

Howard B. Spivak Architect, P.C. v Zilberman

2013 NY Slip Op 30844(U)

April 24, 2013

Supreme Court, New York County

Docket Number: 118165/2006

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

HOWARD B. SPIVAK ARCHITECT, P.C.,

Index No.: 118165/2006

Plaintiff,

Motion Date: 11/16/12

- v -

Motion Seq. No.: 003

HENRY ZILBERMAN and SUSAN ZILBERMAN,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion to set aside the jury verdict.

Notice of Motion/Order to Show Cause -Affidavits - Exhibits

FILED

PAPERS NUMBERED

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits - Exhibits _____

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Cross-Motion: Yes No

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Upon the foregoing papers,

At the conclusion of the trial on July 21, 2012, the jury unanimously rendered a verdict, finding that (1) the defendant Henry Zilberman and the plaintiff Howard B. Spivak Architect, PC did not agree that the defendant would pay the plaintiff about \$200,000 for architectural services that the plaintiff performed for the defendant under their oral contract (2) the defendant incurred fees for architectural services that plaintiff rendered on his behalf in the amount of \$525,661.46 under the contract, (3) the defendant previously made \$204,497.00 in payments to the plaintiff under the contract and (4) that the defendant first owed plaintiff the balance of payments under the contract as of

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 2]
May 2, 2002.

The defendant now moves pursuant to CPLR 4404 to (1) set aside the jury's verdict, in whole or in part, and/or (2) to grant remittitur of the jury verdict, or (3) to direct a judgment in favor of defendant, or (4) to direct a new trial on the grounds that the jury verdict is against the weight of the evidence. The plaintiff opposes the motion.

The court shall grant the defendant's motion only to the extent that the court finds that \$525,661.46, the amount of fees for architectural services that the jury determined that the defendant incurred under the oral contract, is excessive and against the weight of the evidence to the extent of \$39,548.46. The defendant's motion shall be otherwise denied.

The court denied the plaintiff's motion pursuant to CPLR 3025(c) to conform the pleadings to the proof with respect to its claim that it incurred "out of pocket" expenses in the course of rendering services to the defendant, which the defendant never reimbursed. Except for attorneys' fees, plaintiff's bill of particulars did not amplify the allegations in its complaint that it suffered damages in the form of costs and disbursements. Nor did plaintiff disclose any records of invoices or receipts or checks evidencing payment of such invoices during the discovery phase of the action. Finally, plaintiff's testimony at trial that he paid several invoices, some of which were not

* 3]

identifiable to the contract between the parties, was not supported by any documentary evidence. On that basis, the court agreed with the defendant that he would be prejudiced by an amendment to the pleadings with respect to "reimbursable expenses" at the time plaintiff rested its case. Forman v Davidson, 74 AD2d 505 (1st Dept 1980).

With respect to the fees owed the plaintiff, the interrogatory called for the jury to determine the amount of architectural "fees" incurred by defendant. As there was no evidence of "reimbursable expenses", and there was no interrogatory that called for the jury to determine such "out of pocket" expenses (i.e., costs of expeditors, structural and mechanical engineers, messengers and printing, incurred by plaintiff, but not reimbursed by defendant), the jury's inclusion of \$39,548 in expenses that were itemized and delineated as such on the Fee Summary dated as of November 2004 was clearly in error and in excess of the evidence. That portion of the jury verdict must be set aside as against the weight of the evidence. See O'Reilly-Hyland v Liberty Management & Const Ltd, 32 AD3d 765 (1st Dept 2006).

As for the jury 's answer to the interrogatory finding that the defendant owed the balance of the architectural fees to the plaintiff on May 2, 2002, such finding comported with the evidence. There was ample evidence in the record that the

certificate of occupancy was issued on May 2, 2002, and therefore, the jury was correct and the law supports the jury's determination that the date of the breach of the oral contract took place on May 2, 2002, which is also the accrual date of plaintiff's cause of action for breach of contract. Brushton-Moira Cent School Dist v Thomas Associates, 91 NY2d 256, 262 (1998).

Likewise, the defendant failed to raise an issue of fact with respect to his statute of limitations defense. Plaintiff's breach of contract cause of action did not accrue until May 2, 2002 and therefore the statute of limitations did not begin to run until that time, which was less than five years before the commencement of its lawsuit.

Finally, the court agrees with plaintiff that there was no evidence that the oral agreement by its terms was incapable of performance within one year, and therefore the contract is not void pursuant to the Statute of Frauds (General Obligations Law §5-701). North Shore Bottling Co v Schmidt & Sons, 22 NY2d 171, 175-176 (1968). The plaintiff's opinion as to what would be reasonable, which defense counsel attempted to elicit on cross examination, is not relevant to what the parties intended at the time they reached their agreement. Based upon the foregoing, it is

ORDERED that the motion of the defendant Henry Zilberman is granted to the extent that a new trial is directed on the issue of the total amount of architectural fees incurred by the defendant Henry Zilberman under the parties' oral contract, unless within 30 days after service of a copy of this Order with notice of entry, the plaintiff Howard B. Spivak Architect, PC shall serve and file in the Office of the Clerk of the Supreme Court, New York County, a written stipulation consenting to decrease the verdict as to the total amount of architectural fees incurred by the defendant from the sum of \$525,661.46 to the sum of \$486,113.00; and it is further

ORDERED that the defendant's motion is otherwise denied.

This is the decision and order of the court.

Dated: April 22, 2013

ENTER:

FILED

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Debra A. James
DEBRA A. JAMES J.S.C.