

Johnson v Robertson
2012 NY Slip Op 33808(U)
January 11, 2012
Supreme Court, Westchester County
Docket Number: 11686/2008
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED
JAN 12 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHE

**FILED
AND
ENTERED**
ON 1/12 2012
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
L. SCOTT JOHNSON

Plaintiff,

-against-

Index No. 11686/2008
DECISION & ORDER

BRYAN ROBERTSON, INDIVIDUALLY,
ROBERTSON CONTRACTING AND ULSTER
SAVINGS BANK,

Defendants.

-----X

Defendant moves by Notice of Motion seeking an order allowing him to reopen the case for the taking of further proof. The Defendants' attorney contends that he made several serious omissions in the presentation of his clients' case which has placed them in serious jeopardy. Counsel states that his first omission occurred on the first day of trial when Plaintiff's attorney sought to have admitted in evidence by stipulation a number of loose-leaf binders containing hundred of documents. He further states that he was sidetracked by efforts to analyze Plaintiff's offer that he omitted from the stipulation a loose leaf book which he had prepared entitled "Pleadings and Court Documents." Defendants' counsel further states that the omitted book contained many of the documents necessary for the prosecution of the Defendants' counterclaim

for the foreclosure of its mechanics lien, as well as documents which are crucial to the defense of his case for breach of contract. Defendants' counsel also contend that the documents contained in the loose leaf book was served upon Plaintiff's counsel and have been available to Plaintiff's since 2009 and 2010. Therefore, Plaintiff cannot claim surprise or prejudice because all of the documents that are sought to be admitted via this motion were previously supplied by Defendants in response to specific requests made by Plaintiff.

The Defendants second omission dealt with the introduction of an "Itemized Statement of Lien". Defendants' counsel state that he and the Defendant assembled this document in opposition to an application by Plaintiff to cancel the mechanics lien. Defendants contends that this document was prepared and supplied within 20 days per court order and did not include copies of checks used to pay material men and subcontractors, nor did it include copies of Plaintiff's checks acknowledging partial payment of the amounts due. The additional documentation were intended to be offered in evidence at the trial. Defendants belief that when these document are viewed in conjunction with the Defendants response to Bill of Particulars and the aforementioned first omission, the Defendants' right to a mechanics lien foreclosure will become clear.

Defendant further contends that these binders contain critical and important documents which will help to disprove Plaintiff's allegation that Defendant failed to properly credit payments from Plaintiff and explains how the mechanics lien is calculated. Defendants also contend that all of these invoices are business records of the Defendant kept in the regular course of Defendants business. All checks were credited by the Defendant to the Plaintiff's oldest unpaid invoice which were not necessarily the invoice that Plaintiff noted on his check memos.

The Defendants' counsel attributes his omission to being under a great deal of stress in the

weeks leading up to the commencement of the trial. His impaired vision which he claims was evident from the time of the taking of deposition during the late spring and mid summer of 2009, took a turn for the worse in the weeks before the trial. He also provided a letter from his doctor, who is a retina specialist. The doctor's letter confirms the seriousness of counsel's ocular condition. He further states that several months ago he was obligated to cease driving a motor vehicle. He states that he has already lost much of the central vision in his left eye due to the occurrence of a macular hole treated by surgery in January 1998 and a subsequent detachment of his left retina also treated by surgery in 2003. He further stated that the vision in his right eye had been solely deteriorating over the last few years. Due to a thinning of the retina, a blind spot in his right central field of vision has become larger making it difficult to read documents, books or even news papers. Due to disparity of vision between his left and right eyes, he stated that he has recently developed a tendency to experience double vision particularly when his eyes are fatigued from excessive use. He stated that the preparation for trial and the trial itself created a perfect storm for such condition.

Defendants' counsel then stated that stress from the trial preparation and being distracted by the sudden onset of double vision resulted in him being at a loss at points during the trial. This condition, he stated, adversely affected his ability to take notes as witnesses testified because he could not read them back. He also stated that the volume of the Plaintiff's presentation, all in relatively small prints, made it impossible for him to keep track of all of the relevant facts. He was having trouble reading even the larger print notes he had prepared for cross examination of the Plaintiff's witnesses. It was very clear throughout the trial that the Defendants' counsel was having difficulty seeing. Counsel's wife who is not an attorney assisted him and acted as his pair of eyes. There was no question, from the Court's visual

observations, that his vision was severely impaired.

The Plaintiff opposes the motion and argues that Defendants' attorney was given ample opportunity to review and analyze each and every piece of the evidence and that it is disingenuous for him to claim that the reason he did not introduce the alleged evidence was based upon stress and impaired vision. The Plaintiff also contends that Defendants' attorney engaged in extensive direct and cross-examination of the clients throughout the multi-week trial while aided by his wife. Plaintiff states that and that Defendants' counsel apparent recognition of the weakness of his case two weeks after the trial and during his preparation of his post-trial brief cannot be overcome by suspicious claims of stress and impaired vision. Plaintiff further argues that Defendants' motion should be dismissed as Plaintiff's case would be severely prejudiced and significant delay will result. Plaintiff states that the Defendant submitted their itemized statement of lien years ago and Defendant Robertson was questioned under oath whether the submission represented all the proof that he possessed, to which he answered repeatedly that it was all the evidence he had.

Plaintiff further contends that the Defendants and Defendants' counsel were at all times provided ample opportunities to present their case and multiple courtesies by the Court and Plaintiff's counsel. Each and every exhibit that the Defendants now belatedly attempt to introduce, was certainly available to the Defendants at the time of the trial and this is simply an attempt by Defendants' counsel to retry this case. Plaintiff also contend that during the trial, the Defendants introduced hundreds of exhibits and at no time did the Defendants request an adjournment based upon the now claimed disability, and to allow the Defendants at this late stage to utilize a belated argument of what is essentially ineffective assistance of counsel, in a civil action, is unprecedented and would eviscerate the proper functioning of our civil trial court

system and the definition of finality.

The Defendant in support of his claim to reopen the instant non jury trial relies primarily upon the holding of the Supreme Court in *Kay Foundation v. S & F Towing Service of Staten Island, Inc.* 31 A.D.3d 499 (2nd Dept., 2006). In *Kay Foundation*, the Appellate Division ruled that the Supreme Court improvidently exercised its discretion in denying leave to reopen the non-jury trial. The Court opined that:

A trial court, in the exercise of discretion and for sufficient reasons, may allow a party to reopen and supply defects in evidence that have inadvertently occurred (see *Matter of Dutchess County Dept. of Social Servs. v Shirley U.*, 266 AD2d 459 [1999]; see also *Feldsberg v. Nitschke*, 49 NY2d 636, 643-644 [1980]). While it is true that a trial court's discretion to reopen a case after a party has rested should be sparingly exercised (see *King v Burkowski*, 155 AD2d 285 [1989]), here, it appears that the court would have been better advised to reopen the case to permit the submission of what it considered to be crucial evidence (see *Felice v Gershkon*, 34 AD2d 1008 [1970]; see also *Lindenman v Kreitzer*, 7 AD3d 30, 33 [2004]).

It was obvious to this Jurist that the Defendant was attempting to operate as trial counsel with a severe disability. Even though he was able to perform direct and cross-examination of witnesses, his disability was very apparent and at intervals it was evident that Counsel was experiencing severe difficulties. This Court concurs with the Plaintiff that a trial court has the discretion to reopen a case after a party has rested but that discretion should be sparingly exercised, *King v. Burkowski, supra*. However, courts have also permitted the reopening of a case record where to do so would further the interest of justice, *Morgan v. Pascal*, 274 A.D.2d 561 (2nd Dept 2000) ; *Brown v. Salmon River Central School Dist. No. 1*, 52 A.D.2d 968 (3rd Dept 1976) or where the exercise of such discretion is needed to complete a record or to cure a failure to prove a prima facie case, *Lagana v. French*, 145 A.D.2d 541 (2nd Dept 1998).

The circumstances and unique facts of this case demonstrate that it is in furtherance of

the interests of justice to permit Defendants an opportunity to complete the record before this Court before there is any consideration of the final determination . Furthermore, as stated in *Kay Foundation v. S & F Towing Service of Staten Island, Inc.*, 31 A.D.3d 499 (2nd Dept. 2006) :

When a motion to reopen is made, the trial court should consider whether the movant has provided a sufficient offer of proof, whether the opposing party is prejudiced, and whether significant delay in the trial will result if the motion is granted (see *Frazier v Campbell*, 246 AD2d 509, 510 [1998]; *Veal v New York City Tr. Auth.*, 148 AD2d 443, 444 [1989]). Here, the plaintiff specified the evidence it would present if permitted to reopen and there would have been no undue delay for the presentation of such proof (see *Kennedy v Peninsula Hosp. Ctr.*, 135 AD2d 788, 790-791 [1987]). Moreover, there was no evidence that the defendants would be prejudiced. "The fact that the defendants will have to adjudicate the action on the merits does not warrant a finding of prejudice sufficient to deprive the plaintiff of his day in court" (*Lagana v French*, 145 AD2d 541, 542 [1988]; see *Morgan v Pascal*, 274 AD2d 561 [2000]).

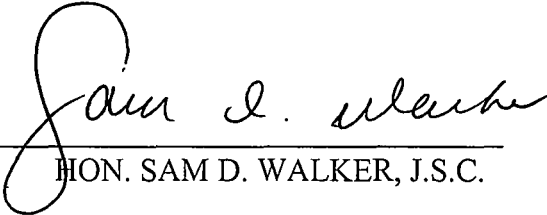
Here, the documents that are proposed to be admitted post trial evidence are not new and have previously been turned over to Plaintiff during discovery, however, when the opportunity to stipulate to the admission of these documents at the beginning of the trial, the binders that contained them were overlooked. This was clearly inadvertent and a consequence of Defendants' counsel's visual infirmity. The Court expects that both parties provide a complete and accurate record for review. In the interest of securing same and to aid this Court's determination of the remaining issues latitude is extended to the Defendant to provide the material that is referred to in this motion. The instant motion was made after the trial was completed and prior to the Court receiving the parties post trial memoranda of law, there is little if any prejudice to the Plaintiff nor will it cause any unreasonable delay in the trial or in the time required for the Court to render its decision. Defendants' counsel has offered the services of his law partner, Frank H. Connelly, Jr to handle the continuation of the trial which the Court finds

satisfactory.

All parties with their respective clients and/or witnesses are directed to appear before the Court ~~at 9:30am~~ on 1/30, 2012 prepared to proceed towards completing this matter.

The foregoing constitutes the Opinion, Decision and Order of this Court.

Dated: White Plains, New York
January 11, 2012



HON. SAM D. WALKER, J.S.C.

TO: KUSHNICK PALLACI PLLC
Attorney for Plaintiff
445 Broad Hollow Road, Suite 124
Melville, New York 11747

McGOVERN, CONNELLY & DAVIDSON
Attorneys for Defendant
145 Huguenot Street, Suite 403
New Rochelle, New York 10801