

P.E. Smith Assoc., Inc. v Bandoian
2019 NY Slip Op 30015(U)
January 2, 2019
Supreme Court, Suffolk County
Docket Number: 00084/2005
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX NO. 00084/2005

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 9/12/18 FINAL SUBMITTED DATE: 9/12/18 MOTION SEQ#016 MOTION: MOTNDECD

 P.E. SMITH ASSOICATES, INC.,

Plaintiff,

ACTION #1
INDEX NO. 00084/2005

-against-

KEVIN BANDOIAN and MELISSA BANDOIAN,

Defendants.

 KEVIN BANDOIAN and MELISSA BANDOIAN,

Plaintiffs,

ACTION #2
INDEX NO. 14419/2006

-against-

 PETER E. SMITH, P.E. SMITH ARCHITECT,
 P.C., P.ED. SMITH ASSOCIATES, INC.,

Defendants.

**ATTORNEY FOR KEVIN BANDOINA
& MELISSA BANDOIAN:**
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 516-739-8222

ATTORNEY FOR P.E. SMITH ASSOC.:
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 631-423-7777

The matters appearing in the caption were tried, non-jury, on the following dates: 2/21/17, 2/27/17, 2/28/17, 3/1/17, 3/3/17, 3/6/17, 3/9/17, 3/10/17, 3/15/17, 3/17/17, 3/20/17, 3/23/17, 3/24/17, 3/27/17, 4/17/17, 4/18/17, 4/19/17, 5/8/17, 5/9/17 and 5/10/17. Although the last day of trial was 5/10/17, the Court was not provided with a complete set of post-trial petitions until October 2018.

The Bandoian parties submit a petition seeking (1) A directed verdict in their favor dismissing any remaining causes of action of the Plaintiff (Associates) in Action No. 1 on the ground that Associates failed to achieve substantial (and final) completion of the project and anticipatorily breached the construction contract between the parties, thereby excusing their performance; (2) Awarding sanctions in the form of dismissing Associates' remaining cause of action in Action No. 1 for the use of altered Bate stamped documents, for failure to produce its expert's notes, calculations, and photographs; (3) Entering into evidence the Bandoian Exhibits, BBBB through DDDDD, inclusive, evidencing the Bandoians' correction and completion costs; and (4) For an order excluding from evidence the expert testimony of William R. Schlumpf, one of the Smith Parties' expert witnesses.

The Smith entities cross petition for an order (1) Striking certain exhibits offered at trial and preclusion as to any testimony relative to those exhibits based upon the fact that the same had not been disclosed, although duly demanded in the discovery phase; (2) Preclusion and striking of the expert testimony of Mr. Scarabino regarding sizing of the units and all testimony regarding Manual J calculations, Manual D calculations and Manual S calculations as that testimony rests on a foundation of inadmissible hearsay; (3) A missing witness inference, based upon the failure of Bandoian to call as a witness, Harry Rutkowski identified in their expert witness disclosure.

In rendering a determination concerning these post-trial applications, the Court has been supplied and considered the following:

(Motion filed under Action #1 Index No. 00084/2005)

1. Defendants' Notice of Motion, Attorney Affirmation of Gayle A. Rosen, inclusive of Exhibits A through G;
2. Affirmation In Opposition of Attorney John C. Bennett with Exhibit A;
3. Reply Affirmation of Gayle A. Rosen with Exhibit A;
4. Sur Reply Affirmation of John C. Bennett with Exhibits A through C;
5. Plaintiffs' Notice of Cross-Motion, Attorney Affirmation of John C. Bennett, inclusive of Exhibits A through J;
6. Affirmation In Opposition of Gayle Rosen, inclusive of Exhibits A through H; and
7. Reply Affirmation of John C. Bennett with Exhibit A.

This should have been a relatively simple case where the Smith entities claim the Bandoian entities owe it/them money for "extras" supplied in connection with a total

renovation of a home owned by the Bandoians; and the Bandoians claim that the Smith entities breached any contract it had with the Bandoians and as a result thereof, incurred damages. Bottom line, both parties seek damages against the other stemming from a written contract to wit: Smith seeking judgment for "extras" and Bandoians claiming damages as a result of Smiths' breach.

These relatively simple issues consumed 20 days of trial time as well as post-trial oral argument held on October 25, 2018.

On February 21, 2017, the Court heard opening statements. The Plaintiffs' [Smith entities] opening statement outlined the nature of Plaintiffs' claims for sums due for "extras" in connection with a construction project at the home of Kevin Bandoian and Melissa Bandoian, his wife [Bandoians]. More particularly, the Smith entities claimed monies due in the sum of \$156,000 for "upgrades and extras."

Counsel for the Bandoians, throughout the trial, made repeated references to the decision in these matters of the Hon. Emily Pines [September 2010]. The Court has reviewed the decision of Justice Pines and concurs with Justice Pines that the contract was not substantially complete as no certificate of occupancy issued.

Furthermore, during Smiths' opening statement it was noted that any claim sounding in architectural malpractice is time-barred as the testimony indicates that the last time Smith, as an architect [Smith Architecture PC], was engaged to complete any services was in 2002. As the Bandoian action was filed beyond the three year period of limitations any claims sounding in architectural malpractice are **DISMISSED**. In any event, the Court heard no testimony sufficient to establish a *prima facie* case of architectural malpractice.

The Court also heard on that same date the opening statement of the Bandoians. That opening statement indicated that the Defendants' claim against the Smith entities was for breach of contract as a result of poor workmanship, scheduling deficiencies, breach of fiduciary duties, false representations (inducement) as well as professional malpractice.

Throughout the trial hundreds of exhibits were produced.

The Smiths' petition seeking a directed verdict is **DENIED** without prejudice to submit argument and law substantiating a verdict in their favor with the submission of their closing brief. All agree, case law concerning a directed verdict and/or motion for directed verdict requires a court not to engage in weighing of the evidence, but instead must

determine that by no rational process could the trier of fact find for the non-moving party. *See, Dolitsky v. Bay Isle Oil Co., Inc.*, 111 A.D.2d 366 (2nd Dept. 1985). Furthermore, the Bandoians claim for directed verdict on the grounds of anticipatory breach is also **DENIED** without prejudice. The Bandoians may submit that issue for determination as part of their post-trial memorandum. In connection with the claim of anticipatory breach, the parties are directed to address within their post-trial memorandums the law regarding anticipatory repudiation articulated in *Fonda v First Pioneer Farm Credit*, ACA, 86 A.D.3d 693, 927 N.Y.S.2d 417.

The Bandoians' petition seeking sanctions in the form of a dismissal of Smiths' remaining causes of action, if any, for use of altered Bate stamped documents, for failure to produce its expert's calculations, notes, and photographs is **DENIED**. The Court finding the Smith entities were in substantial compliance with Civil Practice Law and Rules § 3101(d).

The Bandoians seek a ruling that their exhibits in connection with correction and completion costs marked and tabbed Exhibits BBBB through DDDDD be admitted into evidence. It should be noted that on March 10, 2017 the Court allowed testimony and all the contested exhibits into evidence "conditionally." The condition being that the parties return to Court whereby the attorney for the Smith entities would produce a proper demand for discovery and inspection, bill of particulars, or some type of discovery device whereby it was demanded that the Bandoians produce the documents that were offered into evidence during the trial. The Court further noted that in the event the documents were demanded and not properly exchanged, the Court would hear a petition by the Smith entities to strike the testimony and expunge the documents from the record. The Smith entities have produced exhibits procedurally proper and demonstrative of their demand. That demand clearly calls for the production of evidence in substantiation of the Smiths' pecuniary losses. As concerns the admissibility of the exhibits contested by Smith, the Court finds in favor of the Smith entities and will only consider those exhibits and testimony proffered properly as detailed in Smiths' submission.

Both parties have petitioned concerning the consideration and admissibility of testimony proffered as "expert." That includes the testimony of Scott W. Scarabino and William R. Schlumpf. The Court, without prejudice, denies all parties' applications concerning the admissibility and consideration of purported expert testimony. The Court reserves to itself, as finder of fact, the weight it may or may not afford such testimony based upon post-trial memorandum and the record of all the proceedings.

The Court denies Smiths' petition for a missing witness charge. More particularly, the

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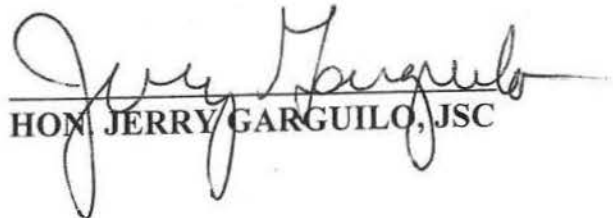
Smith entities seek a missing witness charge (adverse inference) for the failure of the Plaintiffs to produce Henry Witkowski. The Court does not recollect counsel for the Smith entities providing notice to counsel to the Bandoians of his intention to seek a missing witness petition.

Any and all other issues before this Court in the nature of a post-trial motion are denied without prejudice. The parties may re-address same in their respective post-trial memoranda.

The parties are directed to submit to this Court within 60 days of the date of this Order their closing memoranda. In recognition of the time it has taken this relatively simple matter to weave its way through the system, the parties will not be afforded any adjournment of the submission date.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: January 2, 2019


HON. JERRY GARGUILO, JSC