

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

BRYAN GAVINI, ET AL.	:	
Plaintiffs,	:	
	:	
v.	:	3:04cv257(WWE)
	:	
	:	
	:	
PETER ZANNI,	:	
Defendant.	:	

RULING ON APPLICATION FOR PREJUDGMENT REMEDY

On March 8, 2004, the court conducted a hearing on the plaintiffs' application for a prejudgment remedy ("PJR"), which sought an attachment for \$400,000 against real property owned by defendant [doc # 3]. Plaintiffs commenced this diversity action on February 11, 2004, alleging that the defendant breached a contract to construct a home for plaintiffs in Killingly, Connecticut, thereby violating Connecticut common law and the Connecticut Unfair Trade Practices Act, C.G.S. 42-110b et. seq.

Despite being served with all relevant documents, the defendants have not filed an appearance in this action, and did not appear to defend at the March 8 hearing. Counsel for plaintiff called Bryan Gavini as a witness to reaffirm the statements averred to in plaintiffs' affidavit. In ruling on this application, the Court considered all evidence submitted by the plaintiffs, including the affidavit, testimony, and

exhibits presented at the hearing.

For the reasons stated below, the Court finds probable cause to believe that judgment will be rendered in this matter in favor of plaintiffs. Therefore, plaintiffs' application [doc. # 3] is **GRANTED** in the amount of \$207,000.

PROBABLE CAUSE STANDARD

In addressing a motion for prejudgment remedy of attachment, the Court must make a finding of "probable cause" pursuant to Connecticut General Statute § 52-278c(a)(2).<sup>1</sup>

This statute requires that the application include:

An affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any known defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff.

Conn. Gen. Stat. § 52-278c(a)(2). Thus, in order for the Court to issue a PJR, the plaintiffs must establish probable cause that a judgment in an amount equal to or greater than the sought PJR will be rendered. "Probable cause" in the

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<sup>1</sup> This statute was amended during the January 1993 Regular Session of the General Assembly and became effective on January 1, 1994. 1993 Conn. Legis. Serv. P.A. 93-431 (S.H.B.7329).

context of a PJR has been defined by Connecticut courts as "a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." Three S. Development Co. v. Santore, 193 Conn. 174, 175 (1984).

In other words, in addressing PJR applications, the "trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits." Calfee v. Usman, 224 Conn. 29, 36-37 (1992) (citation omitted). A probable cause hearing for the issuance of a PJR "is not contemplated to be a full scale trial on the merits of the plaintiff's claim." Id. The plaintiffs need only establish that "there is probable cause to sustain the validity of the claim." Id. Probable cause "is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false." New England Land Co., Ltd. v. DeMarkey, 213 Conn. 612, 620 (1990). "The court's role in such a hearing is to determine probable success by weighing probabilities." Id.

Moreover, after a hearing, the Court has the responsibility "to consider not only the validity of the plaintiff's claim but also the amount that is being sought."

Calfee, 224 Conn. at 38. "[D]amages need not be established with precision but only on the basis of evidence yielding a fair and reasonable estimate." Burkert v. Petrol Plus of Naugatuck, Inc., 5 Conn. App. 296, 301 (1985) (citation omitted); Giordano v. Giordano, 39 Conn. App. 183, 208 (1995) ("[t]he very nature of some civil claims makes the amount of a prejudgment remedy award a reasonable estimation rather than a estimation of reasonable certainty").

#### FINDINGS OF FACT

Based upon the evidence before it, the Court finds that there is probable cause to believe the following:

1. Plaintiffs commenced this action on February 11, 2004, bringing claims under Connecticut common law and the Connecticut Unfair Trade Practices Act, C.G.S. 42-110b et. seq., alleging breach of contract and conversion by the defendants.
2. On August 31, 2002, defendant entered into a contract with plaintiffs for \$350,000 for the construction of a home for plaintiffs at 44 Stone Road, Killingly, Connecticut. [Exhibit 1.]
3. On September 17, 2002, the contract price was modified to \$302,000, reflecting the cost of construction of the residence on the Killingly property, and excluding the cost of the real property. [Exhibit 1.]

4. Defendant failed to perform the contract by the original deadline, on or about mid-January 2003.
5. The plaintiffs extended the deadline to on or about March 6 or 7, 2003, and defendant also failed to meet this deadline.
6. Plaintiffs thereafter terminated the contract with the defendant, and sought outside services to continue with construction.
7. At the time of the termination, the residence was only partially constructed.
8. The contract contained a liquidated damages clause entitling plaintiff to \$135,000 in damages.
9. The plaintiffs paid \$153,000 to defendant, and defendant returned only \$81,000 in receipts; thus, \$72,000 is still owed to plaintiffs.
10. Plaintiffs seek a PJR in the amount of \$207,000 in the form of an attachment of the properties, including improvements thereon, located at 371 Fox Road, Putnam, Connecticut; 2 Cutler Road, Killingly, Connecticut; 22C Lark Industrial Parkway, Greenville, Rhode Island, and Lots 11 and 13 as described in deeds attached to plaintiffs' application, Book 888, Pages 215 and 216 in Killingly, Connecticut.

9. Counsel for plaintiff indicated that the properties at issue are highly encumbered and, as a result, they are likely to have minimal value.
10. Counsel for plaintiff indicated that there are no counterclaims or sets offs by the defendant, and reported that the defendant has acknowledged he did not perform.

Based upon the evidence before it, the court finds probable cause to believe that the plaintiffs will prevail on their claims against the defendant, and will be entitled to an amount that equals or exceeds \$207,000.

The plaintiffs have submitted a proposed Order for Prejudgment Remedy, in which they detail the particular assets they seek to encumber by the attachment. That Order will hereby enter in the amount of \$207,000.

Counsel for plaintiffs informed the court that in they have since learned of two additional properties located in Rhode Island that they may also seek to attach in conjunction with this application. Counsel may submit to the court a written request for attachment of these properties.

#### CONCLUSION

For the reasons stated above, plaintiffs' application for a prejudgment remedy **[doc. # 3] is GRANTED** in the amount of

\$207,000.00.

This ruling is made without prejudice. The parties may file a motion with the Court asking for a modification of the PJR pursuant to Conn. Gen. Stat. § 52-278k, if warranted by the circumstances.

SO ORDERED at Bridgeport this 16<sup>th</sup> day of March 2004

/s/  
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HOLLY B. FITZSIMMONS  
UNITED STATES MAGISTRATE JUDGE