of the parties is not a final judgment and may be revised prior to the entry of a final judgment, the court rule does not require that all claims be resolved prior to the entry of a judgment. Indeed, MCR 2.625 does not require a final judgment to be entered prior to taxing costs. Accordingly, the Court is convinced that it is authorized to assess costs in this matter without first adjudicating all of the claims involved in this matter. Further, as the prevailing party, by virtue of being granted summary disposition in its favor on the only claim against it, Defendant Family has a right to taxable costs. MCR 2.625(A)

The costs that Defendant Family seeks to recover in this matter are \$60.00 in motion fees, \$108.00 in e-filing fees, \$1692.00 in court reporter fees, \$14.00 in parking fees, \$128.64 in mileage, \$4968.63 in expert fees, and attorney fees in an amount to be determined. However, Defendant Family has failed to provide any authority for the specific costs it seeks to recover.

Although the decision whether to tax costs is discretionary, any costs that the court awards must be authorized by statute and only costs statutorily authorized may be recovered. *Rickwalt v Richfield Lakes Corp.*, 246 Mich App 450, 465, 633 NW2d 418 (2001); *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App.612, 621, 550 NW2d 580 (1996). In this case, Defendant Family has failed to provide specific authority for each of the costs it seeks to recover. Consequently, the Court is convinced that this portion of the motion must be denied without prejudice.

Conclusion

Based upon the reasons set forth above, Defendant Family Heating and Cooling, Inc.'s motion for recovery of costs is DENIED, IN PART, and DENIED WITHOUT PREJUDICE, IN PART. Specifically, Defendant Family's request for taxable costs is DENIED WITHOUT PREJUDICE. The remainder of Defendant Family's motion is DENIED. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

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

Dated: August 27, 2014

JCF/sr

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