

**Pro Restoration, Inc. v Marcoccia**

2007 NY Slip Op 30870(U)

April 4, 2007

Supreme Court, Suffolk County

Docket Number: 0012654/2003

Judge: Martin J. Kerins

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SHORT FORM ORDER

County Court - State of New York  
PART III - SUFFOLK COUNTY

**P R E S E N T :**

Hon. MARTIN J. KERINS  
J.C.C.

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<b>PRO RESTORATION, INC. d/b/a SERVPRO</b>	:	<b>MANOUSSOS &amp; ASSOCIATES, P.C.</b>
<b>OF PORT JEFFERSON,</b>	:	By: <b>Nadine G. Citron, Esq.</b>
	:	Attorneys for Plaintiff
Plaintiff(s),	:	400 Garden City Plaza, Suite 204
	:	Garden City, New York 11530
- against -	:	
	:	<b>BURKE &amp; BURKE, ESQS., P.C.</b>
<b>VINCENT MARCOCCIA, PATRICIA</b>	:	By: <b>Richard J. Burke, Esq.</b>
<b>MARCOCCIA, NORTH FORK</b>	:	510 Broad Hollow Road
<b>BANCORPORATION, INC., MELLON</b>	:	Suite 304A
<b>MORTGAGE COMPANY, and CHASE</b>	:	Melville, New York 11747-3671
<b>MORTGAGE FINANCE CORPORATION</b>	:	
<b>d/b/a CHASE MANHATTAN MORTGAGE</b>	:	
<b>CORPORATION,</b>	:	
	:	
Defendant(s).	:	
-----X		

This matter was tried before the bench pursuant to CPLR §325(d). Plaintiff, Pro Restoration d/t/a Servpro of Port Jefferson, commenced this action for breach of contract and *quantum meruit* against the defendants for money due and owing for emergency and restoration work performed at the home of defendants, Vincent and Patricia Marcoccia, as the result of flood damage. The Marcoccias claim that they have completely abided by the agreements with plaintiff and have a counter-claim against plaintiff for monies they were required to expend.

The plaintiff called Robert Citrangola, owner of Pro Restoration; Belinda Leventhal, an employee of plaintiff; Clark Mason, an independent adjuster for defendants' insurance company; and Robert Simeone, a home improvement and restoration contractor retained by Citrangola. The plaintiff also called the defendant, Vincent Marcoccia, as a witness. The defendants called Gerard Mirro, a prior employee of plaintiff who was project manager for the project; Sharon Cross and Dominic Donato, former employees of plaintiff. Vincent Marcoccia also testified on behalf of defendants.

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The Court has reviewed the Memoranda of Law submitted by the parties. The Court has also reviewed the exhibits in evidence at the trial (Plaintiff's Exhibits 1-7, 9-10, 12, and 15-18 - Defendants' Exhibits A - C, VV, WW-1, WW-2, and WW-3). Based upon the credible evidence and testimony (including a reading of the trial transcript), the Court makes the following findings and conclusions. In reaching its determination, the Court has found that Robert Citrangola, Belinda Leventha, and Robert Simeone were very credible witnesses and has fully credited their testimony. Clark Mason did not seem to deliberately mislead the court, however, he clearly made mistakes in adjusting for the insurance company on this restoration project. The Court did not find the testimony of Gerard Mirro, Sharon Cross and Dominic Donato to have been credible and did not credit their testimony. The testimony of Vincent Marcoccia was found to be incredible in some areas. His testimony was only partially credited by the court.

**Emergency Repairs**

In early July of 2002, the home owned by defendants, Vincent Marcoccia and Patricia Marcoccia, sustained water damage as the result of a plumbing problem. Defendant Marcoccia retained the services of plaintiff, Pro Restoration, Inc. d/b/a Servpro of Port Jefferson (hereafter Servpro). Robert Citrangola, the owner of Servpro, met Gerard Mirro, his project manager and Vincent Marcoccia at the home, located at 19 Sandy Lane, Selden, NY. There was water damage to some areas of the first floor and in the basement. Mildew treatments and demolition work were required to minimize any more damage to the structure. This included the removal of wet carpet, flooring and sheet rock.

On July 7, 2002, Marcoccia signed an authorization for plaintiff to perform emergency work at the home. The document did not specify the total scope of the work required but it did authorize Servpro to perform any work necessary. It also contained defendant's acknowledgment that if his insurance company, Utica First, did not cover the claim, the defendant would be responsible. This authorization was signed prior to Servpro commencing work on the home. A bill was later prepared for the emergency work in the total amount of \$13, 550.70. Belinda Levanthal of Servpro, testified that she sent the bill, dated August 7, 2002, to Utica First in that amount. However, it was apparent that Clark Mason, the independent adjuster retained by Utica First, was not at all clear about what he had done about the bill from Servpro for the emergency repairs. His attempt to explain it at trial failed. Clearly, he was entirely in error about it.

As the independent adjuster, he did seek an estimate from another restoration company, American Wall Corp. Also, the defendant, Marcoccia, retained the services of a public adjuster, Frank Samaritano. There is a significant difference between an independent and public adjuster. The former represents the interests of the insurance company while the latter solely represents the interests of the insured.

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When Mr. Mason first went to defendant's home on July 9, 2002, Servpro was performing the emergency work. He did not retain American Wall or any other company to provide estimates for this work. In fact, Servpro properly completed the emergency work and the defendants never voiced any complaints about this stage of the work. Without question, the necessity for this work to be properly done is obvious. It prevents and abates further damage to the structure.

American Wall's estimate for the reconstruction phase of the project was in the amount of \$43,327.08, while Servpro's was in an amount only slightly higher of \$49,543.38. In any event, Servpro agreed to perform this phase of the project for the lesser amount.

Mason's final report to Utica was dated, January 10, 2003. This was well after all the emergency and repair work were completed. In his report, Mason indicated that a portion of Servpro's bill of \$7,828.00 was adjusted by him to \$5,073.46. This figure, added to the amount allowed by Utica for restoration work of \$48,835.39, amounts to a total of \$53,400.54. However, Mason and Belinda Leventhal both testified that Servpro only received \$47,835.49. As will be discussed later in this decision, Mason improperly included an allowance, albeit a small one, of \$5,073.46 for emergency work, in the total they had agreed to pay Servpro for the restoration work. However, there was no basis for them to do that.

Clearly, Clark Mason did not properly credit the invoice sent by Servpro to him for the total amount of \$13,550.70. During his testimony it was obvious that he realized the mistake that he had made. At first he denied receiving an invoice from Servpro in that amount but later had to admit that he had in fact received it. He was also confronted at trial with a memo by him dated October 16, 2002, to a representative of American Wall. In that memo Mason asks the representative for an opinion regarding charges by Servpro of \$13,550.70, for the emergency work.

Mason also testified that he believed the total amount of \$53,150.05, authorized by Utica to Servpro was for both the emergency and reconstruction work at the home. Nothing supports his testimony in that regard. Significantly, he wrote no memo in his file to reflect that and he certainly did not ever advise anyone of that. It is difficult to determine how Mason could testify in that manner especially in light of his failure to ever consider the total bill for emergency work. The Court finds Mr. Mason's testimony less than straightforward in that regard. Even Frank Samartiano, Marcoccia's public adjuster, never gave Mason an estimate for the emergency repairs and the estimate he obtained from American Wall made no mention of emergency work. Mason, on behalf of Utica, should not have assumed that \$5,073.46, was included in their total check to Servpro and it should not have been so included.

Without question, the defendant is obligated to plaintiff for the \$13,550.70 for the emergency repair phase of the project. The defendant obligated himself to pay the bill if the insurance company did not and it is clear that the insurance company did not pay any part of it.

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**Restoration Work**

The restoration work was commenced in accordance with the estimate and scope of work provided by American Wall. Initially, Gerard Mirro was the project manager for this phase of the work. Mr. Mirro was either totally incompetent or he simply went out of his way to damage his employer Servpro. The court found Mr. Mirro's entire testimony to be incredible. He had a criminal conviction for fraudulently endorsing checks belonging to others at a time when he worked as an independent adjuster. Yet, in his direct testimony he tried to minimize his involvement. Further, at the time he was working for Servpro, he was in disputes with them regarding commissions he believed he was owed. He was fired from Servpro in September 2002 for endorsing checks to himself that were payable to Servpro customers. He later made restitution as part of a criminal investigation. Yet, at trial he even attempted to mitigate that crime.

What is obvious to the court is that Mr. Mirro would testify falsely in order to protect himself and harm his former employer.

During the restoration part of this project, Mirro gave extras to the client, Marcoccia, that were neither deserved nor warranted. Marcoccia had no problem taking these extras, sometimes referred to Mirro and Marcoccia in their testimony as tradeoffs. That term is significant, because when Mirro was confronted with the tradeoffs listed on documents the two of them prepared, there really were no tradeoffs that Marcoccia had to trade in order to receive that significant upgrades he received. It would almost seem to the court that they contrived to steal from Servpro. When asked if he had any documentation to justify these upgrades, Mirro said that his files had been stolen from his car the night before he was fired. Again, Mirro demonstrated that he is unwilling to take responsibility and will hedge his testimony in order to protect himself.

Defendant Marcoccia was very often less than candid and straightforward in his testimony. On the one hand, he argued that he was in honest negotiations with Mirro for numerous expensive extras that, without question, were outside the scope of work on this project. Like Mirro, he did not demonstrate what he gave up in exchange for the expensive upgrades he received. He even seeks several thousand dollars he claims is owed to him for items he was forced to purchase.

However, it is apparent that Mr. Marcoccia is certainly more than a naive homeowner unaware of the costs of doing business. In fact, he could not help but testify as to his many skills, education, and years of experience in the fields of masonry and general contracting.

Other items that Mirro and Marcoccia agreed would be paid out of the funds due Servpro, included the more than \$5,000.00 owed by Marcoccia to the public adjuster who was retained by him, and Marcoccia's insurance deductible.

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Robert Simeone was very credible, honest, and candid in his testimony. Mirro and Marcoccia kept telling him that the upgrades had been approved. Simeone noted that his bill in the total amount of \$53,835.95 was paid in full by Servpro. Yet, this amount was more than was Servpro received from Utica. Incredibly, it included a total of extras in the amount of \$22,338.71. At one point during the renovation, he went to Servpro's owner, Citrangola, and expressed his concerns. Of course, by then it was too late for Citrangola to correct the problem since Mirro and Marcoccia had adequately put some of their dealings into writing. With the assistance of Mirro, Marcoccia got numerous upgrades for nothing. Their terming these "extras" as trade-offs belies logic. There were numerous instances during the trial where this was refuted. Their motivation was blatant. Mirro was completely biased against Servpro and Citrangola. Marcoccia was clearly awarded significant upgrades without any cost to him.

**Electrical Work**

However, they failed to include the electrical work, in the amount of \$5,989.20, in any of their writings. Their testimony that it was orally included is absurd and not believable.

**Mechanic's Lien**

Robert Citrangola, whose testimony this court found to be very straightforward and credible, properly served the mechanic's lien within the statutory time limit. The Court does not credit Vincent Marcoccia's testimony that he was not timely served by Citrangola.

**Interest**

Further, Servpro is entitled to receive interest for the twelve months that they were not paid for the restoration work in the amount of \$47,845.49. This is the amount that everyone agrees they were entitled to receive. Yet, inexplicably, neither Mason nor Marcoccia explained the lateness in payment to plaintiff. The court has subtracted 30 days from the date that the work was completed which is reasonable under the circumstances.

Plaintiff is also entitled to receive interest on the amount owed them by Marcoccia for the emergency work, i.e., \$13,550.70. Interest is awarded at the rate specified in the agreement at 1.5% per month.

**Attorney's Fees**

As to attorney's fees, the Court awards plaintiff attorney's fees in the amount of \$5,000.00 as more than reasonable under the circumstances here. The authorization executed by Marcoccia on July 7, 2002, noted that plaintiff would be entitled to receive them if such was necessary to enforce the agreement against him. Further, plaintiff has sufficiently documented the amount of work expended by his attorneys on the case.

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**Defendants' Counter-Claim**

Suffice it to say that defendants, Vincent and Patricia Marcoccia, have wholly failed to sustain their burden on their counter-claim. In that regard, the Court did not credit the testimony of Vincent Marcoccia or Gerard Mirro. The testimony of the two former employees of Servpro, Sharon Cross and Dominic Donato, were similarly not persuasive. In fact, it was demonstrated that they were nothing more than disgruntled employees who now worked, at least occasionally, for Mirro.

In light of the foregoing, the court finds that the credible evidence overwhelmingly demonstrates that plaintiff has sustained its burden of proof regarding the mechanic's lien; the money owed for the emergency work in the amount of \$13,550.70, plus interest at 1.5% per month from August 7, 2002; the money owed to them for the electrical bill in the amount of \$5,989.20; interest in the amount of 1.5% per month for a period of twelve months on the amount of \$47,845.49; and finally, attorney's fees in the amount of \$5,000.

Plaintiff to submit judgment.

DATED: April 4, 2007  
RIVERHEAD, NY

  
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Hon. Martin J. Kerins J.C.C.

FINAL DISPOSITION \_\_\_\_\_

NON-FINAL DISPOSITION 2