Consumer Protection Restoration LLC v Hickory House Tenants Corp.

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January 18, 2023
Supreme Court, Rockland County
Docket Number: Index No. 031285/2018
Judge: Paul I. Marx
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.
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CONSUMER PROTECTION RESTORATION LLC and PRESTIGE REALTY GROUP INC.,

Plaintiffs,

-against-

HICKORY HOUSE TENANTS CORP. and NATIONAL BILLING AND FUNDING LLC,

Defendants.
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

Index No. 031285/2018

POST TRIAL DECISION

This matter has a long and tortured procedural history which will not be recounted here. Familiarity with that history and this Court's previous Decisions and Orders is assumed. A nonjury trial conducted via TEAMS due to the Covid-19 pandemic that gripped the country during 2020 and 2021 took place over numerous days and took nearly a year to complete.[1] Plaintiffs, Consumer Protection Restoration LLC and Prestige Realty Group Inc. (collectively "Plaintiffs" or "CPR and Prestige") were represented by Munzer & Saunders, LLP (Craig A. Saunders, Esq.). Mr. Saunders also represented National Billing and Funding, LLC, a nominal Defendant owned by the same principal who owns CPR and Prestige, Wetzer Jeannot. Defendant Hickory House Tenants Corp. ("Hickory House") was represented by Wayne A Gavioli, PC (Wayne A. Gavioli, Esq. and Susan M. Smith, Esq.).

The disputes between the parties arise from a fire which occurred on March 11, 2017, at the Hickory House cooperative apartment complex located at 249-260 North Main Street, Spring Valley, NY. The fire completely destroyed one of the several buildings that comprise Hickory House, the building known as Building A. In addition, CPR and Prestige claim that during the removal process, asbestos was discovered in Building B, which necessitated abatement to be

[1] Trial was held on 1/20/21, 1/21/21, 1/22/21, 1/27/21, 1/29/21, 2/3/21, 2/9/21, 2/11/21, 3/10/21, 3/11/21, 3/12/21, 3/15/21, 3/18/21, 5/24/21, 5/25/21, 5/27/21, 7/6/21, 7/7/21, 7/8/21, 7/9/21, 7/12/21, 7/14/21, 8/4/21, 8/6/21, 8/31/21, 10/26/21, 10/27/21, 10/29/21, 12/14/21, 12/15/21, 12/20/21, and 1/24/22.

undertaken. CPR and Prestige further claim that Building B became structurally unsafe during renovations such that additional work was required.

Work by CPR and Prestige at the site initially proceeded pursuant to contracts that have since been nullified by this Court based on the absence of necessary elements. The now voided contract with CPR provided for it to repair the damages to the premises for the amount of $3,897.469.46. Exhibit P8. The now voided contract with Prestige provided for it to provide demolition and construction for the amount of $15,968,439.45.[2] Exhibit P202.

After a change in control of the leadership of Hickory House's Co-op Board, by letter dated January 31, 2008, both companies were told to cease any work at the site and to vacate the property immediately. Hickory House's counsel, Mr. Gavioli, who authored the letter, threatened prosecution for trespass if the stop work directive was not complied with. Exhibit P204. Subsequently, CPR and Prestige filed mechanics liens against the premises. Prestige's filed lien was in the amount of $3,694,746.83. CPR's filed lien was in the amount of $1,547,253.16.

In addition to voiding the contracts, the Court struck the mechanic's liens filed by CPR and Prestige, determining them to be willfully exaggerated. Decision and Order dated March 25, 2020.[3] Although the Court negated the contracts, CPR and Prestige maintained claims for unjust enrichment arising from the work they did to clear the debris and to begin reconstruction/renovation of the buildings. Hickory House asserted a counterclaim that liens placed against the premises by CPR and Prestige were willfully exaggerated resulting in it being entitled to damages under the Lien Law.

Thus, the two issues tried were: (1) the extent to which Hickory House was enriched by work performed by Plaintiffs, and (2) the extent to which the now expunged mechanics liens filed

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[2] Among the other deficiencies in the purported contracts, Plaintiffs conceded that the amounts of the contracts were added after execution. Consequently, the contracts were voided by this Court. *See* Decision and Order dated March 25, 2020. NYSCEF Doc # 380.

[3] The Decision and Order dated March 25, 2020, which granted Hickory House's motion for partial summary judgment dismissing several of CPR and Prestige's causes of action, also held that the liens were willfully exaggerated. The second "Ordered" paragraph provided: "Plaintiffs' cause of action for breach of contract is dismissed. Hickory House has established its counterclaim for willful exaggeration of lien amount, thereby warranting dismissal of the mechanics' liens." Thus, although CPR and Prestige continue to argue that willfulness is an issue to be decided at this trial, it is not. Simply put, CPR and Prestige had their opportunity to rebut the allegation of willfulness and failed to provide competent and adequate evidence to do so.

against the property owned by Hickory House were exaggerated. The amount of counsel fees to which Hickory House is entitled under the Lien Law is also before the Court as an adjunct to the exaggeration claim.

Trial of the action was protracted and made more difficult owing to technical issues that pervaded the use of the TEAMS format. At times, these issues seemed to consume half of an allotted trial day. In addition, the animosity and sniping between counsel and the seemingly incessant objections to matters that should have been the subject of stipulated facts or attempts to lay foundations resulted in an inordinate amount of time expended by the Court cautioning counsel as to their behavior.[4] It should not be left unsaid that this matter should not have been tried. However, neither party ever engaged in reasonable settlement negotiations, as each was intransigent in their position.

Jointly, CPR and Prestige contend that they are entitled to $5,241,999.99 for work performed at the premises and related expenses. CPR seeks $1,547,253.16 plus attorneys' fees, costs, and interest. Prestige seeks $3,694,746.83 plus attorneys' fees, costs, and interest. In support of their claims, they proffered proof in the form of expenses allegedly incurred for materials and labor. Some of the claims were supported by receipts or invoices from vendors, others were predicated on values ascribed to them via an insurance estimating program known as Xactimate. CPR and Prestige contend that in addition to the work performed on Building A where the fire occurred, they are entitled to be compensated for the work performed on Building B because asbestos contamination was discovered there during the renovation and needed to be abated as part of the restoration project. Significantly, CPR and Prestige did not call an expert to testify to the value of the work performed.

Hickory House contends that CPR and Prestige cannot justify the amount of the liens filed and that, as such, under the Lien Law Hickory House is entitled to damages in an amount equal to the amount by which the liens were exaggerated. Lien Law §39-a. Hickory House asserts that Xactimate is not a reliable method for valuing work, but rather is a tool used by insurance companies and their vendors to allow them to negotiate settlement of claims. Hickory House also contends that CPR and Prestige performed unnecessary work, primarily the asbestos abatement,

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[4] Additional delays were encountered due to the unavailability of counsel or witnesses. In an effort to bring the matter to conclusion, this Court canceled a vacation to allot a full week to trial, only to have counsel unable to proceed each day due to lack of witnesses.

overcharged for work claimed to have been performed and charged for work not actually performed, all in an effort to, as Mr. Gavioli stated on opening -- "boost up the price". As such, Hickory House resists compensating Plaintiffs. Hickory House asserts that work performed on Building B was unnecessary and was performed only to inflate the amount claimed. Hickory House went so far as to argue that *none* of the apartments in Building B were restored to occupancy, an assertion disproven by the testimony. Hickory House contends that the Lien Law is designed to protect property owners from exaggerated claims. "At best, they can account for $1,221,995.83." Hickory House Post Trial Memorandum p.1, NYSCEF # 549. Thus, Hickory House concludes, the Court should determine that "the entire difference should be deemed willfully exaggerated, in violation of the governing Lien Law and subject to the statutorily enacted penalties and fees designed to protect parties such as Hickory House from rapacious lienors." *Id.*

CPR and Prestige submit that Hickory House has not met its burden to demonstrate that the subject liens were willfully exaggerated. Curiously, CPR and Prestige attach two different burdens of proof to Hickory House's claims – clear and convincing proof and preponderance of the evidence. *See* page 3 of CPR's Post Trial Memorandum, NYSCEF #551. CPR and Prestige argue that although Hickory House gave notice of its intent to call an expert to testify as to the reliability of Xactimate estimates, it did not call the witness. CPR and Prestige request the Court to charge itself with a missing witness charge as to the witness. In the absence of the witness, CPR and Prestige submit, Hickory House cannot plausibly challenge the Xactimate estimates.

The parties' post trial memoranda appear to attempt to re-argue portions of prior holdings, such as the validity of the liens. CPR and Prestige argue that the Court did not have the same evidence before it when the Court struck the liens as was adduced at trial. CPR and Prestige's failure to submit all of its evidence in opposition to Hickory House's prior motion to strike the liens is of their own doing. The trial does not serve as a means to re-invigorate the liens or to give the Court cause to reinstate them. "Even assuming, arguendo, that a proper motion to reargue was made (which it was not), such motion would fail because the evidence in support of re-argument was known at the time of the underlying motion, but not raised." *Rodriguez v Gutierrez*, 138 AD3d 964 [2nd Dept 2016], CPLR §2221(d)(2). Consequently, the Court declines the invitation to re-visit that which has already been decided and proceeds to the issues before it. In addition, CPR and Prestige argue that although this Court held the purported contracts between the parties to be unenforceable, the contracts nonetheless provided a legitimate basis for justifying the liens filed by them.[5] Thus, they argue, the liens, which the Court has already held to have been willfully exaggerated, could not have been exaggerated because they had a basis in the now voided contracts. The Court rejects that circular argument in its entirety. Simply stated, the Court holds that the voided contracts cannot serve as the foundational predicates for the mechanics liens filed by CPR and Prestige. To allow otherwise would be to negate the Court's prior determinations.

In addition, Hickory House attempts to expand the scope of the trial to include its claim that CPR and Prestige should be treated as one entity; an effort to pierce the corporate veil in each case. The Court rejects that effort despite the fact that the two entities are owned by the same single shareholder, Wetzer Jeannot. While the Court agrees that better differentiation of the two entities during the trial would have been helpful to the Court to allow it to reach a determination of the issues presented, there is no evidence that the two entities have not maintained their separate corporate identities such that the corporate protections afforded by the law should be disregarded. As noted, this was not an issue that was scheduled to be a subject of the trial, nor was there evidence adduced that would allow such a determination. As will be seen below, however, while the Court will not "pierce the corporate veil" as requested, even Plaintiffs lump themselves together when discussing the amounts expended, making no effort to attribute expenses to one plaintiff or the other.

The Xactimate Estimates

The bedrock of CPR's and Prestige's claims are Xactimates,[6] estimates generated by an insurance industry computer program geared principally to ascribing specific costs to the square footage of work to be performed. CPR and Prestige assert that the figures assigned by the insurance program sufficiently establish the value of the work performed by them. Hickory House disputes that assertion. Thus, a threshold question is presented -- can Plaintiffs establish the value of the

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5 "..., at the time the work was performed at Hickory House, it was done so with full contractual agreements of that work, both the work to be performed and the cost of said work and was entered into and ratified in the contracts." CPR and Prestige Reply Memorandum p1-2. This argument ignores the fact that the amounts of the contracts themselves were inserted after the fact. Indeed, one of the bases for the Court's nullification of the contracts was the fact that necessary terms, including cost of work, were omitted.

6 In describing the etiology of the Xactimate program, Mr. Silvestri testified that "[i]n 1968 State Farm, ... created Xactimate so everybody could be on a level playing field in the *insurance industry*." Tr. p 44, l 11.

work they claim to have performed, the crux of their unjust enrichment claim, by relying on the Xactimates?

Over a span of 17 days of the trial, Edward Silvestri, CPR and Prestige's General Manager and Chief Estimator, testified to the creation by CPR and Prestige of Xactimates, ostensibly to demonstrate the value of the work performed. While Mr. Silvestri is undoubtedly an expert in the use of the Xactimate estimating system, there was no evidence presented that all of these estimates would have been accepted by Hickory House's insurer without reduction or compromise, or more importantly, that they accurately reflect the value of the work to Hickory House.[7] Significantly, with the exception of three (3) Xactimates, the record is bereft of any acceptance by Hickory House or Dongbu Insurance Company, Hickory House's fire insurer, ("Dongbu") of the rest of the Xactimate amounts claimed for the work allegedly performed.[8]

To be sure, the Xactimates represented the amounts which CPR and Prestige would have sought from Dongbu for the work it proposed to do or did do, *i.e.* what the contractor hoped to be paid. But, as Johnathan Darwin, the General Adjustor expert called by CPR and Prestige, testified-- the Xactimate is used as a *starting point* – subject to negotiation of a final price. Tr. p. 1314-17.[9] Thus, the conclusion drawn by the Court is that Xactimates are not a reflection of the value of work performed, but rather a proposed amount sought by the contractor from an insurer. It is almost definitional to state that estimates are starting points in negotiations, they are not agreed upon prices or costs. As such, CPR's and Prestige's attempt to justify the values ascribed to the work through the Xactimate estimates fails. Similarly, since the Xactimates have not been accepted as

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7 The Court returns to Mr. Silvestri's testimony at examination before trial, which was submitted in opposition to Hickory House's motion to strike the liens, and which was recounted in the Decision and Order dated March 25, 2020. There, Mr. Silvestri testified that to create the Xactimate estimates, "[a]lls we put in Xactimate is square footage numbers; the number, the dollar amount, is based on counties." (citing EBT transcript, p 296:15-17.)

8 Neil Brandt, the claims adjustor for Hickory house's insurer, testified "Anything other than the three that we discussed earlier, there was never an agreement on anything other than those three." Tr. tr. page 1906.

9 Xactimate is a tool which contractors and insurance adjusters use to "come to an agreed upon price and an agreed upon scope." Tr. p 1316-1317.

proof of the value of the work, the expenses incurred in generating them ($150,000) is not recoverable. [10]

Other evidence that the Xactimates are unreliable as proof of the value of the work performed is apparent when the amounts actually paid are compared to the amounts sought through the submission of the Xactimates. The Court sets forth a non-exhaustive list as highlighted by Hickory House in its Reply Memorandum.

1. The Xactimate for architectural services provided by Eric Osborn was for $91,242.42 but Osborn was only paid $32,781. Exhibit P43. Even assuming an additional 10% for overhead and 10% for profit, the amount paid was $39,373; slightly more than 10% of the amount sought by Plaintiffs.
2. The Xactimate for demolition services performed by Bello Excavating (operators) and Pine Bush Equipment (machinery rental) sets forth a claim for $273,561. Exhibit P26. Bello Excavating was actually paid $22,000 and Pine Bush was paid $18,706. Exhibits P238 and P236. If 20% is added for overhead and profit combined the total is $48,847.20.
3. The Xactimates for Air Monitoring Services total $209,772. Xactimate P5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 26, 48, 49, 50, 51, 57. The actual invoice from Environmental Consulting and Management Services is for $80,949. Exhibit P233. Adding overhead and profit of 20% yields $97,137, less than 50% of the amount which CPR and Prestige contend is the value of the work.
4. The Xactimate for engineering services is for $57,100. Bart Rodi, the Engineer invoiced $7,869 and was actually paid $5,619. Exhibit P60.

Finally, although the amounts involved are *de minimus*, several Xactimates submitted ostensibly to support CPR and Prestige's claims actually reflect amounts that *were paid by Hickory House directly*. Mr. Silvestri testified that on the day of the fire, Hickory House paid for emergency plumbing services ($4,530), labor ($2,218), and electrical shutoff ($1,901.98). Tr. p 46. Nevertheless, CPR and Prestige added overhead and profit to amounts *paid by Hickory House.* Plaintiff now seeks to have the Court include

[10] Barry Carlisle was paid $150,000 to assist Mr. Silvestri in creating the Xactimates. Silvestri Tr p 622. (Exhibit P228).

these monies, justified by the Xactimates, in the unjust enrichment claim. How a party can be unjustly enriched by something it paid for on its own is baffling.

The inescapable conclusion reached by the Court is that the Xactimates are not, and cannot be, reliable and competent evidence to establish the value of the work performed. Thus, to the extent that CPR and Prestige rely on the Xactimates to prove their claims, that proof fails.

The Work Performed in Building B

A cavernous dispute between the parties concerns work performed on what is known as Building B at the property. While CPR and Prestige contend that work on Building B was required because asbestos was discovered in the fire debris and in joint compound in the building, Hickory House contends that this work was not only unnecessary, but undertaken for the sole purpose of inflating the amount to be charged to Hickory House's insurer. CPR and Prestige contend that the evidence established that the work was required by the local municipality, and that, but for Hickory House's counsel's and board's interference, would not only have been completed, but paid for by Dongbu pursuant to an endorsement to Hickory House's fire insurance.

The evidence demonstrated that during the course of the remediation, testing revealed that there was asbestos in the wall board compound in Building B. Mr. Silvestri testified that the asbestos testing was undertaken in Building B because it and Building A shared heating plants and to ensure that heat would be provided to Building B, they had to extend the work scope to include it. Thus, in order to ensure that work could be done safely, Building B needed to be tested. While the motivation for testing in Building B was challenged by Hickory House, and the Court remains skeptical as well, the fact is that the Village of Spring Valley treated the work site as asbestos contaminated.[11] Having discovered asbestos, CPR and Prestige engaged certified asbestos abatement companies or individuals to remove it by tenting and gutting the interior of Building B. Notably, for reasons that were not explained, work was concentrated in the Building B abatement while it appears that little work was performed to re-build the fire destroyed Building A.[12]

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[11] Asbestos was detected only in some wall board compound, the substance that joins wall board at its seams. Yet, CPR and Prestige proceeded to completely gut the units in Building B, while undertaking virtually no work to rebuild the fire ravaged Building A.

[12] In the Court's own experience, wallboard joint compound is generally painted over. As such, one must wonder how asbestos in the wallboard compound in Building B posed a risk to its residents since asbestos poses a hazard only when released into the air and inhaled. It may well be that the debris from

In addition to the asbestos abatement work, CPR and Prestige asserted that the structural integrity of the building had been compromised, an allegation disputed by Hickory House. The entire discussion about the structural integrity of Building B appears to the Court to have been an unnecessary side show since it does not appear that any additional structural reinforcement was undertaken by CPR or Prestige. As Hickory House notes, the building is still standing, despite notices to immediately vacate having been issued and rescinded.

In their Reply Brief, CPR and Prestige argue that all of the charges associated with Building B were necessary and compensable because the work was required by law. In addition, they argue that had they not been thrown off the jobsite, the work would have been covered under an additional endorsement on Hickory House's insurance policy. But for the actions of the new board which ejected them from the jobsite, they argue, the work would have been completed long ago at Dongbu's expense.

CPR and Prestige assert that Hickory House has not offered any evidence to indicate that it attempted to mitigate its damages. Citing to Hickory House's insurance policy, CPR and Prestige argue that over $6,000,000 in insurance coverage for "necessary repairs" may have been lost because of the lengthy delay in rebuilding the property and the apparent absence of any filed claim for those benefits. CPR and Prestige Reply Brief at p.3. While that is an interesting observation, and tragic if true, Hickory House's alleged failure to mitigate and/or to make a claim to Dongbu for the asbestos work in Building B is irrelevant to the unjust enrichment or exaggeration claims. CPR and Prestige cite to no law that requires an entity that has been the subject of an exaggerated lien to mitigate its damages by making claims elsewhere. Mitigation is a defense in a contract action. *See, Losei Realty Corp. v New York*, 254 NY 41 [1930], *Tynan Incinerator Co., Inc. v International Fidelity Co*., 117 AD2d 796, 797 [2nd Dept 1986]. Damages for exaggerated lien are statutorily imposed to dissuade contractors from filing inflated claims. Lien Law §39-a, *Goodman v Del-Sa-Co Foods,* 15 NY2d 191, 193 [1965].

Because there was no competent dispute or challenge to the work performed on Building B (Hickory House's assertion that there was no asbestos was belied by the documents submitted) and because Hickory House was enriched by the work done on Building B (7 apartments were gutted and 3 apartments were fully renovated with tenants restored to occupancy), the Court

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Building A and the smoke from the fire posed a hazard since the asbestos was unleashed, but the bulk of the work performed for asbestos abatement was for Building B.

includes in the amount awarded to CPR and Prestige the amounts expended in connection with that aspect of the project.

The Amount Spent by CPR and Prestige

Having rejected the Xactimates as competent evidence of the value of the work for which CPR and Prestige seek to be compensated, and because CPR and Prestige did not call an expert to offer an opinion on the actual value of the work, the Court is left to divine the value of CPR's and Prestige's work through the other evidence submitted. For the most part, this includes the actual costs incurred by CPR and Prestige, the monies expended by them and some reasonable amount for profit and overhead.[13] Once the value of CPR and Prestige's work has been established, the Court can evaluate Hickory House's exaggeration claim.

The Court starts with the amounts actually expended by CPR and Prestige. CPR and Prestige assert that the amount expended by them at the premises is $2,526,497.25 (Appendices A, B, C). Hickory House contends that this amount is incorrect as it includes three invoices that account for over a million dollars sought by CPR and Prestige that Hickory House claims are not supported by the record. Hickory House contends the actual amount spent totals $1,329,381.74. Post-Trial Reply Memorandum, p 3.

The amount sought by CPR and Prestige is clearly and unequivocally incorrect because it includes amounts far beyond what was actually expended, going so far as to include full contract amounts for subcontractors whose work was never performed. As Hickory House notes in its Post Trial Reply Memorandum, this accounts for well over one million dollars in charges. Glaringly, CPR and Prestige include the full amount of a contract with On Time Electric $450,000 (P55), Alfieri Inc. (plumbing) $534,000 (P134), and 212 Services (debris removal) $432,769 (P234). The On Time contract was not accepted into evidence as proof of the unjust enrichment claim, because that work was not performed. Nonetheless, CPR and Prestige have included the full contract amount in the damages claimed. Similarly, Alfieri's plumbing proposal for $534,000 included the installation of 140 fixtures which were never installed. Rather, Mr. Silvestri testified that Alfieri installed under slab piping for the water main and sewer systems. Nevertheless, CPR and Prestige include the full amount of the contract in their submission. This, despite the fact that Mr. Silvestri conceded that all of the work called for by the Alfieri contract had not been performed. Instead,

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[13] In its Reply Memorandum, Hickory House agrees that 10% is a reasonable amount for profit and overhead. p 11.

Mr. Silvestri allocated $100,000 to the under the slab plumbing. (Although Mr. Silvestri's allocation was without support and cannot, on its own, be competent evidence, Hickory House agreed that $100,000 was a reasonable amount for the under the slab work.) Finally, Hickory House claims that the monies sought for 212 Services debris removal was included in invoices associated with Spartan Environmental Enterprises. The four 212 Services' invoices (P234) reflect claims of $432,769.00. However, testimony revealed that $143,465.15 of those monies was included in Spartan's invoices (P225, 226 and 235).

Hickory House attacks additional monies sought by CPR and Prestige in a catchall Appendix J to its Post Trial Reply Brief, identifying them as "Other Less Significant Differences". Included in these challenged items are receipts from Home Depot which are duplicates of other receipts, and what Hickory House claims are duplicate charges for labor.

Hickory House has established that CPR and Prestige are double counting labor costs by including records of IRS form 1099's paid to various individuals for whom invoices have also been included. CPR and Prestige include in their Appendix A invoices from KTLO Consulting, TDN Data Group, and Filthy Animal Security (P250, 242, 243), entities identified as individuals (acting under company names) who provided labor at the site. CPR and Prestige also included the IRS form 1099s for monies paid to these individuals.[14]

Hickory House also challenges CPR and Prestige's inclusion of labor costs for individuals not previously identified (Appendix C). Hickory House asserts that this accounts for $15,293 of unsupported charges. It urges that Mr. Silvestri testified that P251 was the record of daily job logs and payroll logs. Yet, four individuals whose names do not appear in the exhibit are now included, Jose Toledo, Ranato Farfan, Raul Quizphi and 1107 Merrick LLC. The Court previously determined that any information not provided during discovery could not be claimed and Plaintiffs' counsel stipulated that no claims would be advanced for monies where discovery had not been provided. Since these were not previously disclosed, they are disallowed and will not be considered.

After considering the totality of the evidence as to the monies expended, the Court awards CPR and Prestige the amount as calculated by Hickory House, $1,329,381.74. This is the amount

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[14] The Court notes that the amounts on the 1099s and invoices differ slightly.

that has been proven to have been expended and has now been conceded. To this amount, the Court adds 10% for overhead ($132,938.17) and 10% for profit ($132,938.17) as agreed to by Hickory House. Thus, the Court awards CPR and Prestige the total of $1,595,258.08. As noted above, Plaintiffs have not differentiated between themselves or their claims sufficiently to allow the Court to determine how much each Plaintiff is entitled to be paid, consequently, a lump sum is being allowed as to both collectively and is being netted against the amount awarded to Hickory House on the exaggeration claim.

Interest

Relying on *Tesser v Allboro Equip Co.*, 73 AD3d 1023 [2nd Dept 2010], CPR and Prestige seek interest on any amount awarded to them. They claim that interest on an unjust enrichment claim is appropriate under CPLR § 5001 (a) which provides for interest to be "recovered upon a sum awarded because of a breach of a performance of contract … except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the Court's discretion."

In *Tesser,* the Court held:

> On the question of interest, CPLR 5001 (a) provides that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract . . . except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." Case law indicates that an award of pre-decision or pre-verdict interest pursuant to CPLR 5001 on a damages award on a cause of action to recover damages in quantum meruit is mandatory, as it would be on a damages award on a cause of action to recover damages for breach of contract (*see Brent v Keesler*, 32 AD2d 804, 805 [1969]). Pursuant to CPLR 5001 (b), "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed," which, in the case of a cause of action to recover damages in quantum meruit, is when the plaintiff demanded payment (*see Atlas Refrigeration-Air Conditioning, Inc. v Lo Pinto*, 33 AD3d 639, 640 [2006]; *Leroy Callender, P.C. v Fieldman*, 252 AD2d 468, 469 [1998]). (*Tesser v Allboro Equip. Co.*, 73 AD3d 1023, 1027–28, [2nd Dept 2010]).

Thus, CPR and Prestige claim that they are entitled to interest on the amount awarded. As noted, however, an award of interest is in the discretion of the Court. Here, because of the gross exaggeration of the amounts sought, the Court declines to award interest. Had CPR and Prestige not so overreached the amount sought, perhaps interest would have been appropriate. Indeed, had there not been such a gross inflation of the amounts sought, perhaps the litigation could have been resolved. Given the magnitude of the overreach, equity will not be served by awarding interest to them.

Hickory House's Exaggeration Claim

Lien Law 39-a provides:

> Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of willful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

Hickory House contends that the amounts sought by CPR and Prestige have been exaggerated by $3,776,026.16. Post-Trial Memorandum p 12. While disputing any exaggeration occurred, CPR and Prestige assert that the amount of exaggeration, if any, cannot be calculated simply by deducting the amount proven from the amount for which liens were filed. The Court disagrees.

The Court acknowledges that the Court of Appeals has stated that the burden of establishing the amount of the exaggeration is on the party asserting the exaggeration. Here, Hickory House. *Goodman v Del-Sa-Food Co, Inc.*, 15 NY2d 191, [1965]. In addition, the Court recognizes that *Goodman* stands for the proposition that recovery for willful exaggeration cannot be had in the absence of a finding of which items and amounts were willfully exaggerated. In this case, such specificity is impossible. CPR and Prestige have proffered little more than estimates to support their claims, compelling the Court to rely on their outlay of monies to determine their unjust enrichment claims. All other monies sought by CPR and Prestige were supported only by resort to the use of the Xactimates, which proof has been held to be incompetent and unpersuasive. To be sure, CPR and Prestige knew, or should have known, that as estimates, the Xactimates were starting points for negotiation. They could neither support the unjust enrichment claims nor defeat a claim for willful exaggeration, as they are probative of nothing, save for the amounts *sought* by them. Further evidence of the willful exaggeration can be found in the very Post Trial Memoranda submitted by CPR and Prestige. As noted above, CPR and Prestige attempted to convince the Court that they spent $450,000 for electrical services, when, in fact, only a portion of that work was actually performed, and as discussed above, that contract was admitted for limited purposes.

Again, CPR and Prestige were given every opportunity to prove that the liens were legitimate and were based on the value of the work performed yet failed to do so. At trial, they established only the amount awarded above. This Court previously determined that the liens were willfully exaggerated, a point which CPR and Prestige seem incapable of accepting, and a fact which is law of the case.

Hence, rather than itemize each and every item which was exaggerated, a truly Herculean task even if such could be done on this record, the Court deducts from the total amount liened, the amount awarded to arrive at the amount owed to Hickory House on its Lien Law §39-a exaggeration claim. Thus, the Court awards Hickory House the sum claimed, $3,776,026.16. Again, Plaintiffs did not differentiate between themselves in any of their post trial submissions in any manner that would allow the Court, without additional Herculean efforts, to distinguish which Plaintiff is owed what amount, hence, the Court awards are made jointly. The amount awarded to CPR and Prestige on their unjust enrichment claims of $1,595,258.08, shall be set off against the amount awarded to Hickory House on the Lien Law §39-a claim, yielding a net amount due to Hickory House of $2,180,727.92. The Court denies Hickory House's request for interest, as a matter of discretion. As noted, neither party ever engaged in any effort to meaningfully negotiate a resolution of this action.

Counsel Fees

The Court previously held that Hickory House is entitled to counsel fees in connection with the filed liens. Hickory House seeks counsel fees in excess of $395,870.44. Exhibit TT-1. CPR and Prestige contend that if the Court awards counsel fees to Hickory House, a hearing should be held to determine which fees are attributable to striking the exaggerated liens, as the fees awardable are limited to the "services in securing the discharge of the lien." (Citing Lien Law § 39-a). In addition, CPR and Prestige argue that the amount of fees awarded in connection with an exaggeration claim must be proportionate to the amount of the exaggeration. (Citing *A&E Plumbing v Budoff*, 66 AD2d 455 [3rd Dept 1979].

The Court rejects CPR and Prestige's attempt to limit Hickory House's counsel fee claim to those which were required solely to vacate the liens. Lien Law §39-a provides for damages to be awarded based on the degree to which the liens were exaggerated. Here, the amount of exaggeration could not have been ascertained without the trial. This was not a case in which the value of CPR and Prestige's work could be easily and readily ascertained by reference to clear and indisputable evidence, such as where a contractor had definitive records of work performed. Rather, CPR and Prestige attempted to establish the value of their work by using estimates of what they would have submitted to an insurer, subject to negotiation. Thus, the amount of exaggeration could not be determined without the trial. Indeed, the amount of the exaggeration is now, for the first time, being determined by this Court. Stated differently, if CPR and Prestige had credible proof of the value of their services, determining the value of their unjust enrichment claim would have been a simple task. They did not submit such proof, however. Instead, they relied on the Xactimates which this Court rejected as inadequate proof on the prior motion for summary judgment and again in this Post Trial Decision. Consequently, the Court holds that a hearing to determine which fees are related to the vacatur of the liens is not necessary. Determination of the extent of the exaggeration was required by Lien Law § 39-a.

Given the magnitude of the exaggeration award made herein, the complexity of the issues presented, the extraordinary amount of time required for these prolonged proceedings, including the numerous motions made by both parties, and considering the proportionality requirement, the Court awards counsel fees to Hickory House, in its discretion, in the amount equal to 12% of the net award to it, $261,692.17. This amount shall be inclusive of all costs and disbursements.

SUMMARY

It is hereby ORDERED that on their unjust enrichment claims, CPR and Prestige are jointly awarded the sum of $1,595,258.08 from Hickory House, and it is further

ORDERED that CPR and Prestige's request for interest is denied in the Court's discretion, and it is further

ORDERED that Hickory House is awarded the sum of $3,776,026.16, from CPR and Prestige jointly on its exaggeration claim pursuant to Lien Law §39-a, and it is further

ORDERED that Hickory House's request for interest is denied, and it is further

ORDERED that Hickory House is awarded counsel fees in the amount of $261,692.17, inclusive of all costs and disbursements, and it is further

ORDERED that the amount awarded to CPR and Prestige shall be deducted from the amounts awarded to Hickory House and the Clerk of the Court shall enter a net judgment in the amount of $2,453,364.09, in favor of Hickory House against CPR and Prestige.

All other prayers for relief not addressed in this Post Trial Decision are denied.

Dated: January 18, 2023
New City, New York

E N T E R

HON. PAUL I. MARX, J.S.C.