

<b>Scottsdale Ins. Co. v Shaira Constr. Corp.</b>
2014 NY Slip Op 30631(U)
March 12, 2014
Supreme Court, New York County
Docket Number: 117118/2008
Judge: Joan M. Kenney
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** JOAN M. KENNEY  
J.S.C. Justice

**PART** 8

Index Number : 117118/2008  
SCOTTSDALE INS. CO.  
vs.  
SHAIRA CONSTRUCTION CORP.  
SEQUENCE NUMBER : 002  
TRIAL DE NOVO

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ **No(s)** \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ **No(s)** \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ **No(s)** \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

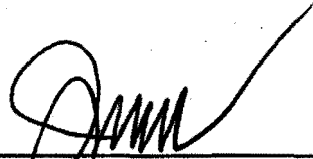
**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**

MAR 17 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/12/14

  
\_\_\_\_\_  
JOAN M. KENNEY, J.S.C.

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
SCOTTSDALE INSURANCE COMPANY,

Index # 117118/2008

Plaintiff,

-against-

**DECISION & ORDER**

SHAIRA CONSTRUCTION CORP.,

Defendant.  
-----X

**KENNEY, JOAN, M., J.S.C.**

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Papers considered in review of these motions

Notice of Motion, Affirmation, Exhibits and Memo of Law in Support	1-12
Affirmation in Opposition, and Exhibits	13-22

Defendant seeks an Order pursuant to CPLR 4401 and 4404(a) setting aside this Court's verdict rendered after a bench trial that occurred on October 17, 2012.

The facts of the case are assumed to be known to the parties. However, a short synopsis of the facts as testified to at trial follows.

**FILED**

MAR 17 2014

Plaintiff sold a general liability insurance policy (the policy) to defendant. The original policy was written and bound in or about November 2004, and was thereafter renewed for the next four years. The policy and the renewals, required prepayment of an "advance premium." Each policy issued to defendant for four years defined the advance premium as a deposit, with the balance to be calculated at the close of the annual audit period, along with delivery of the policy. It was agreed between the parties, pursuant

COUNTY CLERK'S OFFICE  
NEW YORK

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to the terms of the policy, that unless the audit results stated otherwise, defendant was responsible to pay an additional premium amount. The audit takes into consideration, among other things, the number of employees, gross receipts, etc. Finally, the post audit calculation that required defendant to make an payment of the additional premium, was due and owing upon written notice to defendant, that was provided and admitted into evidence.

For the year 2004-2005 plaintiff's auditors determined that Shaira's annual premium amount was calculated to be \$70,606.00, which was due and owing immediately upon the conclusion of the audit (less the payment of \$36,500.00 for the advance premium payment).

During the course of the trial, plaintiff offered, *inter alia*, documentary and testimonial evidence of the terms of the policy, the audit report and notice to defendant that the audit premium was due and owing (the documents). All of these documents were kept in the normal course of plaintiff's business and were admissible into evidence as a matter of law. Defendant's principal, Balwinder Singh (Mr. Singh) testified that he did not recall many of the terms of the policy, nor did he agree to pay any additional premium, other than the advance premium he paid in full.

Upon the conclusion of the trial, plaintiff asked for a directed verdict and that application was granted.

The defendant's motion contends that (1) certain evidentiary material was admitted into evidence improperly; and (2) plaintiff failed to satisfy it's burden of proof, and did not prove a prima

\* 4]  
facie case of breach of contract.

A judgment rendered after a bench trial should not be disturbed unless it is obvious that the court's conclusions cannot be supported by any fair interpretation of the evidence, *particularly where the credibility of witnesses is central to the case* (citations omitted) (emphasis added). *Saperstein v Lewenberg*, 11 AD3d 289 (1<sup>st</sup> Dept 2004).

This Court gave defendant and it's principle as much leeway as was possible without prejudicing defendant. When the trial is to the court instead of to a jury, procedure is always more flexible. Hence the additional options available to the court in the nonjury case under CPLR 4404(b). When it sets aside its own decision on a CPLR 4404 motion, the court can render a different decision on the same record, take new testimony and re-decide the case, etc. This Court need not make any additional findings of fact or law because defendant has not produced any new or additional evidence that would provide a basis for changing the verdict.

It is a prerequisite to the grant of a new trial that the movant point out the specific matter that aggrieves him or her. A court's decision after a nonjury trial that misapprehends the theory of liability and fails to address a key component thereof can provide a ground for the court to set aside its decision. CPLR 4404(b). *Paterno v Strimling*, 107 AD3d 1233 (3<sup>rd</sup> Dept 2013). Defendant has not proffered anything that it did not attempt to provide the Court during the trial. Moreover, Mr. Singh's testimony

was not credible even though it was taken by the Court in a light most favorable to him. On direct examination (plaintiff called Mr. Singh as it's own witness), Mr. Singh could not recall any specific facts that would support his theory that he was unaware of the terms of the policy. Moreover, Mr. Singh never objected to the audited premiums prior to the 2005-2006 policy year, even though the original policy commenced in 2004. More compelling were the clear endorsements of the policy that were recited on the first page of the declarations page.

It was undisputed that the parties contracted for the purchase of insurance coverage, and said coverage was sold and accepted by defendant. As a result, Courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract (*Silber v New York Life Ins. Co.*, 92 AD3d 436 1<sup>st</sup> Dept 2012). Such a meeting of the minds occurred here.

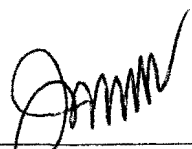
Consequently, defendant's motion is denied.

Accordingly, it is

ORDERED that defendant's motion is denied.

Dated: March 12, 2014

E N T E R:



Hon. Joan M. Kenney  
J.S.C.

**FILED**

MAR 17 2014