

**Edward J. Griswold Carpentry v Feldman**

2014 NY Slip Op 31319(U)

May 13, 2014

Supreme Court, Suffolk County

Docket Number: 26928/2008

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

**POST TRIAL DECISION**

**PRESENT:**

Hon. RALPH T. GAZZILLO  
A.J.S.C.

-----X	:	
Edward J. Griswold Carpentry,	:	Raymond A. Giusto, PC
	:	715 South Country Road
Plaintiff(s),	:	W. Bay Shore, N.Y. 11706
- against -	:	
	:	Berger, Fischhoff & Shumer, LLP
Tammy J. Feldman,	:	40 Crossways Park Drive
	:	Suite 104
Defendant(s).	:	Woodbury, N.Y. 11797
-----X	:	

The non-jury trial of this matter was conducted before the undersigned on March 25th, 2014. The plaintiff's complaint requests mechanics' liens and alleges claims of breach of contract, quantum meruit and unjust enrichment. The defendants' answer contains three counter-claims which essentially allege defective work and failure to comply with codified and statutory building standards.

Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the testimony of two (2) witnesses. Called by the plaintiff was Edward J. Griswold, and, by the defendant, Jeffrey Feldman. At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by April 25, 2014. Those memoranda having been received and reviewed, the Court's decision is as follows:

Preliminary, there are a number of background facts which are not in serious dispute and were stipulated and agreed to by the parties at the trial's commencement. Specifically, there is no contest that Tammy Feldman is the owner of the property (16 Cason) which is known as Lot No. 7 within the project known as "Burr Manor Estates." Lou Castellano was the project manager. There is a project known as "Jefferson Woods Estates" which was a separate estate

from Burr Manor Estates but had the same people as shareholders. The plaintiff performed work for both projects and received the sum of \$10,425 from the proceeds of the mortgage closing for Jeff and Tammy Feldman in addition to other payments.

#### TESTIMONY

What immediately follows is a brief, unassessed and condensed version of the testimony of the various witnesses regarding the relevant and germane facts of this matter as was portrayed, purported and alleged by each.

Griswold testified that he is the president and owner of the corporate plaintiff construction company and it primarily installs trim and paints. On new homes, the corporation comes in after completion of the electric, plumbing and sheet rocking and usually as a subcontractor through a general contractor. It has performed those services in perhaps 300 homes since 1997. During that time, it has received four or five complaints about its work. They were received while on the job-site and before a project's completion.

As to the instant matter, he had worked before with Lou Castellano, the defendant Feldman's partner. This project was on "Lot 7" and was Feldman's home. Through his records, Griswold claimed he was owed \$20,090, a demand for payment had been made, but it was refused. Those records, however, demonstrate that \$9,400 of that amount may have been at least marked as paid. Albeit inconclusive, there is also some testimony about a cash payment of that exact amount, although he denied ever receiving cash on this or any other project. Also of note and somewhat unsettling was his indication that he had two women (the surnames both of he didn't know) who filled in and temporarily did his bookkeeping.

Feldman testified that it is his wife and not he who owns the home. In response to the plaintiff's claims and allegations he unsuccessfully attempted to admit some documentary evidence. There was, however, some indication that there might have been double-billing of the \$9,400. He also indicated there had been a discussion of a discount for cash payments.

In support of his counter-claim, he offered a series of pictures of the purported damage (molding, unfinished deck, no latticing nor footing, nor spackling) as well as an estimate for repairs. There was no satisfactory proof, however, that the plaintiff was given any opportunity to cure the alleged defects.

#### LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondly, it should go without saying that in evaluating each

witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence*, 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v. Town of Bedford*, 60 NY2d 492 (1983); *Latora v. Ferreira*, 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v. Parr Gen. Contr. Co., Inc.*, 102 AD3d 770 (2d Dept 2013); *Hom v. Hom*, 101 AD3d 816 (2d Dept 2012); *Marinoff v. Natty Realty Corp.*, 34 AD3d 765 (2d Dept 2006).

Also worthy of examination is any witness' interest in the litigation. *See e.g.*, 1 NY PJI3d 1:91 *et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact; under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus*, the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *See Deering v. Metcalf*, 74 NY 501 (1878); *see also*, 1 NY PJI3d 1:22. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g. People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz.*, to try or test the case. It is also hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d 1:23.

Additionally, where an award of money damages is sought in a civil action, one of the basic premises in gauging the viability of such an action is the maxim of *damnum sine injuria est injuria sine damnum*: liability without damages is the same as damages without liability. In the absence of proof of both liability by the defendant as well as damages by the plaintiff, the plaintiff will typically not receive any compensation. Also, and assuming the issues of liability and damage are found in the plaintiff's favor, there is a further caveat, *viz.*, the proof must

contain evidence to support a valid calculation of any monetary award for the damages. Stated otherwise, an award of money damages should not be measured or determined by a whim or caprice; there must be a rational, well-established basis for any such award. Obviously, this rule is not only logical and just, it also reflects the established and historic admonition to avoid awarding damages on whim and/or naked speculation as opposed to some proven, satisfactory method which has some acceptable measure of precision. *See e.g. Goldberg v. Besdine*, 76 AD 451 (2d Dept 1902); *see also Kenford Co., v. County of Erie*, 67 NY2d 257 (1986); *R. B. v. M.S.*, \_\_\_ Misc. 3d \_\_\_, 303455/10, NYLJ 1202642854926 (Sup NY 2014). Indeed, in addressing the issue of a claim for damaged personal property the unanimous *Goldberg v. Besdine* panel wrote,

“There is proof as to the first cost of the articles which the plaintiff claims were injured or destroyed, but they were all in use, and had been in use for some time, and no proof was made of their condition or value at the time of the fire. Under these circumstances, the estimate of the value made by the court was necessarily conjectural, and is not based upon that reasonably precise proof which it was within the power of the plaintiff to furnish and which the law requires.”

*Goldberg v. Besdine*, *supra* at 452-53.

Although the rule that requires “that damages be reasonably certain, [it] does not require absolute certainty.” *Ashland Mgt. v. Janien*, 82 NY2d 395 at 404 (1993) (as long as based upon reliable factors but without any undue speculation, damages from loss of future profits are often an approximation). *Cf. Vasquez v. Geshner Realty Corp. & B & B Mgt.*, \_\_\_ Misc 3d \_\_\_, 2014 NY Slip Op 24036 (App Term 1<sup>st</sup> Dept 2014) (in the absence of articulated basis for estimated lost profits, claimed amount for damages indicated as “more or less” insufficient). Under appropriate circumstances where the proof does not provide a sufficient degree of preciseness but there is some support in the record and it is not legally erroneous, the fact-finder may rely upon “reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgement and common sense in arriving at [an] amount.” *Matter of Rothko*, 43 NY2d 305 at 323 (1977).

## DETERMINATIONS

### The Witnesses

The initial focus of the analysis is upon the witnesses’ credibility. In that regard, both witnesses were somewhat equally credible; stated otherwise, any defects in their testimony appeared as most likely to be inadvertent and the fruit of innocent ignorance, lack of recall, and/or mistake. There were no obvious and intentional lies by either—just some inaccuracies.

### Findings

Focusing on the law and its requirements on the matter at bar's causes of action, and after reviewing the evidence under the light of the law and logic, the undersigned finds as follows:

Preliminarily, the Court finds that the plaintiff's claim for non-payment has some merit. There is satisfactory proof that the services were performed, a demand for payment made, and full payment refused. However, the Court is not entirely satisfied that the amount demanded—\$20,900.00—is completely accurate. Indeed, there is insufficient evidence to support \$9,400 of that amount. In so opining, the Court notes that any award which included that portion of the demand would be undermined by questions which remain unresolved, *viz*, whether it was, as suggested by the defense, the result of double-billing? Was it paid, but in unrecorded cash? Was it merely reflective of a bookkeeping error or omission by the temporary office help? In any event, the plaintiff's proof was not strong or persuasive enough to resolve any such arguments or issues in its favor. Simultaneously, any award which included that amount would be haunted by those questions. To summarize, there are open, unanswered questions. As such, they must be resolved in the defendant's favor, the result of which is that portion of the demand being denied.

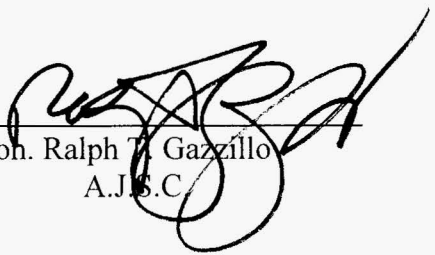
The balance of the claim, or \$10,690.00, is, however, awarded. There was proof of the debt and its non-payment. Although the undersigned notes there was an acknowledged payment of \$10,425.00, that was sufficiently demonstrated to have been for another project.

As to the defendants' counter-claim, there is an absence of proof as to either plaintiff's liability or damages. For example, and firstly, the demonstration of the damage is at best slim and clearly less than persuasive. Moreover, there is also lacking any satisfactory demonstration that any alleged damage was caused by the plaintiff or its agents. Indeed, as far as the trial record is concerned, the cause (or causes) remain virtually unproven if not unknown. Secondly, and again as noted above, damages are not to be measured or determined by a whim or caprice; there must be a rational, established basis for any award. *See e.g. Goldberg v. Besdine, supra*. In the instant matter, however, the claim for the amount of monetary loss is based upon a single mere estimate which, parenthetically, might not pass muster in a small-claims action. *See* UJCA §1804; UDCA §1804. The claim is, therefore dismissed.

It is, therefore, the determination and order of the Court that the plaintiff shall have judgment against the defendants in the amount of \$10,690.00, plus interest. It is the Court's further determination and order that the defendants' counter-claims are dismissed.

Submit judgment on notice.

Dated: 5/13/14

  
 Hon. Ralph T. Gazzillo  
 A.J.S.C.

Final Disposition