

**Hoffman Floor Covering Corp. v 128-138 Mott St.,
LLC**

2007 NY Slip Op 32134(U)

July 6, 2007

Supreme Court, New York County

Docket Number: 0121152/2003

Judge: Shirley W. Kornreich

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

PRESENT: **HON. SHIRLEY WERNER KORNREICH**

PART 54

Justice

Index Number : 121152/2003
HOFFMAN FLOOR COVERING CORP
vs
128-138 MOTT STREET LLC.
Sequence Number : 004
MODIFY ORDER/JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion is for reargument

PAPERS NUMBERED

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

4/3
4/5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the envelope declaration

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/6/07

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
HOFFMAN FLOOR COVERING CORP.,

Plaintiff,

-against-

128-138 MOTT ST., LLC, PANACEA, INC., NORTH
SHORE PLUMBING SUPPLY CO., INC., BRANSA
ELEC., INC., AVCON DESIGN GROUP, INC.,
ELBRUS AIR CONDITIONING SERVICE, INC.,
RIGID ELEC., INC., NEW YORK CITY
ENVIRONMENTAL CONTROL BD. & JOHN &
JANE DOE,

Defendants.

-----X
128-138 MOTT ST., LLC,

Plaintiff,

-against-

PANACEA, INC. & RIGID ELEC., INC.,

Defendants.

-----X

KORNREICH, SHIRLEY WERNER, J.:

These actions arise from the renovation of a seven-story building located at 128-138 Mott St. 128-138 Mott St., LLC ("Mott St."), the owner of the building, borrowed money for the renovation from the Bank of East Asia (the "Bank") and hired Panacea, Inc. ("Panacea") as its general contractor. The remaining named parties were subcontractors on the project, hired by Panacea. Action Number 1 involved mechanics' liens filed against Mott St., and Action Number 2 involved Mott St.'s claims alleging breach of contract, slander of title, exaggeration of

Index No.: 121152/03
(Action No. 1)

**DECISION, ORDER
& JUDGMENT**

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Index No.: 121929/03
(Action No. 2)

Panacea's and Rigid Electric, Inc. ("Rigid")'s liens and lost rental income.

The cases were jointly tried before me, and a decision was rendered in October 2006, awarding judgments of foreclosure to Elbrus Air Conditioning Service, Inc. ("Elbrus") for \$77,050.00 with interest at the statutory rate from October 31, 2003, to Rigid for \$244,318.00 with interest at the statutory rate from December 4, 2003 and to Panacea for \$3,433.12 with interest at the statutory rate from November 25, 2003. Hoffman Floor Covering Corp. settled its action, and the action of Avcon Design Group, Inc. was dismissed and its mechanic's lien discharged. Judgment was rendered in favor of Panacea and Rigid and against Mott St. in its action. The Court presumes familiarity with its previous decision.

Panacea now moves to modify the decision and order of the court by increasing its award. Mott St. cross-moves to set aside the judgments, deny the judgments of foreclosure and award it damages in the amount of \$155,154.00 against Panacea on its breach of contract claim, with interest from July 1, 2003. Panacea, Rigid and Elbrus oppose the cross-motion, and Rigid cross-moves to amend the wording of the court's order, *nunc pro tunc*.

I. Panacea's Reargument Motion

Panacea argues that the decision of the court should be modified by increasing the award to it by \$150,154.00, the amount of offsets the court found was spent by Mott St. to complete the contracted-for work. It contends that the offsets should not be awarded Mott St., because the court overlooked the fact that Mott St. hired others to complete the offset work without first notifying Panacea of this incomplete/defective work and giving Panacea the opportunity to complete or correct the work. Alternatively, it argues the award to it should be increased by \$93,354.00, the offsets, minus \$56,800.00, because the court overlooked the following: that on

September 9, 2003, the Bank, after inspection and before releasing further money to Mott St., determined that work on the 2nd to 7th floors of the subject premises was completed and the premises in excellent operating condition; that on September 15, 2003, Mott St. certified to the Bank that the only remaining work to be completed on the premises was valued at \$56,800.00, in order to draw down money; and that on September 16, 2003, Mott St. submitted to the Bank a certification with the forged signature of Mr. Soh in support of the draw down of the \$56,800.00.

The court does not believe that it overlooked these facts in rendering its decision. The relationship between the parties had broken down in August 2003, Panacea demanding more money to complete the project and Mott St. unhappy with the overages and the progress of the project, which was eight months behind schedule. The project was at a standstill unless Mott St. paid Panacea the money it demanded. Mott St., instead, hired other contractors to complete the work. The costs expended by Mott St. to complete the work were reasonable. Moreover, throughout the project, both Panacea and Mott St. repeatedly falsified paperwork. The court, therefore, could not rely solely on the paperwork filled out by either of these parties, since such paperwork often contradicted testimony and other documentary evidence. Finally, the statement of the Bank was considered by the court together with the voluminous documentary evidence submitted and the days of testimony. Panacea's motion for reargument, thus, is denied.

II. Mott St.'s Reargument Motion

Mott St. contends that damages should have been denied to Panacea, Rigid and Elbrus and that it should have been awarded \$155,154.00. It bases its contentions on the grounds that: Panacea, through its principal Mr. Soh, repeatedly perjured himself; Rigid's claim was fraudulent and unbelievable, and the award to it "had no basis in law and fact"; and Elbrus is not

owed money by Mott St. since it is a subcontractor who cannot collect if Mott St. does not owe money to the general contractor, Panacca. In essence, Mott St. takes issue with the credibility findings of the court. Mott St. further argues that Elbrus' award should be reduced to \$60,800.00 from \$77,050.00 since it originally demanded the lesser amount and never amended its pleading to conform to the proof. The court recognizes that Elbrus never amended its *ad damnum* clause to conform to the proof and now, *sua sponte*, amends that demand to conform to the trial proof, *nunc pro tunc*. See *Murray v. City of New York*, 43 N.Y.2d 400 (1977). Accord *Paton v. Weltman*, 23 A.D.3d 895, 896 (3d Dept. 2005); *Aronov v. Regency Gardens Apt.*, 15 A.D.3d 513, 514 (2d Dept. 2005); *Amy H. v. Chautaugua Co. Dept. Of Soc. Servs.*, 13 A.D.3d 1048, 1050 (4th Dept. 2004); *Greenfield v. Philles Records, Inc.*, 288 A.D.2d 59 (1st Dept. 2001), *modified on other grds.* 98 N.Y.2d 562 (2002). In all other respects, the decision is not disturbed since the court based that decision upon its findings of credibility after assessing days of contentious, divergent testimony and sifting through contradictory documents.

III. *Rigid Electric's Motion to Amend the Decretal Paragraph*

Rigid moves the court to modify the last decretal paragraph to reflect language required by the Clerk of the Court in order to enter judgment. The court will grant this motion.

Accordingly, it is

ORDERED that the motion of Panacea to modify the decision and order of the court by increasing its award, is denied; and it is further

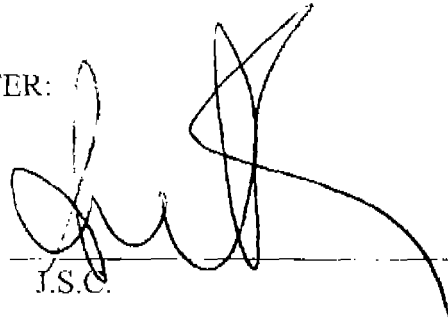
ORDERED that the cross-motion of Mott St. to set aside the judgments, deny the judgments of foreclosure and award it damages in the amount of \$155,154.00 against Panacca, is denied; and it is further

ORDERED that the cross-motion of Rigid to modify the last paragraph of its decision, is granted, the last decretal paragraph of the decision/order is vacated, recalled and substituted with the following:

ORDERED that judgment of foreclosure and sale upon the mechanic's liens of defendants Elbrus Air Conditioning Services, Inc., Rigid Electric, Inc. and Panacea, Inc. be entered by this Court in the form of said judgment presented to this Court for settlement thereof.

Dated: July 6, 2007

ENTER:



J.S.C.

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