SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** 14

Justice

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EPIPHANY CONSTRUCTION SERVICES, LTD.,

Plaintiff,

- v -

WALISON CORP., and RLI INSURANCE COMPANY,

Defendant.

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WALISON CORP.,

Third-party plaintiff

-v-

AEGIS SECURITY INSURANCE COMPANY,

Third-party defendant.

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INDEX NO. 653188/2015

DECISION AFTER TRIAL

This construction case pits the plaintiff Epiphany (a concrete subcontractor) against defendant Walison (the general contractor) over work done erecting two apartment buildings from the ground up. Both buildings were being constructed close to each other in the Bronx at the same time. One site was on Walton Avenue and the other was on Burnside Avenue; these locations are about ten minutes apart.

Plaintiff claims that defendant owes it money for work completed. Not only does defendant deny owing plaintiff anything but defendant claims that plaintiff owes defendant money for delays, poor workmanship, the costs associated with finishing the work and costs relating to plaintiff's failure to pay its suppliers.

At the time the work was being done, Epiphany was run by two sisters: Nicole Lio and Danielle Ziano. Nicole did the "outside" work – measuring, estimating, reading plans, etc. Danielle did the "inside" work – billing clients, processing change orders, payroll, paying suppliers, etc. By the time the of the trial, Danielle had not been involved in Epiphany for some time. She did not testify on behalf of plaintiff (the company run by her sister), although she did obey a subpoena and came to testify when called by Walison.

Defendant Walison was run by a father, Raffi Rajput, and his two sons (brothers Saba and Sal). Saba Rajput testified that he did the "outside" work on these two buildings and that he visited both projects three to four times a week (7/22/19 tr at 29).

It is appropriate to note that the sisters' father, Lou, had known the brothers' father, Raffi, for many years and they had worked together previously. Saba made clear that when he signed the contract, he thought Lou was going to be very involved but it turned out that Danielle and Nicole were "running the show" (6/21/19 tr at 79). From Saba's demeanor as he testified on this topic, it was clear that Saba did not want to work with the women, that he felt that he was duped into working with the women and that he resented them and the situation from the very beginning.

Credibility

Issues of credibility at a bench trial rest with the Court (the fact-finder), "particularly where the credibility of witnesses is central to the case" (*Saperstein v Lewenberg*, 11 AD3d 289, 289 782 NYS2d 720 [1st Dept 2004]). The Court had plenty of opportunity to observe the demeanor of the witnesses and assess their credibility as they testified – this trial lasted nineteen days over the course of more than a year (all pre Covid 19 pandemic and in person). Both

attorneys were experienced in construction law, skilled in trial practice and had an impressive command of the voluminous documents in this case; they were absolutely prepared for this trial, and they obviously prepared the primary party witnesses as best as any lawyer can (Nicole for plaintiff and Saba for defendant).[1]

The Court found Nicole to be credible. She was very familiar with the paperwork and specifics of these two projects; she knew about plans, design changes, progress, stop work orders, etc. But as much as Nicole knew about the "outside" of the office work, she freely admitted that she didn't know much about the "inside" office work at the time these buildings were being built. And so while Nicole would know a change order or application for payment had to be made, it was usually Danielle who would prepare these documents and send them over to Walison.

Danielle handled payroll and all accounts payable and receivable. This Court got the impression that while Nicole was out getting business, she relied on Danielle to collect the money, pay the bills, and generally run the office. Therefore, in responding to specific questions about financial matters, Nicole did not make up an answer – she admitted she did not know, and that Danielle would know. On the other hand, when it came to referring to the detailed plans and drawings, measurements of concrete, placement of rock anchors, etc., Nicole was clearly in her element; she was particularly knowledgeable and comfortable discussing these topics. In other words, she was believable.

[1] Although the principals of plaintiff (sisters) have different last names, the principals of defendants (brothers) do not. To maintain balance, the Court will refer to all principals by their first names.

Saba's Testimony

In contrast, Saba was not believable. Unfortunately, the Court observed that too often counsel for defendant's objections had the effect of coaching Saba; the record is chock full of instances where, after his attorney objected (often with an extended soliloquy), Saba adjusted his testimony accordingly. The transcript does not reflect the smirk that the Court routinely observed in these situations. For example, at first Saba first testified confidently about the contract Walison signed with the owner and specifically that section 9.3.1.2 meant that if he asked the owner for money because certain work has been completed, it was his representation to the owner that he intended to use that money, once released, to pay someone in full for that work (1/28/19 tr at 80). Of course, a general contractor should be familiar with how he gets paid and his obligations with respect to the money received. However, his lawyer started objecting and, even when overruled, she still kept objecting and making speeches until her client got the hint (*id*. at 80-85). Saba finally got the message and then backtracked by saying "I am not an attorney so I don't know what this [section 9.3.1.2] means" (*id*. at 85). To change his testimony and claim that he didn't have a clue what a general contractor's obligations are to the owner was preposterous – what was clear was that he was trying to say whatever he thought his lawyer wanted him to say, after hearing so many of her objections and speeches. That raised questions about the veracity of his testimony.

Once Walison represented to the owner that Epiphany completed certain work, and money was released to Walison based on that representation, then, according to Saba's testimony, Walison should have paid Epiphany. It would make little sense if Walison took the money from the owner and then didn't pay Epiphany based on the claim that the work wasn't done or wasn't done properly. Walison can't have it both ways. Clearly, plaintiff's attorney was

exploring this issue when he showed Saba exhibit 27, where Saba certified to the owner that Epiphany's work in that application for payment was complete according to the contract. Defendant's attorney kept objecting on relevance and then conducted a voir dire – until finally, Saba got the hint and said that certification had no relationship to Epiphany's work. (1/28/19 tr at 92).

Clearly, these episodes diminished Saba's overall credibility and reinforced to the Court that he would say whatever he thought his lawyer wanted him to say. Through her objections and extended comments, counsel for defendant made clear what she wanted Saba to say and the transcript is full of instances in which Saba altered his testimony after his attorney raised strenuous objections.

Credibility and The Concrete Slab

While Saba claimed to be an experienced general contractor who was familiar with all aspects of erecting apartment buildings in New York City, some material parts of his testimony made no sense. During the course of the trial, it was crystal clear that either he was not as experienced as he claimed to be or that he testified to whatever he thought would help his case. An egregious example of this concerns a major aspect of this case: the final concrete slab. This slab was a major point of contention. Saba testified that because Epiphany did not pour the slab, Walison suffered all kinds of damages plus Walison had to do the work itself. Epiphany, on the other hand, claimed that it could not pour the slab because the "under slab" utilities, plumbing, were not yet installed. Epiphany was terminated before the under slab utilities were installed, and so it never poured the slab and never charged for it.

Saba testified that Epiphany could have and should have poured the slab even without the under slab plumbing being installed. If it had, then "all" Walison would have had to do was break the slab up to install all the pipes and utilities (11/6/19 tr at 29-39). This Court thought Saba's testimony was preposterous – even Richard Scarry's children's book explains that after the sewer pipes and other plumbing is installed under the ground the floor goes down. Here, that floor is a huge, thick concrete slab.

Moreover, Walison terminated Epiphany in July and did not start to pour the slab until September 20, *after* the under slab utilities were finally installed. So Walison waited, and that certainly is no surprise. When confronted with that fact-- that Walison couldn't start pouring the slab until after the utilities were installed-- Saba responded "Yes, but that does not stop Epiphany from doing their work. They can install it and we can rip it up and do it again later on" (*id*. at 29). Later Saba testified that Epiphany didn't install the slab so Walison waited for the underground utilities to be installed, saying "Why do the work twice?" (*id*. at 31). When plaintiff's counsel followed up, asking whether the "right" way involved pouring the slab *after* the utilities were installed, Saba answered "there are many ways." When confronted with the fact that he said pouring the slab after the utilities were installed *was* the right way, and that Walison had waited until the utilities were installed before pouring the slab, Saba lost even more credibility when he responded "That's one of the ways" (*id*.).

Of course, this Court is not an engineer or a construction expert. And the Court recognizes that the children's book author, Richard Scarry, isn't either. However, the Court did hear from an expert. Mr. Rosenberg was qualified – by stipulation- to be *Walison's* expert. Mr. Rosenberg has been in the construction industry his whole professional life. And even Mr. Rosenberg testified that the under slab utilities go in before the concrete slab is poured. When

asked "Would you agree with me that under slab utilities need to be installed prior to pouring the slab?" He answered, without any hesitation, "Yes" (3/9/20 tr at 66). Saba would have been a lot more credible had he only admitted the obvious: that it would have been stupid for Epiphany, or anybody, to pour the slab before the sewer and other pipes were installed.

Credibility and Puffery on Damages

Obviously, it was not Epiphany's fault that it couldn't pour the slab until Walison's plumber installed the under slab utilities. Perhaps Saba did not make that admission because he knew he improperly pumped up Walison's damages for work done after Epiphany was terminated. On September 7, he charged for six workers when the records only show three people worked (11/6/19 tr at 7-10). On September 9, Walison charged for eight men when only three were doing concrete work (*id*. at 12-14). On September 17, he charged for six men when it was either three or five (the number was not legible) but it was certainly not six (*id*. at 16-17) and on September 30, Walison charged for five people when the records only show three (*id.* at17-18). But it didn't stop there.

On October 8, Walison charged for six men but the reports only show two (*id*. at 18), on October 13, Walison charged for one worker but no concrete work was done (*id*. at 20) as was the case on November 9, when he billed for two men when no concrete work was done (*id*. at 21). The same thing happened on November 10, when Walison charged for one person but no concrete work was taking place (*id*. at 23).

When Saba's overbilling - charging for more workers than his daily reports reflected- was exposed, he first tried to shrug it off – saying things to the effect of "so reduce the damages" – as if swearing falsely was just a ministerial error rather than a big deal. When it became clear that this tactic was a pattern, he tried to blame it on a new employee at that time (Henda). But

Saba was testifying to the accuracy of these documents, not Henda. And if Saba knew that Henda made mistakes or that the records were not entirely accurate, the time to correct them was before the trial. Blaming Henda only when confronted with numerous examples of exaggeration on cross-examination eviscerated Saba's credibility.

Credibility and Lien Waivers

Another clear indication that Saba was not credible was his testimony about lien waivers. At times, Walison would only release money to Epiphany upon presentation of lien waivers from Epiphany's suppliers and subcontractors. Nicole testified that, although Danielle had handled obtaining and presenting these particular lien waivers, suppliers often provide lien waivers in advance of actually being paid (because the subcontractor needs the money from the general contractor in order to pay for the supplies). Saba vigorously disagreed and testified, with utter disdain for Nicole, that subcontractors and suppliers never sign a lien waiver unless they have been paid. Saba swore unequivocally that to the general contractor, a signed lien waiver is absolute proof that the signor has already been paid in full (1/31/19 tr at 46). Saba testified so forcefully that, when Epiphany presented lien waivers where the signor had not been paid, he portrayed it as a horrible lie and intimated that it was tantamount to fraudulently grabbing money to which Epiphany was not entitled. Saba seemed totally disgusted that Nicole would even suggest that anybody would sign a lien waiver in advance of being paid in full.

Walison decided to subpoena Epiphany's suppliers who had signed lien waivers, and the Court was eager to hear from them. As it turned out, Walison's witnesses completely contradicted Saba's testimony and corroborated Nicole's. Lien waivers are in no way limited to receipts for payment. That is just not the way the industry works.

The first witness called was from the rebar supplier, Men of Steel. Ms. Tomer, the operations manager who is responsible for billing and other matters, testified that she was very familiar with lien waivers and Men of Steel provides them when they got paid, are being paid or will get paid (9/16/19 tr at 5). She wasn't the owner of Men of Steel and did not testify as to why the owner would sign before he got paid, but she knew and swore to the fact that signed lien waivers are not limited to receipt for payments.

Defendant also called A-1 Transit Mix, the supplier of concrete, ready mix, and related supplies for both jobs and to both parties. A-1 sold concrete to Epiphany and grout to Walison for these jobs (*id*. at 52). A-1 filed liens after not being paid by Epiphany. Mr. Gentile, the owner of A-1, appeared to testify. He has been in this business a long time, knew Raffi (Walison's president (the father)) since 1997 and had a strong motive not to offend either party – both sources of potential future business.

When pushed by Walison's counsel as to Epiphany's non-payment, Mr. Gentile reviewed his records; then he looked up and answered that all he could say was that it looked like Epiphany wasn't getting paid fast enough (*id*. at 48). As for lien waivers, Mr. Gentile said, "Sometimes we sign lien waivers to people in good faith that they're going to get a check to pay us" (*id*. at 54). When asked how long A-1 waits to get paid, he responded that it depends, he usually gives thirty days, sometimes forty five, sometimes sixty and ultimately observed that "I guess we give them time to get paid, things get cleared then" (*id*. at 57).

And when questioned further about lien waivers, Mr. Gentile was absolutely clear that a lien waiver is in no way a receipt for payment; rather, he signs them so money can get released and then he can get paid (*id*. at 61).

It is abundantly clear that Saba's testimony about lien waivers was absolutely false. It was either the result of puffery from a person who knows much less than what he claims to know or, alternatively, knows better but testified falsely. The Court does not enjoy pointing out the numerous instances in which a significant witness lacks all credibility. But it is unavoidable under these circumstances. Accordingly, this Court has no choice but to completely disregard Saba's testimony. He testified falsely about material issues – the slab, lien waivers, his damages and more – and altered his testimony when coached by his attorney's objections. Quite frankly, he was one of the least credible witnesses this Court has encountered.

Credibility and Withholding Payments

The Court also observes that even though Walison and plaintiff engaged in similar conduct, when plaintiff did certain things, Saba deemed them reprehensible. For example, Walison claimed that plaintiff was dead wrong to not immediately pay off its suppliers in full as soon as it received payment from Walison. Walison claimed it was shocked to learn that Epiphany was slow to pay its suppliers.

Yet Walison was clearly doing the same thing. Walison was certifying to the owner that it would pay Epiphany with money released by the owner. However, based on Walison's Requisitions 8 and 10, Saba admitted that Walison did not pay Epiphany almost $200,000.00 received from the owner and earmarked to pay Epiphany.

In Epiphany's application for payment 5 on the Burnside project, covering the period ending March 23, 2013, Epiphany billed Walison almost $57,609.72 for 68% completion of concrete footings and foundation walls and for 100% completion of the elevator pits. Although Walison never paid Epiphany for that application (11/14/18 tr at 92), Walison and the architect

certified to the owner – in Walison's Requisition 8- that 64% of the concrete footings and foundation walls were complete as well as 100% of the elevator pits. Walison received that money from the owner (which was necessarily earmarked for Epiphany pursuant to the certifications of Walison and the architect) but did not pay Epiphany a nickel (1/28/19 tr at 109-12). Although Saba claimed that the parties were in a dispute at the time, he simply withheld all the money rather than withholding the disputed amount.

And that wasn't the only time Walison took for itself money earmarked for Epiphany. Walison also intercepted Epiphany's earnings in the application for payment 6 for $148,458.13 (less the adjustment for $29,760) for the period ending June 18, 2015. By that time, Epiphany had done everything it could possibly do – which was everything but the slab (100% excavation, new foundation, backfilling, footings, walls, design change foundation, additional rebar, and cleaning piles) (11/15/18 tr at 30-32). Walison and the architect certified to the owner – in Walison's Requisition 10 for the period ending 6/20/15 for over $300,000- that 100% of Epiphany's work was done (except for the concrete slab). Walison received that money from the owner, $148,458.13 of which was necessarily earmarked for Epiphany (1/28/19 tr at.96-97) but did not pay Epiphany a penny (*id*. at 117-25 and 11/15/18 tr at 30).

What Walison did with the money from the owner that was earmarked for, but not paid to, Epiphany is not the issue. The point is that Saba testified that Walison and the architect certified to the owner that the work claimed done was actually completed satisfactorily *and that the money will go to pay the subcontractor for the certified work*. Obviously, Saba's shock that not all of Epiphany's suppliers were paid was feigned. Clearly, subcontractors in the construction industry often juggle making and receiving payments; suppliers know that and that is why they sign lien waivers even when all the money has not yet been paid. And Walison

admitted doing worse- diverting money that it certified was meant for, and would be paid to, Epiphany.

Walison made much ado about showing that Epiphany had cash flow problems and, in the beginning of the project, that Epiphany paid creditors other than those involved in these projects from money received from Walison. The overall testimony in this trial showed that the reality is that everyone in the construction industry struggles with cash flow – suppliers sign lien waivers so money can be released to the subcontractor so that the subcontractor can pay the suppliers. A-1's president, Mr. Gentile, testified that when he looked at the numbers, it looked like Epiphany wasn't getting paid fast enough. And the reality is also that work gets completed in reliance on promises, often without regard to the terms of the contract. This is true even between Epiphany and Walison; Epiphany had worked on these projects for months before anyone ever signed a contract.

Obviously, businesses often juggle claims by creditors. And there is no doubt that had these projects proceeded on time – without being shut down by the city due to Walison's failures (including lack of safety requirements) or the extensive delays from redesigns– then Epiphany's vendors could have been paid. If Walison decided to actually pay Epiphany the money that was earmarked for Epiphany (and which Epiphany actually earned), then this dispute may not have happened. Instead, Walison withheld from Epiphany the large payments due at the end of the job, money on which Epiphany was relying to pay its vendors.

Both Nicole and Danielle consistently testified that Epiphany paid vendors as they got paid by Walison. It was Walison's squeezing of Epiphany by withholding the hundreds of thousands of dollars earmarked for Epiphany which set in motion the circumstances leading to this unfortunate lawsuit. And if that wasn't enough, after making the ludicrous claim that the

slab could be poured before the under slab utilities were installed, Walison waited for those utilities to be installed and padded the expenses it incurred to "finish" plaintiff's work.

Credibility and Measurements

For the reasons set forth above, this Court cannot in good conscience credit Saba's testimony, especially when it contradicts any other witnesses' testimony. And so when plaintiff's foreman Miguel Pimental testified how many truckloads of rock or dirt were carted away, for example, Saba's claims to the contrary cannot be credited. Notably, Walison did not bring in any other witness who worked at the sites to contradict Mr. Pimental – it was only Saba who testified. Besides, Mr. Pimentel was actually working on the sites while Saba admitted that he only stopped by a few times a week.

Summary

Unfortunately, Saba, Walison's primary witness, was unable to offer any persuasive testimony. The examples given in this decision are just that – examples. The Court does not, nor could it, endeavor to capture every instance in which Saba diminished his credibility before the fact finder. The Court's finding about Saba's lack of credibility was informed by more than just his demeanor, even though on some days his body language and facial expressions made it clear that he would say just about anything that he thought would help his case. It's not just that he freely changed his testimony in response to his lawyer's monologues while she was making objections. Either of those would have been enough, but there was much, much more.

Saba's exaggeration on his claimed damages was obvious – his own "back up" documents did not back up his claims. He acted as if he had a blank check to charge Epiphany

for unrelated work after Epiphany was off the job. And his tone when his padding was explored was bizarre – a flippant "just reduce the damages" – demonstrated that he had little regard for the truth or the accuracy of his own testimony. It was as if he figured that if he got caught cheating in this Supreme Court case, the only penalty would be to reduce the damages. On the contrary, the penalty for purposely puffing up requested damages is that the fact-finder is unable to credit your entire testimony.

The fact is that Walison got money released from the owner by certifying that Epiphany rightfully earned it and that this earmarked money would be paid to Epiphany. But Walison never handed the money over to Epiphany. So it is no surprise that Saba, who did not tell the truth in this trial, did not tell the truth to the owner either. Saba's excuse that "we were in a dispute then" is not a reason to withhold the final big payments, which far exceeded any amounts owed to Epiphany's suppliers. "Joint checks" could have been written to those suppliers and Walison could have given Epiphany the rest. The only thing left was the slab and the delay related to this task was not Epiphany's fault. Besides, Epiphany never billed for the slab.

Considering Saba's documented complete lack of credibility, there is no reason to credit his testimony as to measurements (truckloads of dirt or rock, etc.). Therefore, Epiphany is given credit for all such measurements.

Because this Court does not credit Saba's testimony, the Court awards plaintiff damages as set forth in the chart on pages 60 and 61 of its post-trial brief (NYSCEF Doc. No. 163 at 60-61).

Accordingly, it is hereby

ORDERED that the Clerk enter judgment in favor of plaintiff Epiphany Construction Services, Ltd. and against defendants, Walison Corp. and RLI Insurance Company, jointly and

severally, in the amount of $301,101.93 plus interest at the statutory rate from July 15, 2015, plus costs and disbursements as taxed by the Clerk upon presentation of the proper papers therefor, and it is further

ORDERED that the third-party complaint is dismissed; and it is further

ORDERED that the matter of plaintiff's reasonable attorneys' fees is severed. If the parties agree on an amount, the Court will so-order a stipulation. Otherwise, plaintiff may submit the application via e-filing.

DATE: 4/8/2021

ARLENE P. BLUTH, JSC

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify _____)**