

**Trinity Assoc., Inc. v Telesector Resources  
Group, Inc.**

2007 NY Slip Op 31164(U)

May 2, 2007

Supreme Court, New York County

Docket Number: 0601250/2003

Judge: Richard B. Lowe

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

PRESENT. HON. RICHARD B. LOWE, J.

PART 86

Index Number : 601250/2003

TRINITY ASSOCIATES

vs

TELESECTOR RESOURCES GROUP

Sequence Number : 004

VACATE

INDEX NO. \_\_\_\_\_

MOTION DATE 11/8/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

FILED  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

DECISION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

HON. RICHARD B. LOWE, J.

Dated: 5/2/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
TRINITY ASSOCIATES, INC.,

Plaintiff,

Index No. 601250/2003

-against-

TELESECTOR RESOURCES GROUP, INC., d/b/a  
VERIZON SERVICES GROUP, INC.,

Defendant.

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**Hon. Richard B. Lowe, III:**

In motion sequence 004, defendant Verizon Services Group, Inc. (Verizon) moves, pursuant to CPLR 4404 (a), to set aside the jury verdict and to grant judgment, as a matter of law, in its favor.

On August 17, 2006, the jury returned a verdict finding that (1) Verizon breached its contract with Trinity Associates, Inc. (Trinity) when it suspended services; (2) Trinity sustained lost profits as a result of such breach in the amount of \$92,500; (3) Verizon modified the contract in regards to emergency services and breached that modification; and (4) Trinity sustained \$1,251,895 in compensatory damages as a result of Verizon's breach of the modification. The remaining facts surrounding this action are recited in detail in this court's January 4, 2006 decision, familiarity with which is assumed.

**Analysis**

"In determining a motion to set aside a verdict and to direct judgment in favor of a party entitled to judgment as a matter of law pursuant to N.Y. C.P.L.R. 4404 (a), the court's role is not to determine whether the jury erred in weighing the evidence presented, but whether there is any

valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial.” *Vasquez v Figueroa*, 262 AD2d 179, 180 (1<sup>st</sup> Dept 1999).

Verizon argues that the evidence reveals that an issue of fact did not exist in regard to the suspension of services by Verizon, and therefore, this court should have decided the issue as a matter of law. It asserts that the contract between Verizon and Trinity was unambiguous and the Court should have determined, as a matter of law, that Verizon was within its rights when it suspended services.

Verizon’s argument seems to be a re-argument of its partial summary judgment motion, which this court decided on January 4, 2006. In that decision, this court found that an issue of fact existed in regard to Verizon’s suspension of services and whether such was permitted under the contract as a modification, cancellation, or other action. The First Department, Appellate Division, affirmed this court’s January 4<sup>th</sup> decision, holding that this court correctly found triable issues of fact concerning Verizon’s right to suspend Trinity’s services under the contract. *Trinity Associates, Inc. v Telesector Resources Group, Inc.*, \_\_\_ AD3d \_\_\_, 831 NYS2d 390(1<sup>st</sup> Dept, March 13, 2007).

Therefore, submitting this issue to the jury was not improper, because it required determination by a fact finder. Further, after a review of the record, there is a valid line of reasoning and permissible inferences which could lead rational people to the conclusion reached by the jury from the evidence presented.

Verizon argues that the jury’s award of lost profits was irrational, because Trinity did not offer competent proof of such a loss. After reviewing the record, the court agrees.

To recover loss profits, “first, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible, or imaginary ...” *Kenford Company, Inc. v County of Erie*, 67 NY2d 257, 261 (1986). Here, Susan Loch’s<sup>1</sup> own testimony establishes that the basis for the lost profits was speculative. When asked what her best estimate of the profit margin Trinity would have received on revenues from the Verizon contract, she responded “I would estimate ten percent. That’s an estimate. There is no way to know.” Transcript 117-118. This is not calculation of reasonable certainty and to accept it as such is not rationale. Therefore, the court sets aside the jury verdict awarding lost profits in the amount of \$92,500 to Trinity.

Verizon also seeks to set aside the jury’s verdict on the modification of the contract in regard to the emergency services that Trinity was to provide for Verizon. Verizon argues that this modification claim should never have gone to a jury, because as a matter of law, there could be no modification of the contract without a writing signed by both parties.

Again, this court decided this issue in its January 4<sup>th</sup> decision, and held that an issue of fact existed. The First Department, Appellate Division, affirmed that a triable issue of fact existed as to whether plaintiff was acting under the terms of an existing agreement or under a new arrangement. *Trinity Associates, Inc. v Telesector Resources Group, Inc.*, \_\_\_ AD3d \_\_\_, 831 NYS2d 390, *supra*. Further, after reviewing the record, the jury’s final determination, based on the evidence presented, was not irrational.

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<sup>1</sup> Mrs. Loch has been Trinity’s Bookkeeper since 1978 and is also married to Trinity’s principal, Al Loch.

Verizon also argues that a chart prepared by Mrs. Loch, entered into evidence to show expenses incurred by Trinity, was improperly admitted. However, Trinity asserts that the chart is irrelevant to the damages awarded for the modification claim, because the jury did not rely on the chart to determine damages. Mainly, the jury relied on Mr. Loch's price quote in his February 2001 letter in regard to the emergency services work and did not award expenses from the chart.

After a review of the record, it is evident that the chart was a summary of a majority of expenses that were supported by submitted documentary evidence. However, Verizon points out that the chart contained payroll and rent expenses, which were not supported by documentary evidence in the record. Regardless, it is clear that the jury did not rely on the chart in rendering its award and that it had other reasonable evidence on which it exclusively relied on in calculating plaintiff's damages for the breach of the modification. Therefore, Verizon's argument that the jury was tainted by the admission of the chart is without merit. Even if this document was inadmissible, the fact that the jury did not rely on it constitutes harmless error. *See Abdella v Scribner*, 31 NY2d 940 (1972).

The jury, after reviewing the evidence, decided to award Trinity the modified contract price of \$1,251,895, which is apparently based on Mr. Loch's 2001 letter to Verizon outlining the new costs for the emergency work. This court does not find such an award by the jury unreasonable. The jury made a rational determination based on the evidence it had before it. Further, the fact that the chart and Mr. Loch's 2001 letter contained a contradicting figure as to the cost of its employee was something that was to be weighed by the jury, and does not make the jury's award irrational.

Accordingly, it is

ORDERED that the motion to set aside the jury verdict is granted on to the extent of setting aside the award of lost profits, and it is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff, minus the award by the jury for lost profits, in the amount of \$1,251,895, together with prejudgment interest that this Court ordered on October 25, 2006 [at the rate of 9% per annum from the date of April 8, 2003], until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Date: May 2, 2007

ENTER:

J.S.C.

HON. RICHARD B. LOWE, SJ

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