SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8

255 BUTLER ASSOCIATES LLC,

Plaintiff, Decision and order

- against - Index No. 511560/2015

255 BUTLER, LLC, ARIEL AKKAD, NATHAN AKKAD, SOLOMON AKKAD and BENJAMIN AKKAD,

Defendants, March 16, 2023

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #35 & #36

The defendants have moved pursuant to CPLR §4404 seeking to set aside this court's decision dated December 5, 2022 which granted judgement in favor of plaintiff in the amount of $36,241,836. Specifically, the defendants seek to introduce expert testimony not introduced at trial to rebut the plaintiff's experts upon whose testimony the award was based. The plaintiff cross moves seeking to strike the proposed additional testimony and for costs. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

CPLR §4404(b) states that after a bench trial "the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue" (id). It is well settled that the

circumstances whereby such relief may be granted is reserved to the discretion of trial court and such decision will not be disturbed absent an abuse of discretion (see, Shelmerdine v. Myers, 143 AD3d 1200, 40 NYS3d 248 [2016]).

Thus, CPLR §4404(b) "is not a grant to the party bringing the motion to supplement the evidence adduced at trial with additional evidence, unless there is a claim that such evidence is newly discovered or was previously inaccessible" (see, Grossbaum v. Dil-Hill Realty Corp., 58 AD2d 593, 395 NYS2d 246 [2d Dept., 1977], Gagliardi v. State, 148 AD3d 868, 49 NYS3d 504 [2d Dept., 2017]). There is no contention at all that the proposed testimony sought to be introduced is newly discovered or was previously inaccessible. Indeed, a careful examination of the defendant's request reveals it does not fully explain the grounds for the belated introduction of evidence other than to simply argue for its admission. The defendants do argue that they focused their energies at the trial attempting to defeat the plaintiff's causes of action on the merits. Consequently, upon the striking of their answer they concede the court adopted the conclusions of the plaintiff's expert testimony "without meaningful opposition" (see, Affirmation in Support, ¶16 [NYSCEF Doc. No. 1151]). However, why the defendant's chose this trial strategy and purposefully neglected to adequately defend the damages portion of the trial remains unanswered. In any event,

the defendants now seek to introduce such expert testimony which they assert sufficiently rebuts the expert plaintiff's expert rendering the verdict reached deeply flawed requiring its vacatur.

In Collins v. Central Trust Company of Rochester, 226 AD 486, 235 NYS 511 [4th Dept., 1929] the court stated that "parties are supposed to prepare their cases for trial. If they fail so to do, and are defeated, they are not entitled to another trial. They have no one except themselves to blame for the result. There should be some end to litigation. The Constitution gives to all litigants their day in court, and a fair and impartial trial, but it does not assure them two days in court" (id., see, also, Lercari v. Rivers, 50 Misc3d 1211(A), 31 NYS3d 921 [District Court of Nassau County 2016]). Thus, the defendants do not argue the predicate grounds necessary for the admission of such new evidence but instead stress the value of the testimony. However, without providing a basis upon which to reopen the trial such a novel and unprecedented request cannot be entertained. As explained, regardless of the importance of the proposed evidence, there is simply no mechanism where a trial can be reopened after a verdict has been rendered unless the evidence is newly discovered (Oppedisano v. Arnold, 191 AD3d 794, 142 NYS3d 84 [2d Dept., 2019]).

The defendants stress in Reply that the court should not allow a grossly excessive award to be confirmed and that courts routinely vacate erroneous awards. In support of this argument the defendants incorrectly assert that "because the Award was issued on default, the Court's only responsibility is to ensure that the Award is correct" (see, Memorandum in Reply, Preliminary Statement [NYSCEF Doc. No. 1177]). However, the award was not issued on default, rather, it was issued following a damages trial in which the defendant had every opportunity to present evidence to counter the expert testimony of the plaintiff. It is true that where an award is issued on default then any interested party may move to vacate that award on the grounds such award is excessive (Bajwa v. Saida Inc., 6 AD3d 471, 774 NYS2d 427 [2d Dept., 2004]). The authority granting such a request derives from the court's inherent power to "vacate its own judgment for sufficient reason and in the interests of substantial justice" (see, Woodson v. Mendon Leasing Corp., 100 NY2d 62, 760 NYS2d 727 [2003]). Moreover, such discretion is reserved for "unique or unusual" circumstances (Cox v. Marshall, 161 AD3d 1140, 78 NYS3d 212 [2d Dept., 2018]).

The reality the damages awarded was not on default is self evident and consequently the defendant may not draw upon the court's inherent authority to vacate the award in the interest of substantial justice. There is no substantial justice that would

necessitate a court to act upon facts where a litigant failed to specifically argue those very facts. Rather, the crux of defendant's argument is that, after the trial concluded and the Appellate Division issued its decision striking the defendant's answer, the liability portion of the trial had been rendered moot. Although the trial also included a damages portion which survived the default, the defendants argue that "this was not a conventional default and the Court should not penalize Landlord for the unusual procedural posture it found itself in following the Strike Decision, an Award based on a default that was found after trial, and without the benefit of an inquest focused on the sole issue to be determined: the quantum of damages. In a practical respect, the rules under which Landlord proceeded were changed retroactively - what began as a plenary trial focused on liability was transformed into a quasi-inquest that no one knew was being held" (see, Memorandum in Reply, page 7 [NYSCEF Doc. No. 1177]). To be sure, the rules never changed. All parties were fully aware the trial included both liability and damages. The only change that occurred was an appellate determination regarding liability. Indeed, in opposition to the motion seeking judgement the defendants never argued they were not afforded a fair opportunity to present damages. They further never argued their trial strategy had been frustrated by the post-trial appellate ruling. The defendants never argued that had the

Appellate Division issued its decision before the trial commenced their approach to damages would have been altered by a changed reality. On the contrary, the defendants only argued the plaintiff did not sustain its burden establishing damages based upon the testimony submitted. Further, the defendants cited the same case cited in this motion, namely Brosnan v. Behette, 186 AD2d 165, 587 NYS2d 953 [2d Dept., 1992] for an alternative interpretation. In the prior motion this case was cited to support the proposition that "the plaintiff's pleading of damages cannot be deemed admitted even by a default" (see, Memorandum in Opposition, ¶16 [NYSCEF Doc. No. 1115]). In this motion it is cited to support the assertion that "the Court has the inherent power to set aside any award that it deems excessive" (see, Memorandum in Reply, page 5 [NYSCEF Doc. No. 1177]). In truth, the case really only deals with a judgement entered on default, which did not occur in this case. The prior citation of this case for a wholly different premise demonstrates the defendants never argued they were somehow prejudiced by the unusual posture of the case. The defendants did argue previously the plaintiff could not benefit from the appellate rulings since they waived their results by proceeding to trial so quickly, however, that is a far cry from arguing the defendants themselves were harmed by the procedural unfolding of the case. Thus, the defendants cannot claim they were surprised or caught off guard by the

appellate ruling to the extent they were unable to present a defense pertaining to damages. The simple fact the defendants had an opportunity to present evidence but failed to do so is not grounds to reopen the trial.

Lastly, the defendants repeat and insist that "where, as here, the Award is patently excessive, the Court must do justice to ensure that any judgment awarded is accurate. This is precisely why the Court is empowered to vacate a judgment in the interest of justice when it is excessive" (see, Memorandum in Reply, page 9 [NYSCEF Doc. No. 1177]). As noted, the award is only allegedly excessive based upon accompanying testimony of experts the defendants are seeking to admit after a trial has concluded. The court cannot admit such testimony once a trial has fully concluded. As the Supreme Court observed "public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause" (see, Baldwin v. Iowa State Traveling Men's Association, 283 US 522, 51 Sct. 517 [1931]).

Consequently, the motion seeking to reopen the trial pursuant to CPLR §4404(b) is denied. The cross-motion seeking to strike any of the proposed testimony is granted. The portion of the request seeking fees is denied.

So ordered.

ENTER:

DATED: March 16, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC