

Air Professional Assoc., LLC v Siialin Rd. Dev. Corp.
2018 NY Slip Op 33443(U)
October 16, 2018
Supreme Court, Putnam County
Docket Number: 50045/2016
Judge: Janet C. Malone
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To commence the statutory period for appeals as of right under CPLR §5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
PUTNAM COUNTY

-----X
AIR PROFESSIONAL ASSOCIATES, LLC,

INDEX NO.: 50045/2016

Plaintiff,

-against-

DECISION AND ORDER

SHALIN ROAD DEVELOPMENT CORP.,
TRI MAR INDUSTRIES, INC., and MARTIN
PARENTI, individually.

Motion Sequences: 3 & 4

Defendants.

-----X
MALONE, J.

The following papers¹ numbered 1-4 were read in deciding Defendants' Notice of Motion and Plaintiff's Notice of Cross-Motion:

<u>Papers</u>	<u>Numbered</u>
<u>Motion Sequence 3</u>	
Notice of Motion/Affirmation in Support of Ellen A. Faulkner, Esq./	
A-J	1
<u>Motion Sequence 4</u>	
Notice of Cross-Motion/Affirmation of Michael Fahey, Esq. in Opposition to Defendants Shalin Road Development Corp. and Martin Parenti's Motion and in Support of Plaintiff APA's Cross Motion/Exhibits A-D	2
Reply Affidavit of Ellen A. Faulkner, Esq./Exhibits K-L	3
Decision and Order (<i>Summary Judgment</i>), (Malone, J.) dated January 18, 2018	4

¹ Plaintiff's Reply Affirmation was not considered as it constitutes an impermissible sur-reply. See, CPLR R 2214.

After the bench trial² in the instant action, Defendants by way of Notice of Motion filed on August 10, 2018 and Plaintiff by way of an untimely motion filed on August 24, 2018, move pursuant to CPLR R 4404(b) to set aside the Decision and Order After Trial (the “Trial Decision”) dated July 30, 2018 (Malone, J.) and to reargue the evidence at trial pursuant to CPLR R 2221(d).

The Trial Decision in relevant part denied Plaintiff’s relief for a 15% allowance for overhead, a 10% allowance for profit and the amount of \$9,275.00 for sheet metal and awarded Plaintiff \$72,725.56 on its third cause of action for unjust enrichment, inclusive of sales tax in the amount of \$2,396.76 and \$70,327.90 on its fourth cause of action to foreclose on a mechanic’s lien. The Trial Decision also denied Defendants an offset in the amount of \$35,050.00 for Defendant Tri Mar Industries, Inc.’s (“Tri Mar”) alleged services to Plaintiff and \$6,500.00 for services bartered with Proformance, Inc. for failing to assert same as a counterclaim. *See*, the Decision and Order After Trial (Malone, J.) dated July 30, 2018 as Defendants Exhibit F.

Defendants claim the Court overlooked and misapprehended matters of fact and law in awarding certain damages to Plaintiff and in the event such leave is granted that the Court render a new decision reducing its award of \$72,725.56 on Plaintiff’s third cause of action for unjust enrichment by \$2,396.76 as and for sales tax, \$36,250.00 or \$29,000.00 as and for an offset for services performed by Defendant Tri Mar and \$6,500.00 as and for a reduction for the services performed by Proformance, Inc. as a result of Plaintiff’s defective work; and further reducing Plaintiff’s award of \$70,327.80 on Plaintiff’s fourth cause of action foreclosing Plaintiff’s mechanic’s lien by \$36,250.00 or \$29,000.00 as and for an offset for services performed by Defendant Tri Mar and \$6,500.00 as and for a reduction for the services performed by Proformance, Inc. because of Plaintiff’s defective work. *See*, Affirmation of Ellen A. Faulkner, Esq. in Support at paragraph 43.

Defendants’ counsel does not cite the standard or any supporting case law for a CPLR R 4404(b) application anywhere in its motion papers, but instead conflates the arguments for a CPLR

² Air Professional commenced this action on January 19, 2017 against Defendants for breach of contract, account stated, unjust enrichment, foreclosure of a mechanic’s lien and to pierce the corporate veil. The Court granted partial summary judgment to Defendants dismissing Plaintiff’s first cause of action for breach of contract. *See*, Affirmation of Ellen A. Faulkner, Esq. in Support at paragraphs 4 and 5; *see also*, Decision and Order (*Summary Judgment*), (Malone, J.) dated January 18, 2018.

4404(b) motion, with a CPLR 2221(d) motion, leaving it to the Court to parse out Defendants arguments.

At the outset, a motion pursuant to CPLR R 2221(d) is based on matters of fact or law overlooked or misapprehended by the Court in determining a prior motion. As Defendants improperly move under CPLR R 2221(d) to reargue the Court's Trial Decision and not a prior motion, Defendants arguments that the Court overlooked and misapprehend the prior pleadings and the evidence produced at trial by failing to consider an offset to Defendants must fail. Therefore, Defendants' motion to reargue is **denied**.

Moreover, a decision rendered by a court after a nonjury trial should not be disturbed unless it is clear that the Court's conclusions could not have been reached under any fair interpretation of the evidence. *See*, CPLR R 4404(b), *Kahan v. Sulaymanov*, 24 A.D.3d 612 (2d Dept. 2005), *Ardmar Realty Co. v. Bldg. Inspector Vill. of Tuckahoe*, 5 A.D.3d 517 (2d Dept. 2004), and *Zohlman v. Zoldan*, 2011 NY Slip Op 30357(U) (Sup. Ct., New York 2011); *see also*, Affirmation of Michael Fahey, Esq. at paragraph 8.

Accordingly, as to Defendants argument regarding sales tax, upon further review of the Court's calculations, the Court concedes that the Court double-awarded the sales tax figure of \$2,396.76³ in its award for damages on Air Professional's third cause of action for unjust enrichment. *See*, the Trial Decision at pages 5 and 7; *see also*, the Affirmation of Ellen A. Faulkner, Esq. in Support at paragraphs 23 and 24. Plaintiff's motion pursuant to CPLR R 4404(b) is **granted**.

The Decision and Order After Trial (Malone, J.) dated July 30, 2018, is hereby corrected (*see*, CPLR R 4404(b)) by way of the Corrected Decision and Order After Trial (Malone, J.) dated October 16, 2018, to reflect the correct calculation of *quantum meruit* damages on Plaintiff's third cause of action for unjust enrichment in the total amount of \$70,327.80, by removing the second award of sales tax in the amount of \$2,396.76 at paragraph 3, page 7 of the Trial Decision, to have the paragraph now read:

Air Professional Associates, LLC's third cause of action
for unjust enrichment has been established by *quantum*

³ In reviewing the last four pages of Plaintiff's Trial Exhibit 11, the \$2,396.76 of sales tax was included in the \$46,212.27 cost for materials, which was awarded to Plaintiff. *See*, Trial Exhibit 11 as Defendants Exhibit G and Decision and Order After Trial (Malone, J.) dated July 30, 2018 at page 5 as Defendants Exhibit F.

meruit damages in the total amount of **\$70,327.80**: \$24,115.53 for labor and \$46,212.27 for materials. Statutory interest from October 12, 2016, when Air Professional demanded payment shall be applied to **\$70,327.80** upon presentation of a judgment for the Court's signature. *See*, CPLR § 5001 (a) and (b), and *See*, *Tesser v. Allboro Equip. Co.*, 73 A.D.3d 1023, 1026 (2d Dept. 2010).

It should also be noted that the Corrected Decision and Order After Trial (Malone, J.) dated October 16, 2018 reflects the correct spelling and name of Proformance Inc. on page 7.

Plaintiff's counsel is to notice for settlement a proposed judgment in the amount of \$70,327.80 to the Court no later than **November 2, 2018**.

As to Plaintiff's motion, it is **denied**. It is well settled that a post-trial motion pursuant to CPLR article 44 must be made within fifteen (15) days after the decision. The Trial Decision here was rendered on July 30, 2018 and Plaintiff's counsel did not file Plaintiff's motion until August 24, 2018. This defect would not have been fatal had Plaintiff's counsel established "good cause" for the delay, however, counsel offered no explanation for its delay in filing its motion. *See*, CPLR § 2004; CPLR R 4405; *Verdi v. Jacoby & Meyers, LLP*, 154 A.D.3d 901 (2d Dept. 2017), *Casey v. Slattery*, 213 A.D.2d 890 (3d Dept. 1995); *see also*, Reply Affirmation of Ellen A. Faulkner, Esq. at paragraphs 17 and 18. *Arguendo*, even if the Court were to consider Plaintiff's arguments none of them persuade this Court that the conclusions reached by the Court were not based on a fair interpretation of the evidence deduced at trial.

To the extent not addressed, the remaining relief is denied.

This constitutes the Decision and Order of the Court.

DATED: October 16, 2018
Carmel, New York

ENTER:


Hon. Janet C. Malone, J.S.C

Via NYSCEF:

Michael Fahey, Esq.
Bartels & Feureisen, LLP
Attorneys for Plaintiff
1025 Westchester Avenue, Suite 402
White Plains, New York 10601
Ellen A. Faulkner, Esq.
Law Office of Craig T. Bumgarner, P.C.
Attorneys for Defendants
1118 Route 52, Suite F
Carmel, New York 10512