

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-327

FEB 4 2009

FEBRUARY TERM, 2009

James A. Naylor d/b/a Naylor Construction	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
	}	
Tammy Cusson and Dorothy Ducharme	}	DOCKET NO. S0142-05 CnC
	}	
	}	
	}	Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Contractor James A. Naylor appeals from a superior court order denying his motion for attorney's fees and costs under the Prompt Payment Act, 9 V.S.A. §§ 4001-4009. Contractor contends the court erred in concluding that a contractor's lien was insufficient to satisfy the attorney's fee request. We affirm.

This is the second appeal to reach the Court in this contract dispute between contractor and homeowners Cusson and Ducharme. In the first appeal, Naylor v. Cusson, 2007 VT 108, 182 Vt. 627 (Naylor I), we affirmed a judgment in favor of contractor on his claim for the unpaid portion of a home improvement contract. Id. ¶ 1. The superior court had awarded \$25,000 due under the contract plus attorney's fees and costs totaling \$15,373.92 under the provision of the Prompt Payment Act authorizing such an award, 9 V.S.A. § 4007(c). While affirming the award, we remanded to the superior court to enter a separate judgment for the attorney's fees as required by Vermont Rule of Civil Procedure 54(d)(2)(C). Naylor I, 2007 VT 109, ¶¶ 17-19.

While the first appeal was pending, homeowners filed chapter 7 bankruptcy petitions in federal court and were granted a discharge in bankruptcy in August 2007. Our decision in Naylor I issued one month later, in September 2007, and contractor thereafter moved for an attorney's fee award. Homeowners thereupon moved to reopen the chapter 7 proceedings to avoid the contractor's lien which contractor had earlier filed and recorded in the underlying superior court action. The bankruptcy court granted the motions to reopen and ordered supplemental briefing.

On July 16, 2008, the superior court issued an order denying contractor's motion for attorney's fees. The court ruled that even if the contractor's lien survived the bankruptcy petition as an in rem charge against the property, rather than an in personam action against the debtor, the

lien was secured only in the amount of \$20,000 (the amount set forth in the writ of attachment), which was insufficient to satisfy the contract award—much less the additional attorney’s fees sought.

One week later, the bankruptcy court issued its decision, ruling that the contractor’s lien had expired as a result of contractor’s failure to record a certified copy of the underlying judgment within five months of the judgment, as required by 9 V.S.A. § 1925, and that the judgment standing alone represented a judicial lien which was avoidable in its entirety as impairing the debtors’ homestead exemption. Accordingly, the federal court granted homeowners’ motion to avoid the lien. Contractor also appealed the bankruptcy court ruling, which remains pending.

In this appeal from the superior court order denying his motion for attorney’s fees, contractor contends the court “consciously defied the law” and refused to comply with this Court’s order on remand. Inexplicably, however, contractor fails to acknowledge—much less address—that the superior court based its conclusion expressly on the federal bankruptcy order, which discharged all of the homeowners’ preexisting debts. Nor does contractor address the superior court’s resulting conclusion that any in rem exception from the discharge for the statutory lien against the property was limited to the \$20,000 secured by the writ of attachment (even assuming that, contrary to the bankruptcy court’s conclusion, the contractor’s lien remained valid).¹ Although contractor makes a number of personal attacks against the opposing parties and against the superior court, contractor has not shown that the court erred in concluding that the attorney’s fees incurred in prosecuting the underlying action were strictly in personam liabilities discharged in bankruptcy.


As the superior court here correctly observed, a properly perfected lien under Vermont’s mechanic’s lien law constitutes a statutory lien that is not avoidable under the bankruptcy code. In re APC Constr., Inc., 132 B.R. 690, 692-94 (D. Vt. 1991). It is less certain whether, as the superior court suggested, the amount of the contractor’s lien was limited by the amount set forth in the writ of attachment (\$20,000) rather than the amount of the judgment for that portion of the contract remaining unpaid (\$25,000). See 9 V.S.A. § 1921(b) (providing that contractor’s lien “shall extend to the portions of the contract price remaining unpaid”). Nor are we persuaded, as the court implied, that the attorney’s fees might have been recoverable as part of the mechanic’s lien in this case had the amount been sufficient. Rather, as another federal court correctly concluded, attorney’s fees awarded under Vermont’s Prompt Payment Act represent a remedy separate from that afforded under the mechanic’s lien law; they are not a part of the contractor’s lien, and thus are subject to discharge in bankruptcy. See In re Ahokas, 361 B.R. 54, 63-64 (Bankr. D. Vt. 2007) (holding that attorney’s fees awarded under Vermont’s Prompt Payment Act represented a judicial lien “outside the mechanic’s lien statute” and were therefore “subject

¹ Contractor belatedly, if only barely, acknowledged the fact of bankruptcy in his reply brief. Although contending that his claim was an action in rem, rather than in personam, contractor insisted that the superior court’s ruling was motivated by some imagined animus against plaintiff’s counsel or the law, or both, rather than demonstrating how the court was mistaken in failing to treat the contractor’s \$20,000 lien for overdue construction fees as also securing an additional \$53,000 in attorneys fees.


to avoidance” under the bankruptcy code).² Accordingly, we find no basis to disturb the order denying attorney’s fees.

Affirmed.

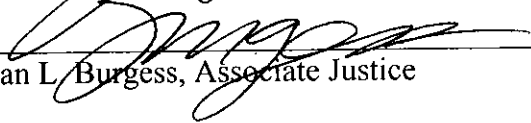
BY THE COURT:



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice

² Indeed, contractor has yet to acknowledge on appeal that, consistent with Ahokas, the bankruptcy court determined that his mechanic’s lien expired before it was perfected according to state statute so as to avoid discharge in bankruptcy.