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

PRESENT: DEBRA A. JAMES PART 59
Justice

ASSOULINE RITZI LLC and LICHTEN RITZ2 LLC,

Plaintiffs,

- v -

EDWARD I. MILLS & ASSOCIATES, ARCHITECTS, P.C., EDWARD I. MILLS and JAMES KETTIG,

Defendants.

Index No.: 602552/2006
Motion Date: 07/12/2013
Motion Seq. No.: 008

The following papers, numbered 1 to 5 were read on this motion to set aside the jury verdict.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2, 3
Answering Affidavits - Exhibits	4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the motion of plaintiffs for an order pursuant to CPLR 4404(a) shall be denied.

At the conclusion of the trial on December 5, 2012, with one juror dissenting, the jury rendered a verdict, answering (1) "No" to the interrogatory, "Were the defendants Edward I. Mills & Associates, Architects, PC/Edward I. Mills (EIM) negligent in rendering zoning advice as to 16 Warren Street?" and (2) "No" to the interrogatory: "Was the defendant James Kettig negligent in rendering zoning advice as to 16 Warren Street?"

The plaintiffs now move pursuant to CPLR 4404 for an order

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

(1) setting aside the jury verdict on the grounds that the verdict is against the weight of the evidence and directing a new trial, or (2) directing a judgment in favor of plaintiffs as a matter of law[1]. The defendants oppose the motion.

The court shall deny the motion of plaintiffs in all respects.

The court concurs with defendants that to set aside the verdict as against the weight of the evidence and order a new trial, the court must determine that the evidence so greatly preponderates in the moving party's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. See Pavlou v City of New York, 21 AD3d 74, 76 (1st Dept 2005). It is axiomatic that in its evaluation, the judge "cannot interfere with a jury's fact-finding process simply because [she] disagrees with its finding or would have reached a contrary conclusion based on different credibility determinations." See Cholewinski v Wisnicki, 21 AD3d 791 (1st Dept 2005). As defendants argue, the court may also set aside a verdict and order a new trial in the "interest of justice" where there was harmful error or some form of judicial or counsel misconduct. However, the latter relief is limited to circumstances where the

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[1]As observed by defendants, were the court to grant plaintiffs a directed verdict, it would have to order a new trial on the damages and mitigation thereof, as the jury never reached the interrogatories pertaining to such issues.

error likely affected the verdict or where the misconduct was prejudicial. See Gilbert v Luvin, 286 AD2d 600, 600-601 (1st Dept 2001).

This court likewise agrees with defendants that for plaintiffs to establish entitlement to a judgment notwithstanding the verdict pursuant to CPLR 4404(a), plaintiffs must show that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v Hallmark Cards, Inc, 45 NY2d 493, 499 [1978]). Continued the Court of Appeals in Cohen, supra:

> It is a basic principle of our law that "it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. Similarly, in any case in which it can be said the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court many not conclude that the verdict is as a matter of law not supported by the evidence" (citations omitted).

The court further concurs with defendants that QB, LLC v A/R Architects, LLP, 19 AD3d 673 (2d Dept 2005), which is cited by the plaintiffs, is not to the contrary. In QB, LLC, the Second Department reversed the order of the trial court that granted defendant architect's cross motion for summary judgment dismissing the complaint and held that the evidence raised an issue of fact concerning the scope of defendant architect's professional and contractual obligations, particularly with

respect to the period before the defendant in that case prepared and presented the standard form agreement drafted by the American Institute of Architects. While QB, LLC and the case at bar are each actions for architectural malpractice alleging erroneous zoning advice that involve questions of the scope of the professional services rendered, the similarity between the two matters ends there. The procedural posture of this case, which is a post trial motion to set aside a verdict, makes QB, LLC's holding on a summary judgment motion wholly inapposite to the issues of law presented herein.

In addition, plaintiffs continue to assert the "law of the case" doctrine with respect to the affirmance of this court's order denying defendants' motion for summary judgment in the instant case. As defendants continue to affirm and this court repeatedly ruled from the commencement of the jury trial the opinion in Assouline Ritz LLC v Edward I. Mills & Associates, Architects, P.C., 91 AD3d 473 (1st Dept 2012) did not adjudge liability in favor of plaintiffs, but stated only

> "for the purposes of the motion, EIM did not dispute that an issue existed whether it had committed professional malpractice, but argued, inter alia that the malpractice, if any, had not proximately caused plaintiffs recoverable damages. EIM further argues that, even if there were evidence of damages, plaintiffs' failure to attempt to sell the property after learning of the zoning problem established as a matter of law that they had not taken reasonable steps to mitigate the loss." (underscoring added.) Assouline, 91 AD3d 473-474.

Ruling that there were issues of fact with respect to mitigation of damages and rejecting EIM's argument that there were no such issues, the Appellate Division never disagreed with EIM's argument that there were issues of fact with respect to whether EIM had committed professional malpractice, which EIM asked the appellate court to assume arguendo for the purposes of the appeal. Had the Appellate Division intended to reject defendants' "for the sake of argument" position on liability, the Appellate Division would have searched the record and granted partial summary judgment in favor of plaintiffs pursuant to CPLR 3212(b), which it decidedly did not do. As defendants quite correctly argue, the clear directives of the Appellate Division's opinion were that there were issues of fact with respect to proximate cause and damages as well as negligence that required determination by the fact finder, a jury in this action.

Plaintiffs have failed to demonstrate either that there is an absence of viable evidence that exists to support the jury verdict (see Lolik v Big V Supermarket, Inc., 86 NY2d 744, 746 [1995]), that the court committed serious error, or that the court or counsel engaged in prejudicial misconduct. Nor have plaintiffs shown that reasonable minds could not differ about the correctness of the conclusion reached by the jury in light of the evidence presented and the law charged.

As argued by defendants, in charging the jurors on the law of professional negligence, specifically architectural malpractice, this court decided "'[t]he threshold question in any negligence action [which] is: do[] defendant[s] owe a legally recognized duty of care to plaintiff[s]?" (See In re New York City Asbestos Ligation, 5 NY3d 486, 493 [2005]). In so charging the jury, this court implicitly answered that question in the affirmative, and in favor of plaintiffs. Plaintiffs are therefore incorrect that this court committed reversible error in failing to charge the jurors that irrespective of the contractual relationship between the parties, defendants owed an independent duty to plaintiffs. Plaintiffs also ignore well settled law with their contention that the court should have charged the jury on their cause of action for breach of contract, since an explicit term of a contract that requires the architect to carry out his ordinary professional obligations does not convert a malpractice action into one for breach of contract. See Matter of R. M. Kliment & Frances Halsband, Architects (McKinsey & Co.), 3 NY3d 143 (2004).

Nor did the admission of written agreements between the parties constitute error. As observed by the Court of Appeals, "the very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of contract

obligations, and the breach of that independent duty will give rise to a tort claim" (see New York University v Continental Ins. Co., 87 NY2d 308, 316 [1995]), which is true in this case involving allegations of professional negligence. It does not follow that because the duty is independent of any contractual obligations owed by defendants to plaintiffs, the written agreements in question were not probative on the question of tort liability, specifically as to the scope of services related to 16 Warren Street that defendants performed, which was hotly contested throughout the trial.

This court does not find that the continuance of trial proceedings resulting from a month long hiatus in trial testimony precipitated by the Sandy hurricane/storm was error either prejudicing the plaintiffs' case or affecting the jury rendering of a true verdict. As defendants point out, at no time during the trial did plaintiffs ever make an objection to the reconvening of the jury. Nor does this court find any "interest of justice" reason to set aside the verdict, as the court determines that the hiatus tainted neither the jury deliberations nor its verdict.

The court again agrees with defendants that it was not within the court's province to charge the jury with respect to the applicability of any part of the Zoning Resolution. Such opinion is a matter of architectural expertise (see Lesron

Junior, Inc. v Feinberg, 13 AD2d 90, 97 [1st Dept 1961]), which was for each parties expert witness to offer for consideration by the jury.

The jury finding that defendants did not depart from the standard of care for architects in the community was supported by their expert's opinion that the defendants' advice that plaintiffs make a submission for a pre-determination to the New York City Building Department was good and accepted practice on the part of reasonably prudent architects. The question of foreseeability, i.e., whether a reasonably prudent architect could reasonably foresee monetary loss as a result of the erroneous zoning advice considering the totality of circumstances under which such advice was rendered, turned entirely on credibility, which is "peculiarly within the province of the jury" Cholewinski, 21 AD3d at 792. The inability of plaintiffs' expert to testify concerning whether defendants violated the standard of care of an architect prior to August 26, 2004, the date that plaintiffs entered into a contract of sale to purchase of 16 Warren Street, which is the date that plaintiffs allege they suffered monetary loss, also supports the jury verdict. It is beyond peradventure that the defendants were not negligent if the erroneous zoning advice was rendered after the loss since by definition defendants could not have foreseen monetary loss as a

result of their having rendered erroneous advice after plaintiffs incurred the monetary loss.

Based upon the foregoing, it is

ORDERED that the motion of the plaintiffs for an order setting aside the verdict and (1) directing that judgment be entered in their favor notwithstanding the verdict or (2) ordering a new trial is denied.

This is the decision and order of the court.

FILED

JUL 24 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 21, 2014

ENTER:

DEBRA A. JAMES J.S.C.