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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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STEPHEN J. DANSEGLIO and RENEE A. DANSEGLIO,

Plaintiff(s),

-against-

JEMVAL CORP., WINDSOR CUSTOM HOMES, INC. and VINCENT CONTRACTING AND DISMANTLING SERVICES, INC.,

Defendant(s).

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Index No. 14291/06

Motion Submitted: N/A

Plaintiffs commenced this action for property damage resulting to their home allegedly as a result of the Defendants' negligence. After a trial, at which a jury found Defendants were negligent in deviating from the building plans and building permit, Defendants moved to set aside the verdict, or to have the Court order a new trial on the issue of damages. It is Defendants' contention that the findings of negligence and the award of damages are contrary to the weight of the evidence. Plaintiffs oppose Defendants' motions and request the Court to enter judgment consistent with the verdict.

It is within the Court's inherent power to set aside a jury verdict and order a new trial (***Nicastro v. Park***, 113 A.D.2d 129, 495 N.Y.S.2d 184 [2d Dept., 1985]). Pursuant to CPLR § 4404(a), the court may order a new trial when the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree. Whether a jury verdict is against the weight of the evidence is a

discretionary and factual determination, distinguishable from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence (***Cohen v. Hallmark Cards***, 45 N.Y.2d 493, 498-499, 410 N.Y.S.2d 282, 382 N.E.2d 1145 (1978). In order to support a finding that a jury's verdict is not supported by the weight of the evidence, a court must conclude that there is simply no valid line of reasoning and permissible inferences by which the jury could have rationally reached its verdict on the basis of the evidence presented at trial (***Guglu v. 900 Eighth Avenue Condominium, LLC.,*** 81 A.D.3d 592, 916 N.Y.S.2d 147 [2d Dept., 2011]). A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (***id***).

Plaintiff Stephen Danseglio (Stephen) testified that in 2001 he and his wife Renee purchased a home, built in approximately 1837, for $269,000.00. Stephen worked with the town historian to have the area in which he resided designated as a historic district. Due to its presence in the newly designated historic district, any alterations to the exterior of the home required approval by the Historic Commission. Stephen worked with the draftsman on plans for his proposed renovation from 2002 until November 7, 2004, when the plans were approved by the Town of Huntington ("the Town"). The Plaintiffs looked at many other homes for design ideas, and to observe the quality of craftsmanship between 2002 and 2005. Plaintiffs ultimately chose Ludwig Ziemba and Windsor Custom Homes, Inc., to renovate their home after seeing his work and being favorably impressed.[1] After living in the home for several years, it was their intent to expand the home to accommodate their growing family, which now included three children. Ultimately, in April of 2006, when Plaintiffs were ready to proceed with the renovations, Windsor Custom Homes was unavailable to do the renovations, and Ziemba recommended Jemval Corp. to undertake the job. A contract was signed between Jemval and the Plaintiffs, and the project began on May 1, 2006.

Jemval's principal, William Valasky(Valasky), testified that he had been a foreman on Windsor Custom Home renovations prior to opening his own company. Valasky and Ziemba met with the Plaintiffs regarding the proposed renovations

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[1]Despite this extensive research and working with the draftsman on the plans for two years, Stephen testified that he had no knowledge of simple building terms such as ridge, gable or sill.

before and after the contract was signed, and both were periodically on the job site during its duration of less than five days. While Plaintiffs expressed some reservation about using Jemval instead of Windsor, they signed the contract with the understanding that Ziemba would be "involved" in the project.

From a vantage point across the street, in a house Plaintiffs rented, Stephen watched the work on his own home progress. Specifically, Stephen watched the progress of the renovations from the office he had set up in the rented house. Additionally, he and Renee inspected their house daily to assess the progress. The work progressed without incident on Monday and Tuesday; however, on Wednesday, May 3, 2006, at 4:07 p.m., Stephen Danseglio (Stephen) sent an email to Steven Christiansen, the draftsman of the plans. In that email, Danseglio provided Valasky's phone number, and, referencing various changes to the plans, wrote, "using existing house plans ***we just finished last night (not the original plans*** . . . .)." The email was also sent to Valasky. Seven changes were requested to the plans that had already been submitted and approved by the Town. Those changes were set forth in the email as follows:

> "CHANGES:
>
> Re-add-in the hallway walkthrough with the coat closet, half-bath-powder room and pantry to kitchen. But, remove walls to pantry - we will add-in cabinets there instead.
>
> Move LR wall adjacent to the eat-in kitchen/kitchen forward -north by 2 feet making the living room smaller and the eat-in kitchen and kitchen bigger.
>
> Eliminate wall between eat-in kitchen and playroom but post must remian - Renee prefers to keep a more open floor plan. Entryway or cased opening will be good
>
> Move fireplace back accordingly (centered on the living room wall.)
>
> Re-adjust any windows accordingly on all floors.
>
> Two sidelights for the front door will fit fine now.
>
> Load bearing/haunches/posts to be discussed tomorrow with Bill Valasky."

In his direct testimony, contrary to this email, Plaintiff testified the proposed changes were first discussed on Wednesday afternoon with Ziemba and Valasky. Nonetheless, Stephen testified that he and his wife agreed to deviate from the approved plans to provide the more open floor plan desired by Renee, as well as the other modifications.

Plaintiff also testified that all was going as expected until late Thursday afternoon (May 4th), when he was advised that the house was unstable due to extensive fire damage, and all but the front facade was taken down for safety's sake. The alleged smoke and/or fire damage to the 169 year old house had also been discussed on Wednesday, although there was no mention of demolishing additional portions of the house in the email. Stephen denied that he granted permission to perform the additional demolition of the first floor walls. Defendant Vincent Contracting removed the first floor walls for an additional fee.

On Friday morning, May 5th, shortly after the town historian drove by the house, the Town came to the site and issued a Notice of Violation and Stop Work Order. The reason stated for the Violation and Stop Work Order was that, "Demo being done on dwelling not as per plan. Permit is for 2nd story addition only not demolition of first floor" (Exhibit 5).

A series of letters and emails, drafted by Stephen after the Stop Work Order was issued, was designed to encourage the Town to lift its Order due to the "emergency" of smoke and fire damaged studs and beams, and resulting structural instability. Plaintiff testified on cross-examination that he drafted the correspondence after speaking with an attorney, and he was hoping that the language would require his insurance company to pay for the additional construction costs[2]. Stephen also admitted at trial that the content of his correspondence was untrue. As a result of a May 11, 2006 letter drafted by Stephen (Exhibit 7), sent to Vincent Contracting for Vincent Morea's signature, Defendant Vincent Contracting's attorney accused Plaintiff of fraud, and threatened criminal charges (Exhibit 12). Despite Stephen's admitted lack of candor in composing the correspondence, the jury apportioned fault against Defendant Jemval in the amount of 75%; Windsor Custom Homes 5%[3]; Vincent Contracting 20% and Plaintiffs 0% for a total of 100%.

Plaintiffs' initial purchase money mortgage for the home in question was 90%

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[2]An offer of $40,000.00 from the insurance company was rejected by Plaintiffs. No proof of what that offer was intended to cover was submitted, nor was a copy of the claim provided. Whether it could be considered a collateral source to offset defendants liability can not be determined at this point.

[3]Windsor and Ziemba settled with Plaintiffs after trial and counsel withdrew the post trial motion to set aside the verdict.

of the value of the home at the time of purchase in 2001. A year later, the couple refinanced the house and an additional mortgage of $348,000 to $350,000 was obtained against the property. Plaintiffs also obtained a Home Equity Line of Credit ("HELOC") in the amount of $224,000.00.

According to Stephen's testimony, in August, 2006 the HELOC had an available balance of $170,000, though he offered no explanation as to how the proceeds of the aforementioned loans and mortgages, designated for the project, were spent. In addition to obtaining the funds as outlined above, Stephen also testified that he sold stocks and liquidated other assets to have the $240,000.00[4] contract price available. Stephen additionally agreed to pay an extra $10,000.00 for more wood to accomplish new framing on the first floor, after the additional demolition occurred.

After paying $878.00 for a new permit application and $130.00 for the variance, which variance he obtained on August 10, 2006, Stephen failed to submit the necessary documents to actually obtain the building permit because he ultimately determined that he could not afford the house if it was completed. Stephen testified that he anticipated additional expenses upon completion of the house, which were not previously included in his budget. For example, he anticipated increased property taxes, replacement of the foundation, and de-watering the property due to its presence in a flood zone. Other than Stephen's testimony, no evidence was offered as to the cost of, or need for a new foundation or de-watering the property, or the amount of the anticipated increased property taxes based upon the project as planned, as compared with the estimated taxes for the amended construction plans.

There is no version of the facts that would support a finding that Defendants' negligence was the proximate cause of harm to the Plaintiffs at any time before the afternoon of Thursday, May 4, 2006, when the demolition exceeded the approved building plans.

Jemval's subcontractor Vincent Contracting and Dismantling Services

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[4] The original contract price quoted by Ziemba was $180,000, but it was amended based on changes requested by Plaintiffs and rose to $240,000.00. Ziemba testified that he recommended against the project, because in his opinion, the property would be over improved and Plaintiffs would be better served by moving.

demolished portions of the house at Jemval's direction, however, it's principal, Vincent Morea, testified that he never reviewed the building plans, instead relying on Jemval's direction, as was his custom in residential remodeling jobs. In contravention to his claims of negligence, Stephen testified that Morea was present when Stephen reviewed the plans with Valasky and Ziemba, prior to any work beginning.

It is undisputed that the full scope of the demolition job on the subject property was not incorporated in the approved plans, or contemplated at the start of the project. Thus, regardless of whether or not Morea had reviewed the plans, the result would not have changed. The performance of the additional demolition had no bearing on the breach of the duty to review the plans[5].

The issue complained of herein is the additional demolition work performed on the first floor, which was the subject of a separate "contract," or "extras," between Jemval and Vincent Contracting. Vincent Contracting was paid in full by Jemval for the additional work[6]. Plaintiffs failed to establish that Vincent Contracting, Jemval's subcontractor, owed a duty to Plaintiffs not to perform additional work, nor that Vincent had a duty to obtain new plans or new permits, which would comport with the expanded scope of work. While the testimony was conflicted as to which party or parties made or participated in the decision to perform additional demolition without a permit, there was no question that the "extras" exceeded the plan. The removal of all but the front facade, and approximately three foot sections on each side of the facade to provide stability to it, was the intended result of the contract amendment. There was no proof of a collapse of any portion of the home. Thus, there is no fair interpretation of the evidence to support a finding of negligence or breach of a duty to Plaintiffs on the part of Vincent Contracting. Vincent Contracting's motion is granted and the complaint is dismissed against Vincent Contracting.

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[5]Justice John M. Galasso in a decision dated September 30, 2008 granted summary judgment on the breach of contract claim, but denied summary judgment to Vincent Contracting based upon Plaintiffs' expert affidavit, which stated that in demolition work it is essential to view the plans before work is commenced and thus defendant Vincent owed an independent direct duty of care to plaintiffs.

[6] Exhibit 4 is a fax of the estimate from Vincent's C & D Service, Inc., for $7,950.00, dated April 26, 2006, to Ziemba of Windsor Homes. Exhibit 6 is a paid invoice from Vincent's to Jemval in connection with this project. It includes the original $7,950.00, per the estimate, as well as $2,800.00 for the "Extras" "full 1st floor demo, excluding front wall," dated May 8, 2006.

The appropriate measure of damages is the lesser of the cost of restoring the property to its former condition, or the diminution in the market value of the whole property by reason of the injury (***Hartshorn v. Chaddock,*** 135 N.Y. 116, 31 N.E. 997 (1892); ***Fisher v. Qualico Contracting Corp.***, 98 N.Y.2d 5324, 779 N.E.2d 178, 749 N.Y.S.2d 467 [2002]). Replacement cost and diminution in value are each proper ways to measure lost property value, the lower of the two figures affording full compensation to the owner (***Fisher v. Qualico Contracting Corp, id.,*** at 540; ***Dilapi v. Empire Drilling & Blasting,*** 62 A.D.3d 936, 880 N.Y.S.2d 115 [2d Dept., 2009]). An injured party has a duty to mitigate damages. If Plaintiff could wait until trial to recover damages measured as of the trial date and, in addition receive interest from the earlier date of accrual there would be no incentive to mitigate damages ***(Brushton-Moira Central School District v. Fred H. Thomas Associates, P.C.***, 91 N.Y.2d 256, 692 N.E.2d 551, 669 N.Y.S.2d 520 [1998]). Damages are to make a plaintiff whole and are not to provide plaintiff with a windfall that would not have been received but for the stop work order (***Swain v. 383 West Broadway Corp.,*** 216 A.D.2d 38, 627 N.Y.S.2d 393 [1st Dept., 1995]). Plaintiffs should not benefit from the loss (***Gass v. Agate Ice Cream, Inc.,*** 264 N.Y.141, 190 N.E. 323 [1934]).

The value of the home before the renovation is not relevant to the determination of damages in this matter, as it is undisputed that the house was to be expanded to square off the first floor and to increase the size of the second story with a reverse gable roof. The demolition of the interior of the premises and portions of the second floor and roof were the intended consequences of the contract, essential in furtherance of the project, and there was no evidence of any negligence proximately causing harm to Plaintiffs as a result of that demolition.

It is only when the removal of all of the first floor walls occurred, but for the front first floor facade, that there was negligence. Defendants contend that Plaintiff consented to the removal of the first floor walls, second story and entire roof. The jury chose to believe that Plaintiffs did not consent to the demolition of the first floor walls, and that Plaintiffs were shocked that all but the facade was demolished.

There was, however, absolutely no evidence presented regarding the value of the home on the morning or early afternoon of Thursday, May 4, 2006, before any alleged negligence occurred; thus, Plaintiffs failed to prove the cost of restoring the property to its former pre-negligence condition, nor have Plaintiffs proven the diminution of market value due to the Defendants' negligence. The failure to prove

either diminution, or cost of repairs requires the property damage action to be dismissed (***Farrell v. Klapach,*** 24 A.D.2d 590, 262 N.Y.S.2d 203 [2d Dept., 1965]). Lacking any evidence on the diminution in value or cost of repairs, it can not be said that the jury could have reached its verdict on any fair interpretation of the evidence. (***Delagado v. Board of Education of Union Free School District No.1 of the Town of Greenburgh and Mt. Pleasant***, 65 A.D.2d 547, 408 N.Y.S.2d 949 (2d Dept., 1978), aff'd 48 N.Y.2d 643, 396 N.E.2d 481, 421 N.Y.S.2d 198 (1979); ***Cohen v. Hallmark Cards, Inc., supra)***

Further, to the extent that Plaintiff seeks to recover the cost of the mortgage, home equity line of credit, insurance and real estate taxes on the subject property, those expenses stem from property ownership, not Defendants negligence and thus are not recoverable. Likewise, loss of landscaping and theft of personal property from a shed are incidental to property ownership and not supported by the evidence, but for vague unsubstantiated allegations by Stephen. The contract down payment is also not recoverable, as the work contracted for was performed and the down payment did not flow from the negligence. The heating system was a part of the value of the house, not a separate expense due to the alleged negligence and Plaintiff may not recoup that loss twice. Plaintiffs' appraisal (Exhibit 36) was replete with mathematical errors and thus did not support the alleged valuation (***Dilapi v. Empire Drilling and Blasting, Inc., supra***), nor did it establish the value of the property immediately before the negligence. Plaintiffs bare conclusory assertions that he paid storage fees were unsupported by any evidence.

For the foregoing reasons, the verdict must be set aside as against the weight of the evidence and judgment entered in favor of the defendants, dismissing the complaint.

The foregoing constitutes the Order of this Court.

Dated: April 14, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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