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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Rab Contractors Inc. et al

- v -

Stillman Dev et al

INDEX NO. 602968/97

MOTION DATE

MOTION SEQ. NO. 016

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion tolfor _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED

APR 30 2003

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 4/1/03

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

EMILY JANE GOODMAN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

…… X

RAB CONTRACTORS, INC., MICHAEL A. FINK d/b/a MAGICAL DESIGN, et al

Plaintiffs,

-against-

Index No. 602968/97

IRWIN STILLMAN, ROY STILLMAN, 1515 SUMMER STREET CORPORATION, WEST 79TH STREET CORPORATION, DOWNTOWN ENTERPRISES, LLC, and The STILLMAN ORGANIZATION,

Defendants.

…… X

1515 SUMMER STREET CORPORATION and WEST 79TH STREET CORPORATION

Plaintiffs,

-against-

Index No. 605398/97

RAJENDRA PARIKH; AEA CONSULTING SERVICES, LLC, MICHAEL A. FINK, MAGICAL DESIGNS; and JACKSON NING,

Defendants.

…… X

EMILY JANE GOODMAN, J.:

This CPLR 4404 motion arises out of a lengthy, contentious, litigation involving the design and construction of a nightclub (the Club) located at the site of the famous Village Gate, in New York City. On July 9, 2002, after a trial of approximately three weeks, the jury found that 1515 Summer Street Corp., West

79th Street Corp., Downtown Enterprises LLC, The Stillman Organization,[1] Irwin Stillman and Roy Stillman (Defendants) were liable to Michael **A.** Fink d/b/a Magical Designs (Fink) for $70,000 on his breach of contract claim and $160,000 on his fraud claim. The jury also found that Defendants were liable to Rajenda Parkih/AEA Consulting Services (Parikh) for $119,000 on his breach of contract claim and $119,000 on his fraud claim.[2] Defendants move for an Order setting aside the jury's verdict on the grounds that (1) there was no evidence to support the jury's finding of liability on the fraud and contract claims (2) there was no evidence to support the amount of damages awarded, and (3) there was no evidence to support a finding of liability against West 79th Street Corporation, Downtown Enterprises, or The Stillman Organization.

Plaintiffs oppose this motion and have filed separate motions for an Order setting the date from which pre-judgment interest is to be computed (decided herein). Because Plaintiffs' opposition contained no references to the transcript, the Court directed Plaintiffs to submit annotated excerpts of the transcript to support their positions, and Defendants have responded to those submissions.

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[1] References to The Stillman Organization are references to The Stillman Organization, Ltd.

[2] The jury also rejected Defendants' claim that Fink negligently provided defective, incomplete or unbuildable drawings of the Club and that Parikh negligently designed the Club's HVAC system. The jury further rejected Fink's and Parikh's claims for unjust enrichment.

Discussion

To set aside a jury's verdict, there must exist "no valid line of reasoning and permissible inferences" which could lead rational persons to the conclusion reached by the jury on the basis of the evidence at trial (Cohen v Hallmark Cards, Inc., 45 NY2d 493,499 [1978]). Furthermore, the movant must demonstrate that the preponderance of the evidence so greatly favors its position that the verdict could not have been reached on any fair interpretation of the evidence (see Niewieroski v National Cleaning Contractors, 126 AD2d 424,425 [1st Dept 19871). Evidence must be construed in the light most favorable to the non-moving party (see Mirand v City of New York, 84 NY2d 44, 50 [19941);Mazariegos v NYC Transit Authority, 230 AD2d 608 [1st Dept 19961. To set aside a jury's verdict, the Court must conclude that "the jury could not have reached its verdict on any fair interpretation of the evidence" (Lolik v Big; V Supermarkets. Inc., 86 NY2d 744 [19951). However, where a cause of action is legally insufficient and the jury's award of damages is against the weight of the evidence, the verdict may be set aside (see Shalor Designs, Inc. v NBA Properties, Inc., 264 AD2d 686 [1st Dept 19991).

Fraud claim

Defendants contend that Parikh's fraud claim is insufficient as a matter of law because it merely duplicates the breach of contract claim and therefore, amounts to a double recovery. Defendants note that the fact that the jury awarded

Parikh the same amount in damages on both his fraud and breach of contract claims evidences that Parikh was awarded double damages. Moreover, Defendants point to Parikh's summation, where his attorney asked for $1 19,000,and not double that amount (Tr at 2104). Parikh essentially argues that the verdict with respect to the fraud claim was supported by the record because of the ample testimony showing that Defendants had the preconceived and undisclosed intent not to pay him for his services. There is sufficient evidence in the record from which the jury could infer this intent (Tr at 62; Tr at 1835-1839; Tr at 1846). However, Parikh has not alleged any facts that are collateral to, or extraneous to, the contract, nor articulated any damages which would not be recoverable under a contract measure of damages. Therefore, the jury's verdict on Parikh's fraud claim is against the weight of the evidence (see Deerfield Comminications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954 [1986] [a claim for fraud in the inducement was not duplicative of the breach of contract claim because plaintiff had no intention of abiding by an oral agreement on geographical restrictions, which was collateral to the contract, and, because separate damages were alleged]; Coppola v Applied Electric Corp., 288 AD2d 41 [1st Dept 20011 [fraud claim was properly dismissed because it was based on the same facts underlying the contract and thus, was not collateral to the contract, and, because no damages were alleged that would not be recoverable under a contract measure of damages]; JE Morgan Knitting; Mills, Inc. v Reeves Brothers, Inc., 243 AD2d 422 [1st Dept 19971

[same]); Tesoro Petroleum Corp. v Holborn Oil Co. Ltd., 108 AD2d 607 [1st Dept 1985] [motion to dismiss fraud claim should have been granted because defendant's false assurances of performance, made with the intent to deceive, does not state a separate duty from a contractual duty, and, because no damages were alleged that were not also recoverable under contract]).

Defendants similarly contend that Fink's fraud claim is insufficient as a matter of law because it merely duplicates the breach of contract claim and therefore, amounts to a double recovery. Defendants acknowledge a contract with Fink to perform interior design work for the Club, for which Fink was to be paid $20,000 (which was paid) plus a "Ding Joint" (a bonus) (Tr at 150; Tr at 1497). The Village Gate Proposal & Information Package was admitted in evidence in connection with Fink's breach of contract claim (Plaintiff's Ex S1) (the "Ding Joint"). It provides, in relevant part:

> I am offering you a "Ding Joint" provision here. A flat fee for all of the above work (not inclusive of architectural and engineering services or normally incurred expenses) of $20,000.00 USD. Said monies to be paid as a deposit of ½ at the start of work with a second payment after completion of the preliminary design drawings. Then two weeks after you are open I will expect to pick up an envelope that will contain any or all of the following:
>
> 1-A pay out check commensurate to the quality of services I have rendered.
> 2-A pay out check commensurate to the quality of services I have rendered, and an agreement entitling myself and my sub assignee (as I have explained my assistant will be getting a %) a percentage of ownership of the project that we now refer to as "The Gate Project". Said percentage shall be provided with no overage or draw clause and shall be for services already rendered.

> 3-An agreement entitling myself and my sub assignee to a larger percentage of ownership of the project that we now refer to as "The Gate Project". Said percentage shall be provided with no overage or draw clause and shall be for services already rendered.

Like Parikh, Fink points to the ample testimony in the record from which the jury could infer that Defendants had the preconceived and undisclosed intent not to pay Fink for his services (Tr at 37; Tr at 45; Tr at 62; Tr at 107). However, as with Parikh, Fink has not alleged any facts collateral to the contract, nor has he alleged any damages not also recoverable under a contract measure of damages. Fink's assertion that Defendants falsely promised Fink that he would be entitled to an equity interest in the Club, merely duplicates his claim for breach of contract (see Page v Muse, Inc., 270 AD2d 401 [2d Dept 20001 [plaintiff's fraud claim was properly dismissed as duplicative of the breach of contract claims where plaintiff alleged that defendants promised to give him an equity interest in a company and then, reneged on that promise]). Whether Fink was entitled to an equity interest in the Club (or some other bonus) was the crux of his breach of contract claim. Fink also claims that his fraud claim is not duplicative of his contract claim because he continued to perform work after he received a $20,000 base fee and a $2,500 check (denominated as a bonus), and performed services beyond what was required under the contract (including creating artwork in the form of a graphics show and negotiating several contracts for the Club), for which Defendants had a preconceived and undisclosed intent not to pay. However, as contended by

Defendants, these facts merely relate to his breach of contract claim (see Alamo Contract Builders, Inc. v CTF Hotel Co., 242 AD2d 643 [2d Dept 19971 [although additional work for which plaintiff sought payment was outside the scope of the written contract, the alleged fraudulent representations which induced plaintiff to perform that work were directly related to a contract provision and therefore, were duplicative of the breach of contract claim]). Accordingly, the jury's verdict with respect to Fink's fraud claim is against the weight of the evidence.

Breach of contract

Defendants further seek to set aside the jury's finding that Defendants breached the contract with Parikh and their finding that he was entitled to $119,000.00 in damages. Defendants point to the fact that Parikh did not bill for his overtime hours (contending that he submitted his last invoice, dated May 1, 1997 for $7,401.74) and argue that the evidence conflicted with Parikh's testimony that Defendants owed him "about $84,000" and "about $31,000," representing his premium rates. They further contend that Parikh had no independent recollection to substantiate these numbers and therefore, the jury could not rely upon such testimony (but cite no authority for that proposition). In D'Angelo v State of New York (39 NY2d 781 [1976]), the Court of Appeals rejected this very argument, holding that the law does not require written business records in lieu of oral testimony. The Court also rejected the argument that the witnesses' oral testimony was speculative because it was based to a large part on memory and selective

recollection, not otherwise substantiated, and held that such testimony only went to issues of credibility and weight (id.). Therefore, in this case, it was in the province of the jury to weigh the credibility of Parikh's testimony and any conflicting evidence (see Wiseburg v Douglas Elliman-Gibbons and Ives. Inc., 224 AD2d 361 [1st Dept 19961). The jury was entitled to credit the letter, dated July 24, 1996 (Plaintiff's Ex S 69), which indicated that Defendants promised Parikh a bonus and which indicated that by that date, Parikh had already worked more than 180 premium hours (for which he did not bill), and, testimony concerning his hourly rate (Tr at 1846; Tr at 1990). The jury was properly instructed that although a plaintiff must prove that it is reasonably certain that he suffered damages as a result of the breach of contract, the law does not require plaintiff to prove the exact amount of loss. Once the fact of damage is clearly established, the aggrieved party may sustain the burden of proof on the amount of damages on any reasonable basis (see West, Weir & Bartel, Inc. v Mary Carter Paint Co., 25 AD2d 81 [1st Dept 19661). Accordingly the jury's finding that Defendants breached the contract with Parikh and the jury's finding on the amount of contract damages is not against the weight of the evidence.

Additionally, Defendants argue that the jury's finding that Defendants breached the contract with Fink is against the weight of the evidence because Defendants were not "elated" with Fink's work and therefore, Fink was not entitled to the "Ding Joint." The Court determined that the "Ding Joint" provision

was ambiguous and therefore raised issues of fact to be decided by the jury.[3] The Court properly instructed the jury that they should decide whether Fink's performance had to suit Defendants' personal taste and judgment, or, if not, whether the performance was reasonably satisfactory (see Fursmidt v Hotel Abbev Holding Corp, 10 AD2d 447,449 [1st Dept 19601 [interpreting contract which provided that the services were to "meet with the approval" of defendant]). The jury was properly instructed that if personal and subjective services were involved, such as with the design ofclothing, that might mean that the parties agreed that Fink's performance had to suit Defendants' personal taste (id.). The jury was also properly instructed that if they determined that the contract required that the performance had to satisfy Defendants' taste, the dissatisfaction of the Defendants was controlling, so long as the determination was made in good faith [id.; Duffy Bros., Inc. v Bing & Binn, Inc., 217 AD 10 [1st Dept 19261 [contract which provided that a builder would pay a bonus if the contractor's quality of work was satisfactory to the builder, who was "the sole judge of the quality" and whose decision was "final," could form the basis for liability if the builder's decision was made in bad faith]). By finding that Defendants' breached the contract and by

[3] The Court determined that the "Ding Joint" was ambiguous because the Village Gate Proposal & Information Package provided, in relevant part, that "two weeks after you are open I will expect to pick up an envelope that will contain any or all of the following" (emphasis added). However, the proposal also provided that "I believe that if you are elated with my work and wish to keep me happy for the future and other projects you will try to find a way or compensate me with the percentage or monetarily for what I have done."

awarding Fink $70,000, the jury necessarily determined that Fink was entitled to a "pay out check commensurate to the quality of services" he rendered, because either the agreement called for only reasonably satisfactory performance, or, Defendants' dissatisfaction with Fink's performance did not control because of Defendants' lack of good faith. In determining this issue, the jury was free to credit Fink's testimony that prior to this lawsuit, Defendants were very pleased with his services, and even compared his work to the artist Kandinsky (Tr at 14; Tr at 47; Tr at 106). The jury was free to consider that Defendants actually paid Fink a bonus, but that $2,500 was not commensurate with the quality of Fink's services. Accordingly, the jury's finding that Defendants breached the contract with Fink is not against the weight of the evidence (see Wiseburg v Douglas Elliman-Gibbons and Ives, Inc., supra).

Moreover, the Court finds that the damages award of $70,000 to Fink is not against the weight of the evidence. Defendants contend that because the jury found that Fink was entitled to a lesser amount than the expert, Mr. Van Bemmel, calculated, the verdict was unsupported by the evidence. However, the jury was free to consider Mr. Van Bemmel's testimony, valuing Fink's services at $558,000, and weigh it against the other evidence (see Matter of Estate of Svlvestri, 44 NY2d 260, 266 [1978]) [the weight to be accorded to expert testimony is a matter for the trier of fact]). Mr. Van Bemmel testified that Fink worked approximately 3,048 hours on his design sketches, and reached his

valuation by applying an averaged customary rate of $125.00 hour for Fink's time, and $75.00 for his assistant's time, and discounted the total by 20 percent (Tr at 95). It was in the province of the jury, who reviewed the design sketches during deliberation, to determine what weight to be accorded to such testimony.

Privity

Defendants additionally argue that jury's verdict is against the weight of evidence because there was no evidence to support a finding of liability against West 79th Street Corporation, Downtown Enterprises, or The Stillman Organization.[4] Plaintiffs contend that there is such evidence, but cite nothing in support of their contention. The Court finds that there was sufficient evidence for the jury's finding of liability as to The Stillman Organization and West 79th Street Corporation (as to Parikh), but not as to Downtown Enterprises (as to either Plaintiff). The jury was free to find that The Stillman Organization was liable to Fink and Parikh because of the numerous letters and faxes sent by Plaintiffs to The Stillman Organization, and the faxes sent from The Stillman Organization, on its letterhead, to Plaintiffs (Defendant's Ex AY; AAA-1). Moreover, The Stillman Organization's letterhead was also used by Parikh to send faxes to other

[4] Defendants improperly raise, for the first time in reply, the argument that there is no evidence to support why Irwin and Roy Stillman should be held liable. The function of a reply is to address arguments made in opposition to movant's position and not to permit the movant to introduce new arguments in support of the motion, for which there is no opportunity to respond (see Schultz v 400 Coop. Corp, 292 AD2d 16, 21 [1st Dept 20021). Therefore, the Court will disregard this argument.

subcontractors (Defendant's Ex P). The jury was also free to credit the fact that Plaintiffs prepared reports for The Stillman Organization (Defendant's Ex S 128) and credit the numerous blueprints prepared by Fink, which indicated the client's name "The Stillman Organization." The jury was also free to find West 79th Street Corp liable to Parikh (Defendant's Ex **S** 121 DD). However, the Court finds no evidence to support a finding of liability against Downtown Enterprises.

Prejudgment interest

Parikh argues by separate motion (decided herein) that prejudgment interest should be computed from November 25, 1996, as a reasonable intermediate date between the start of his work, April 25, 1996, and the completion date in June, 1997. Defendants contend that, except for the invoice indicating a balance of $7,401.74, interest should be computed from the date on which Parikh commenced his counterclaim for breach of contract, July 27, 1998. With respect the $7,401.74 invoice, Defendants assert that interest should accrue from June 1, 1997, thirty days from the date of the invoice.

CPLR 5001 (b) provides that interest shall be computed from the earliest ascertainable date that the cause of action existed. Parikh expected to continue working premium hours until the project was complete, in consideration for Defendants payment of a bonus upon completion (Plaintiff's Ex **S** 69). Thus, except with respect to the $7,401.74 invoice, the Court finds that interest should be

computed from June 18, 1997, the last date Parikh was involved with the project.[5] With respect to the $7,401.74 invoice, the Court finds that interest should be computed from June 1, 1997 (thirty days from the date of the invoice).

With respect to Fink's motion to set prejudgment interest on his breach of contract claim, the Court finds that interest should be computed from January 15, 1997 (two weeks after the Club opened on December 31, 1996) (Tr at 105). The Village Gate Proposal & Information Package provided that "two weeks after you are open I will expect to pick up an envelope that will contain any or all of the following . . . A pay out check commensurate to the quality of services I have rendered." Accordingly, the Court finds that because the "Ding Joint'' (bonus) was due January 15, 1997, prejudgment interest should be computed from that date. Accordingly, it is

ORDERED that motion to set aside the verdict as against the weight of the evidence is granted to the extent of (i) dismissing Plaintiffs' fraud claims against Defendants, (ii) vacating the jury's finding that Downtown Enterprises was liable to Parikh and Fink for breach of contract and, (iii) vacating the jury's finding that West 79th Street *Corp* was liable to Fink for breach of contract, and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that prejudgment interest with respect to Parikh's breach of contract claim except with respect to the $7,401.74 invoice, should be computed

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[5] Parikh was removed from the project by letter dated June 18, 1997.

from June 18, 1997 and with respect to the $7,401.74 invoice, should be computed from June 1, 1997; and it is further

ORDERED that prejudgment interest with respect to Fink's breach of contract claim interest should be computed from January 15, 1997; and it is further

ORDERED that Fink and Parikh submit a proposed Order, on notice, in conformity with this Decision and Order, within 30 days from the date hereof.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2003

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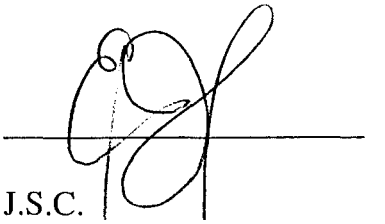

J.S.C.

EMILY JANE GOODMAN