SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MIRANCO CONTRACTING, INC.,

Plaintiff,

-against-

DR. ALAN PEREL, LILLIAN H. ASSOCIATES and ULTIMATE ALTERATIONS, INC.,

Defendants.

DCM PART 4

Present:
HON. ROBERT J. GIGANTE

DECISION & ORDER

Index No. 12954/03
Motion No. 3912 - 005

DR. ALAN PEREL and
LILLIAN H. ASSOCIATES, L.L.C.,

Third Party Plaintiffs,

-against-

MICHAEL MIRANDA,

Third Party Defendant.

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The following papers numbered 1 to 5 were used on this motion the 26th day of January 2006:

	Papers Numbered
Defendants' Notice of Motion and Supporting Papers	**1**
Defendants' Memorandum of Law in Support of Motion	**2**
Plaintiff's Affirmation in Opposition	**3**
Plaintiff's Memorandum of Law in Opposition	**4**
Defendants' Reply Memorandum of Law	**5**

Upon the foregoing papers, the motion of defendants Dr. Alan Perel and Lillian H. Associates to (1) set aside the jury's verdict, (2) order a new trial, (3) dismiss the complaint against Dr. Perel individually, and (4) limit pre-verdict interest, is granted, in

part, and denied, in part, in accordance with the following.

In moving to set aside the jury's verdict in quantum meruit pursuant to CPLR 4404(a), defendants begin by noting that the evidence adduced at trial regarding plaintiff's claim to have incurred some $154,334.50 in expenses during the course of its work for defendants is limited to two checks (with supporting invoices) totaling $7,697.70; a series of 35 checks totaling $93,386.80; and the testimony of Michael Miranda (the president and sole shareholder of the plaintiff corporation) regarding certain additional expenditures of $53,250.00, i.e., $9,250.00 in cash payments, $15,000.00 for insurance premiums and an outstanding obligation to a subcontractor in the amount of $29,000.00. Also in evidence was a series of seven checks payable to plaintiff from defendant Lillian H. Associates, the corporate defendant, in the aggregate sum of $105,045.70 for work, labor and materials. Additional evidence adduced by plaintiff included proof that the corporate defendant paid another entity, Ultimate Alterations, Inc., the sum of $880,000.00 to complete the construction project.

In view of the foregoing evidence, defendants maintain that plaintiff's verdict in the sum of $294,045.70 is "against the weight of the evidence and well settled principles of law." In this regard, defendants maintain that the unsubstantiated testimony of Mr. Miranda regarding plaintiff's so-called "additional expenses" was entirely self-serving, and not entitled to any weight.[1] Defendants also contend that the jury improperly relied

[1] However, the weight of such evidence was for the jury to determine (*see* Gentile v Robert Pergament Trust, 29 AD3d 627).

on plaintiff's cost estimate of $1,176,000.00 as the "contract price" in determining the reasonable value of its services on a quantum meruit basis, and that it further erred in adding the sum previously paid by the corporate defendant ($105,045.70) to the amount of $189,000.00 which (it is claimed) the jury determined to be plaintiff's anticipated profit on the $1,176,000.00 "contract" (i.e., $105,045.70 + $189,000.00 = $294,045.70). According to defendants' counsel, these details regarding the method of calculating the award were made known to him during post-verdict conversations with "a majority of the jurors." Defendants also claim that the erroneous and confusing statements made by plaintiff's attorney during summation were at least partly responsible for the jury's errors, and that the so-called "customary method" of calculating quantum meruit damages in construction disputes is to use the actual job cost plus a reasonable allowance (7%) for overhead and another 7% for profit, less all sums previously paid for the work performed. Thus, the verdict at bar is claimed to be "blatantly incorrect" and wildly in excess of (1) the maximum amount allegedly incurred by plaintiff during construction ($154,334.50), (2) the *ad damnum* ($156,000.00), and (3) the amount ($107,000.00) which defendants allege to be the jury's determination of the reasonable value of plaintiff's services.[2]

[2] In point of fact, no such award appears on the verdict sheet. In fact, the jury found, in response to the Court's instructions, that the "total reasonable value of plaintiff's work, labor, services and materials" was $294,045.70.

In support of that branch of their motion which is to dismiss the complaint against Dr. Perel personally, defendants maintain that no evidence was adduced at trial sufficient to warrant "pierc[ing] the [corporate] veil" of Lillian H. Associates. Consequently, it is argued, the award of damages against the doctor was unauthorized. In this regard, defendants point out that the corporate defendant was the owner of the subject property, and that all checks issued to plaintiff for its services were issued from the corporate account.

Lastly, defendants seek to limit pre-verdict interest by arguing that plaintiff's unsuccessful appeal of an earlier order of Justice Maltese effectively delayed the resolution of its quantum meruit claim. Therefore, it is claimed that any award of pre-verdict interest should be limited to the period between May 23, 2006, the date that the appeal was decided, to December 7, 2006, the day before the verdict was rendered.[3]

On a motion to set aside a jury verdict and order a new trial, the court's discretionary power "must be exercised with considerable caution" since a "successful litigant is entitled to the benefits of a favorable jury verdict" (Romero v Metropolitan Suburban Bus Auth., 25 AD3d 683, 684 citing Nicastro v Park, 113 AD2d 129, 133). The criterion in such circumstances is whether the jury's conclusion is predicated on a "rational basis" that is supported by "viable evidence", and not whether the jury erred in

[3] On appeal, the Appellate Division upheld the dismissal of plaintiff's causes of action for breach of contract based on defendants' showing "that there was no written contract and no mutual assent or agreement to a material term of the alleged oral contract because the parties could not agree upon the price for the project" (Miranco Constr. v Perel, 29 AD2d 873, 873).

weighing the evidence presented (*see* Diversified Fuel Carriers Corp. v Coastal Oil N.Y., 280 AD2d 448; 370 Hamilton Ave. Corp. v Allied Outdoor Adv., 258 AD2d 517). Consonant with these principles, the jury's award in this case "should not be set aside as against the weight of the evidence unless the evidence preponderates so heavily in favor of [defendants] ... that the verdict could not have been reached on any fair interpretation of the evidence" (Artusa v Costco Wholesale, 27 AD3d 499, 500, citing Salim v Gomez, 20 AD3d 410; *see* Romero v Metropolitan Suburban Bus Auth., 25 AD3d at 684; Campbell v City of Glen Cove, 19 AD3d 632).

No such showing has been made herein.

In the opinion of this Court, defendants have failed to show that the verdict at bar is "internally inconsistent" or the "product of juror confusion" (Artusa v Costco Wholesale, 27 AD3d at 500). Here, it is worthy of note that the jury was instructed to determine "the *total* reasonable value of the work, labor, services or materials which were provided to defendants." In this context, it must be noted that the only basis for defendants' claim that the amount awarded in response to this instruction improperly included the sum which plaintiff already had been paid must rest upon the fact that the sum awarded ($294,045.70) and the amount of the prior payment ($105,045.70) end with the same four digits. However, whether this was done, e.g., to simplify the calculation of the net award or for any other reason, is purely speculative. In any event, the amount of the prior payments was deducted in arriving at the net award of $189,000.00. Also, there is no reason to assume (as defendants have done) that the sum of $189,000.00 represents

an award of anticipated profit on plaintiff's $1,176,000.00 estimate.[4] Finally, there is nothing about the jury's verdict that is unsupportable, or results in a windfall to plaintiff for the 18 months which it spent at the job site, *inter alia*, excavating and installing a dry well system, and erecting the foundation for a 10,000 square foot commercial building. As for defendants' seminal argument that the jury improperly utilized plaintiff's cost estimate as the basis for determining the quantum meruit value of its services, the cases cited in support of this proposition are inapposite.

Turning to that branch of defendants' post-trial motion which seeks dismissal of the complaint as against Dr. Perel, CPLR 4404(a) restricts such relief to those cases in which the dearth of evidence against a party would warrant the court in directing a judgment in his or her favor as a matter of law (*see* Smith v Au, 8 AD3d 1, 2; Vasquez v Figueroa, 262 AD2d 179, 180). Thus, the ultimate question to be answered is whether the jury's verdict against Dr. Perel is based on any fair interpretation of the evidence (*see* Artusa v Costco Wholesale, 27 AD3d at 500). On this issue, plaintiff correctly argues that certain of the evidence adduced at trial, e.g., the doctor's role in personally financing the project and paying for the demolition and construction permits, provides an adequate basis on which a rational individual might logically conclude that Dr. Perel was acting in a personal capacity during the events at issue, effectively

[4] Again, the verdict sheet reflects no award for anticipated profit, and defendants' attempt to impeach the verdict through post-trial discourse with the discharged jurors must be rejected (*see* Sharrow v Dick Corp., 86 NY2d 54, 60-61; *cf.* Laylon v Shaver, 187 AD2d 983; Gamell v Mount Sinai Gen. Hosp., 40 AD2d 1010, *app dismissed* 32 NY2d 678).

exercising complete control over the corporate defendant in which he holds 100% of the equity. Hence, the verdict against him represents a fair interpretation of the trial evidence.

Since the jury's verdict in this case is supported by legally sufficient evidence, it will not be set aside pursuant to CPLR 4404(a) as contrary to the weight of the evidence (*see* Kaplan v Miranda, __ AD3d __, 2007 NY Slip Op 01684).

As for movants' request to limit pre-verdict interest, it is well recognized that while such an award is discretionary with the court in an action based on quantum meruit (*see* CPLR 5001[a]; Precision Founds. v Ives, 4 AD3d 589, 593), any award of pre-verdict interest should be computed from the earliest ascertainable date on which the prevailing party's cause of action existed (*see* CPLR 5001[b]). In this case, that date is June 18, 2003, the date of plaintiff's written demand for payment. However, inasmuch as these proceedings were delayed as a result of plaintiff's unsuccessful appeal of the decision and order of Justice Maltese dated March 9, 2005, fairness dictates there be no award of pre-verdict interest for the period between the date of that order (March 9, 2005) and May 23, 2006, the date on which said order was affirmed (*see e.g.* Precision Found. v Ives, 4 AD3d at 593). Said interest shall be computed at the rate of 9% per annum (CPLR 5004).

MIRANCO v. PEREL

Accordingly, it is

ORDERED, that the motion to set aside the jury verdict is denied; and it is further

ORDERED, that plaintiff is awarded interest at the rate of 9% per annum from June 18, 2003 through the date of judgment, except that no interest is awarded for the period between March 9, 2005 and May 23, 2006; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R

Dated: May 4, 2007

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Robert J. Gigante, J.S.C.