

Board of Mgrs. of the 195 Hudson St. Condominium v 195 Hudson St. Assoc., LLC
2007 NY Slip Op 34205(U)
December 18, 2007
Supreme Court, New York County
Docket Number: 0118784/2003
Judge: Jane S. Solomon
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

PRESENT: HON. JANE S. SOLOMON
Justice

PART 55

Bd. of Managers of the 195 Hudson Street Condominium

- v -

195 Hudson Street Associates

INDEX NO. 118784/2003
MOTION DATE 9 - 17 - 2007
MOTION SEQ. NO. 026
MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for enter judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 5</u>
Answering Affidavits — Exhibits _____	<u>6 - 8</u>
Replying Affidavits _____	<u>9 - 10</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **is decided in accordance with the annexed memorandum decision and order for judgment.**

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

FILED
DEC 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/18/07


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

BOARD OF MANAGERS OF THE 195 HUDSON
STREET CONDOMINIUM,

Plaintiff,

INDEX NO. 118784/2003

-against-

195 HUDSON STREET ASSOCIATES, LLC,
195 HUDSON ASSOCIATES, LLC, STEVEN
BLUMENTHAL, SYNCHRON ACQUISITION CORP.,
K&J CONSTRUCTION CO., LP, PERFIDO
WEISKOPF ARCHITECTS, KALLEN & LEMELSON
CONSULTING ENGINEERS, LLP, JEFFREY M.
BROWN, ASSOCAITES, INC., NEVERSINK
CONSTRUCTION CORP., NEVERSKING GLASS
CORP., NORTHEAST RESTORATION CORP.,
GONZALEZ CONSTRUCTION, LLC, MARSHALL
COHEN and CHRISTINE MAJLOJ

DECISION and
ORDER for JUDGMENT

Defendants.

-----X

JANE S. SOLOMON, J.

On May 9, 2007, a jury returned a \$2,106,728.09
verdict in favor of the Board of Managers of the 195 Hudson
Street Condominium ("Plaintiff") on its breach of contract claims
against K&J Construction Co., L.P. and its general partner
Gonzales Construction, LLC (collectively, "K&J"). Following the
verdict, K&J's motion to set the verdict aside was denied, except
that decision was reserved on K&J's request to reduce the verdict
by (1) the jury's award of \$47,036 for an intercom system, and

[* 3]

(2) the amount Plaintiff had earlier accepted in settlement from other defendants. These issues are presented in connection with Plaintiff's Order to Show Cause for entry of judgment, with interest, and are resolved as follows.

Intercom System

As stated in Plaintiff's moving papers, the record is "somewhat murky" as to why the intercom system was included on the verdict sheet. Plaintiff argues that documents listing the costs of the intercom system were admitted into evidence, and a verdict sheet including the intercom system was reviewed by K&J's counsel without objection before being presented to the jury.

K&J argues that the intercom system was sent to the jury in error because all claims for estimated future costs, as listed on Exhibit C to the Plaintiff's CPLR § 3101(d) expert disclosure report dated April 23, 2007, were barred, except for those relating to the roof. In addition, when K&J's counsel made a CPLR § 4401 motion at the close of Plaintiff's case, Plaintiff's counsel agreed that "in light of Your Honor's ruling, I don't think I can press the Exhibit C costs." Moreover, K&J argues that because Plaintiff admits that K&J never performed the intercom work or received payment for it, the costs should not be included in Plaintiff's damages. K&J's arguments are persuasive, and the verdict shall be reduced by the \$47,036 awarded for the

[* 4]
intercom system.

Set-off Against Settlement Amounts

On the eve of trial, Plaintiff settled with the defendants Perfido Weiskopf Architects and Kallen & Lemelson Consulting Engineers, LLP (collectively, the "Design Defendants") for \$1,350,000, and with defendants 195 Hudson Street Associates, LLC, 195 Hudson Associates LLC, Synchron Acquisition Corp., L.P., Steven Blumenthal, Marshall Cohen and Christine Malloy (collectively, the "Sponsor Defendants") for \$610,000, the deed to a parcel of land and an assignment of "all of their cross-claims against K&J." K&J accordingly contends that the verdict against it should be reduced by \$1,960,000.

K&J's argument is that Plaintiff is not entitled to recover twice for the same claim, as New York law bars duplicative recovery and windfalls. This argument is based on the theory that all of the original defendants were sued for the same injury, and that Plaintiff's pre-settlement proposed verdict sheet had provided that all defendants be found jointly and severally liable. K&J next represents that nothing in either settlement agreement provides that the settlement amounts did not cover damages from K&J's defective construction; based on this representation, it contends that because the jury's verdict was for defective construction, it must be reduced.

K&J's position does not take into account the terms of the written settlement agreements between Plaintiff and the settling defendants. The agreement with the Design Defendants states that "the Settling Parties wish to settle and resolve all of their differences to date." As conceded by K&J, Plaintiff pursued claims against the Design Defendants that were different from those it pursued against K&J at trial. For example, Plaintiff claimed that the Design Defendants negligently designed a fireplace system, which Plaintiff's expert claims will cost \$2,500,000 to correct. It is undisputed that costs related to the fireplace system were not included in the jury's verdict.

Similarly, part of the settlement with the Sponsor Defendants covered breaches of the Offering Plan that were not related to K&J's construction defects. For example, the Offering Plan promised the installation of a specific electrical system. Plaintiff concluded that the Sponsor Defendants approved the installation of a non-conforming electrical system, for which it would have sought \$560,000 in damages had it not settled with them. Moreover, the agreement specifically states that settlement amount was "in partial payment of the Board's fees and expenses in litigation;" and Plaintiff has produced a report showing that its legal fees, in excess of \$625,000, are greater than the amount received.

The facts here resemble those in Promenade v. Schindler Elevator Corp., 39 A.D.3d 221 (1st Dep't 2007), where the owner of a residential building sued the developer and general contractor for construction defects. The plaintiff settled with the developer and general contractor, and, by assignment, pursued the general contractor's third-party contractual indemnification claims against some of the subcontractors. The First Department reversed the decision of the trial court, rejecting the argument that the plaintiff was seeking a double recovery. Rather, it stated the plaintiff "was seeking nothing more than the full value of its negotiated settlement." The same can be said here.

It is noted that New York General Obligations Law § 15-108 and CPLR §§ 1401 and 4545(c) all do not apply because they apply only to joint tortfeasors, and here, Plaintiff only brought its breach of contract claims to verdict. Hence, the verdict should not be setoff by the amounts in the settlement agreements.

Interest

Plaintiff has also moved for interest on the verdict amount; K&J's papers do not oppose. Under CPLR § 5001(b), interest is to be computed upon damages from the date they were incurred. "The award of interest reflects a recognition of the principle that damages are properly ascertained as of the date of the breach and a recognition that there may be a time lag between

[*7]
the accrual of a plaintiff's cause of action and the resulting damage sustained and actual payment by defendant."

Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C., 91 N.Y.2d 256, 262 (1998). Here, there is some uncertainty as to the date K&J stopped construction, but it is undisputed that K&J was not permitted to return to work by September 1, 2000. Thus, providing K&J the benefit of the uncertainty of the exact date of damages, pre-verdict interest shall be calculated from August 31, 2000 through May 9, 2007 at the statutory rate of 9% per annum.

Moreover, pursuant to CPLR § 5002, Plaintiff is entitled to an additional sum of interest on that amount at the statutory rate of 9% calculated from the date of the verdict until the date final judgment is entered against K&J and Gonzales.

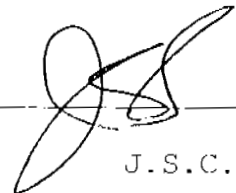
Accordingly, it hereby is

ORDERED that Plaintiff's motion is granted, except that the jury verdict shall be reduced by \$47,036 for the amount of the intercom system to \$2,059,692.09; and it further is

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff Board of Managers of the 195 Hudson Street Condominium, residing at 195 Hudson Street, New York, New York, and against defendant K&J Construction Co., LP, residing at 2337 Philmont Avenue, Huntington Valley, Pennsylvania, and defendant Gonzalez Construction, LLC, residing at 2337 Philmont Avenue,

Huntington Valley, Pennsylvania, jointly and severally, pursuant to CPLR § 5001(c), for \$2,059,692.09 with interest thereon at the statutory rate as calculated by the Clerk of the Court from August 31, 2000, to the date of entry, together with costs and disbursements as taxed.

Dated: December 18, 2007



J.S.C.
JANE E. SOLOMON

FILED
DEC 24 2007
NEW YORK
COUNTY CLERK'S OFFICE