[* 1]

SCANNED ON 8/25/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESEN _____ PART 1

0604933/2001

AMERICAN TELEPHONE & UTILIY
vs
BETH ISRAEL MEDICAL CENTER

SEQ 7

VACATE STAY/ORDER/JUDGMENT

ATE _____

EQ. NO. _____

AL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits Memo-opp	2
Replying Affidavits Reply-Memo	3

Cross-Motion: ☐ Yes ☑ ~~No~~

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

AUG 25 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 15, 2005

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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AMERICAN TELEPHONE & UTILITY CONSULTANTS, INC.,

Plaintiff,

-against-

BETH ISRAEL MEDICAL CENTER,

Defendant.

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Index No: 604933/01

Decision and Order

Hon. Martin Shulman, J.:

Plaintiff American Telephone & Utilities Consultants, Inc. ("ATUC" or "Plaintiff"), moves for an order setting aside the April 20, 2005 jury verdict in favor of Defendant Beth Israel Medical Center ("BIMC" or "Defendant"), dismissing ATUC's breach of contract cause of action as against the weight of the evidence (CPLR §4404[a]). Regardless of the eventual ruling on this post-verdict motion, ATUC further moves to reopen the [bench] trial to enable the court to receive additional evidence in support of Plaintiff's unjust enrichment claim. BIMC opposes the motion.

Normally, a motion to challenge a jury verdict pursuant to CPLR §4404(a) is governed by the 15-day time limit of CPLR §4405. This Court permitted the parties to stipulate to extend their time to present written arguments. *See*, "(CPLR 2004; see, 4 Weinstein-Korn-Miller, NY Civ Prac para. 4405.05)..." Brown v. Two Exchange Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept.,1989).

ATUC's post-verdict motion addresses the triable issue[1] which the jury decided

[1] Pursuant to a Bench Decision and Order issued by the Hon. Charles A. Ramos, J.S.C., on January 31, 2005 (Trial Court Exhibit 1), *inter alia*, the parties' motion and cross-motion for

against the plaintiff; *viz.*, whether or not Plaintiff's advisements to BIMC concerning the Con Edison Modified High Tension Rate ("MHT") program[2] and the New York State Power Authority Power for Jobs ("PFJ") program[3] were within the scope of services contemplated by the March 30 1995 contract (the "Contract"; *see*, Plaintiff's Exhibit 50) between the parties which would entitle Plaintiff to be paid 33% of the future electricity cost savings resulting therefrom for a 60 month period.

The following is the complete text of the body of the Contract that is at the heart of this dispute:

> **I.** The undersigned, herein after called **CLIENT**, having entered an agreement in writing this date with **AMERICAN TELEPHONE AND UTILITY CONSULTANTS**, herein after **AMERICAN**, to serve as consultant for the undersigned, in connection with the Telephone, Electric, Gas, Steam, Oil, Water, And Sewer bills.
>
> **II. AMERICAN** agrees to examine **CLIENT'S** telephone and utility accounts for the purpose of determining overcharges and overpayments which may now exist, or have existed on previous billings**. AMERICAN** will prepare documentation deemed necessary to negotiate with proper

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summary judgment were respectively denied with a direction that the breach of contract cause of action be resolved by jury trial. Apparently, the Commercial Part court found "there [was] ambiguity in the terminology used. . . [which requires one to look to the] intent of the parties. . . [which in turn] depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, [and] such determination is to be made by the jury. . ." (bracketed matter added) Hartford Accident & Indemnity Company v. Wesolowski, 33 N.Y.2d 169, 350 N.Y.S.2d 895 (1973).

[2] During the period 1981 to 1996, Con Edison offered this economic development program to provide eligible businesses with electricity cost savings if they purchased a high tension transformer from Con Edison which would result in the applicability of cheaper high tension electric service rates. In other words, ownership of this transformer eliminates the imposition of certain distribution charges to customers in the monthly bill Con Edison would otherwise assess if it continued to own this equipment.

[3] New York State offered economic incentives such as the PFJ program to enable businesses and non-profit institutions to achieve energy cost savings in exchange for their commitment to retain and/or increase their workforce.

telephone and utility companies, city and state agencies, tax agencies, or other necessary parties to have overcharges removed and obtain refunds and/or credits for past overcharges and overpayments.

III. Recovered Monies
CLIENT agrees to pay **AMERICAN** thirty-three percent (33%) of all recovered monies in the form of refund(s) or credit(s). Payment shall be due within 60 (sixty) days from the date the credit first appears on **CLIENT's** billing or 60 (sixty) days from receipt of refund.

IV. Future Billing Reductions
In the event **AMERICAN** is successful in obtaining a reduction in **CLIENT's** billings, including, but not limited to, correction of error(s), rate change advisement, or any combination thereof, that shall manifest itself in future savings, **CLIENT** agrees to pay **AMERICAN** thirty-three (33%) of the accumulative savings for a sixty (60) month period beginning the date the savings first appears on the **CLIENT's** bill. All fees are due and payable within sixty (60) days of such appearance.

V. Term
The term of this agreement shall be five (5) years from the date of acceptance and shall continue thereafter, for consecutive five (5) year periods unless cancelled by written notice at least ninety (90) days prior to the beginning of the renewal period. All payments not received from client within sixty (60) days shall be subject to interest accrued at the rate of twelve percent (12%) per annum. **AMERICAN** shall also be entitled to reimbursement from **CLIENT** for the expenses, including attorney's fee, incurred in collecting any overdue amounts. During the term of this agreement, **CLIENT** agrees to send **AMERICAN** the telephone and utility bills each month, as well as any other pertinent information **AMERICAN** may request.

VI. **Performance Clause**
Notwithstanding anything to the contrary herein contained, **Client** shall the right to terminate this contract upon ninety (90) days prior written notice at any time, for any reason, provided that any Recoverable Monies tha **American** has located for **Client** or any Future Billing Reductions that **American** has secured or discovered as of the date of effective termination of contract shall be paid to American pursuant to the terms of the contract.

In seeking a judgment notwithstanding the jury verdict of dismissal, ATUC argues that: 1) the Contract is clear and unambiguous and should be construed in favor of

Plaintiff warranting judgment in its favor as a matter of law; 2) rate change advisements such as the MHT and PFJ programs were contemplated by the parties and included in Clause IV of the Contract in the illustrative categories of billing reduction discoveries[4]; 3) ATUC's interpretation of the Contract promotes the Contract's dual purpose, namely, to enable BIMC to obtain refunds and/or credits based upon past overcharges and overpayments and their concomitant future billing reduction savings as well as future billing reduction savings via rate change advisements such as the MHT and PFJ programs; 4) even if the case was properly submitted to the jury due to Contract ambiguities, still, the verdict should be set aside as a matter of law or because it was against the weight of the evidence; 5) Defendant's admissions, pre-Contract communications, the parties' dealings regarding "rate change advisements" similar to the programs in issue[5] all support ATUC's position that the Contract expressly entitled

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[4] To support its contention that economic incentive programs such as MHT and PFJ were within the scope of the Contract, ATUC heavily relies on the following language in Clause IV contained therein:

> In the event [ATUC] is successful in obtaining a reduction in [BIMC]'s billings, ***including, but not limited to*, correction of error(s), rate change advisement or any combination thereof**, that shall manifest in future savings, [BIMC] agrees to pay [ATUC] thirty-three percent (33%) of the accumulated savings for a sixty (60) day period. . . (Emphasis added).

[5] ATUC analogizes the MHT and PFJ programs with its future billing reduction advice to BIMC (which Defendant accepted and paid for): 1) to complete the requisite paper work which directed Con Edison to change the rate at which it charges for electrical service to Defendant's facilities, namely from a higher conventional rate to a lower "Voluntary Time of Day" ("VTOD") rate; and 2) to install water meters on its cooling towers which then measured evaporating water and reduced the amount of the pre-meter installation sewer bills which previously charged for a percentage of the volume of water never discharged into the sewer (based upon meter readings of actual water usage within BIMC's facilities, the N.Y.C. Department of Environmental Protection assumed that a commensurate volume of water being used was being discharged into the sewer.)

ATUC to obtain 33% of Defendant's actual savings for identifying future billing reduction opportunities such as the MHT and PFJ programs; and 6) even if the post-verdict motion is denied, ATUC is otherwise entitled to a directed verdict on its unjust enrichment claim.

In opposition, BIMC contends as follows:

- It was rational for the jury to conclude that ATUC's "form" contract did not entitle Plaintiff to receive any contingency fee from the accumulated savings derived from the MHT and PFJ programs;
- The Contract's unambiguous terms (*i.e.*, Clause II) limited ATUC 's services to auditing BIMC's utility bills to eliminate overcharges and overpayments;
- Among the Contract clauses, Clause I merely identified the contracting parties and the type of utilities bills covered by the Contract, Clause II described the precise services BIMC contemplated ATUC would perform, Clauses III and IV set forth ATUC 's fee structure based upon recovered monies and future billing reductions BIMC obtained as a result of ATUC's services performed under Clause II, Clause V is not germane to this dispute and Clause VI's termination option did not expand the scope of ATUC's services to include "discovering" and communicating to BIMC cost saving ideas such as the MHT and PFJ programs;
- ATUC's future revision of its form contract like the Contract in issue to substitute the word "discovered" in Clause VI with the phrase "advise CLIENT of" (*see*, Defendant's Exhibit I) led rational jurors to conclude that Plaintiff was simply not entitled to any compensation under the Contract for purportedly advising Defendant of future billing reduction opportunities such as the MHT and PFJ

programs;

- ❑ The defense verdict was supported by evidence of ATUC's conduct such as the description of ATUC's services rendered (as described in Clause II only) in every billing invoice generated prior to the termination of the Contract and the non-issuance of any ATUC invoice for the purported services rendered in relation to the MHT and PFJ programs prior to the termination of the Contract;
- ❑ Based upon the unchallenged charge to the jury, the jury properly construed the language of the Contract strictly against ATUC, its undisputed drafter; and
- ❑ The branch of Plaintiff's motion for an order granting ATUC another "bite of the apple" to put in additional evidence in support of its unjust enrichment claim should be denied, especially when ATUC had ample opportunity during the trial to properly present this evidence.

Discussion

This Court denies the branch of ATUC's post-verdict motion to reopen the trial record to allow ATUC to submit additional testimony and documentary evidence in support of its outstanding unjust enrichment cause of action. Plaintiff was afforded a full and fair opportunity to present evidence to substantiate its legal and equitable claims during the course of the 11–day trial. Moreover, ATUC never made any application either during the trial or subsequent to the verdict for leave to reopen the trial record and submit additional evidence of its *quantum meruit* claim. Plaintiff's equitable claim must rest on the existing record.

Concerning the jury verdict dismissing ATUC's breach of contract cause of action, Barry & Sons, Inc., v. Instinct Productions L.L.C., *et al.*, 5 Misc.3d 172, 180, 783

N.Y.S.2d 225, 232 (Sup. Ct., N.Y. Co., 2004, Edmead, J.) summarizes useful principles of contract construction which the Court of Appeals has enunciated over the years:

> The fundamental, neutral precept of contract interpretation is that agreements are to be construed in accordance with the parties' intent (*see Slatt v. Slatt*, 64 N.Y.2d 966, 967,488 N.Y.S.2d 645, 477 N.E.2d 1099, *rearg denied* 65 N.Y.2d 785, 482 N.E.2d 568, 492 N.Y.S.2d 1026 [1985]). "the best evidence of what the parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 N.Y.2d 1016, 1018, 584 N.Y.S.2d 424, 594 N.E.2d 918 [1992]). A written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 744 N.Y.S.2d 358, 771 N.E.2d 240, *rearg denied* 98 N.Y.2d 693, 775 N.E.2d 1291, 747 N.Y.S.2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for the difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 385 N.E.2d 1280 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, the court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520, 640 N.Y.2d 472, 663 N.E.2d 628 [1996]; *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630, 638, 290 N.Y.S.2d 721, 238 N.E.2d 868, *rearg denied* 22 N.Y.2d 827 [1968]). Whether an agreement is ambiguous is a question of law for the court and is determined by looking within the four corners of the document, not to outside sources (*Kass v. Kass*, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 696 N.E.2d 174 [1998]). When deciding whether an agreement is ambiguous courts should examine the entire contract, particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole, and form should not prevail over substance (*id.*). Contract provisions are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 N.Y.2d 347, 352, 645 N.Y.S.2d 433, 688 N.E.2d 404 [1996]). Ultimately, the court's aim is a practical interpretation of the language employed by the parties so that there may be a realization of the parties' "reasonable expectations" (*Sutton v. East River Sav. Bank*, 55 N.Y.2d 550, 555, 450 N.Y.S.2d 460, 435 N.E.2d 1075 [1982]).

As noted earlier, both parties claim the Contract is unambiguous and its plain meaning supports their respective positions. Both parties alternatively argue that

ambiguities in the Contract, if any, were clarified by extrinsic evidence in the trial record which also supports their respective positions. As to this latter point, ATUC contends the evidence so preponderated in its favor and warrants setting aside the verdict of dismissal; whereas, BIMC contends the jury's consideration of the evidence was proper and does not warrant disturbing the verdict.

This Court readily agrees that most of the Contract provisions are unambiguous and do not require an interpretation dependent "on the sense the words were used in view of the subject matter, the relationship of the parties and the surrounding circumstances. . ." Matter of Doniger v. Rye Psychiatric Hospital Center, Inc., 122 A.D.2d 873, 505 N.Y.S.2d 920 (2nd Dept., 1986).

Notwithstanding ATUC's expansive reading of Clause I which Plaintiff claims broadened its role as a consultant to advise BIMC of potential cost saving measures such as the MHT and PFJ programs and be compensated therefor, this introductory clause simply identifies the contracting parties, defines the parties for purposes of the Contract and recites the subject matter of the Contract, without more. Clause I is clearly a subordinate clause and must be read together with Clause II which describes ATUC's contractual obligations; *viz.*, to examine the enumerated types of utility bills and determine (*i.e.*, discover) potential sources of overcharges and overpayments, complete the necessary paper work to enable BIMC to obtain refunds or credits for these past overcharges/overpayments and have same removed from future utility bills. Clause I when read with Clauses III and IV clearly provided the fee structures and Defendant's contractual obligations to compensate Plaintiff for such bill auditing services.

However, this Court finds there is ambiguity in the Contract contained in Clause

IV as to what "rate change advisement" means[6]. Plaintiff claims this Contract term clearly refers to future billing reduction opportunities such as the MHT and PFJ programs. On the other hand, Defendant strenuously challenges Plaintiff's interpretation and claims this term refers to a rate change advisement a bill auditor such as ATUC, on behalf of its client, would present to Con Edison, a municipality and/or its respective agencies, etc., as to the reduced billing rate to be applied to future bills based upon a correction of error or reduced rate change such as the VTOD rate. Because this "language used is ambiguous and admits to different reasonable interpretations, it create[d] a factual question that [could not] be determined [by the court]. . ." (bracketed matter added) (Konik v. Anesthesia Associates of Plattsburgh, P.C., 128 A.D.2d 933, 934, 512 N.Y.S.2d 739, 740 [3rd Dept., 1987],) but rather by a jury. *See*, Hartford Accident & Indemnity Company , *supra*. And in construing this Contract, "any ambiguit[y] in an agreement [is] to be interpreted 'most strongly against the draftman' as long as the particular interpretation would not lead to an absurd result. . ." (bracketed matter added) White/Tishman East, Inc., v. Banko and Surgical Design Corp., 171 A.D.2d 401, 566 N.Y.S.2d 628, 628 (1st Dept., 1991).

The jury had the opportunity to listen to the respective testimonial evidence and weigh the credibility of the witnesses. Surprisingly, the jury heard ATUC's principal witness testify that his solicitation letters and pre-Contract communications to BIMC

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[6] Plaintiff correctly interprets the phrase, "including but not limited," to suggest that "examples following the quoted language are illustrative only and do not limit the broad scope of the terms employed. . .the word 'including,' when followed by a list of examples is designed to broaden the concept being defined. . ." *see*, Matter of Doniger, *supra*, 122 A.D.2d at 877, 505 N.Y.S.2d at 923. Still, this phrase does not clarify the ambiguous meaning of the "rate change advisement" example.

were unnecessary to explain any term of the Contract and he relies solely on the four corners of the Contract in dispute. In any event, the jury was confronted with the notion of reconciling Clause II which describes the precise task of reviewing bills for [potential] overcharges and overpayments with Plaintiff's expansive definition of the term, "rate change advisement" in Clause IV to include economic incentive programs. The jury simply rejected ATUC's interpretation and concluded that Clauses II and IV had to be read contextually to avoid the seeming conflict created by Plaintiff's unfounded interpretation. Put differently, based upon the testimonial and documentary evidence presented at trial, the jury "adopted the construction of the [C]ontract that reasonably harmonizes these provisions and avoids the inconsistency. . ."James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 743 N.Y.S.2d 85 (1st Dept., 2002). It is one thing for ATUC to discover: a) the wrongful imposition of a sales tax in a bill which a non-profit institution is not required to pay; b) water charges on a bill from a non-existent meter; c) the overpayment of water sewer charges for non-discharged water which evaporated from the cooling towers; d) the overcharges due to incorrectly set gas meter(s); e) frontage billing overcharges; f) Con Edison's failure to furnish a discount for BIMC using electric heat, etc. The jury clearly recognized that these auditing discoveries are consistent with the services expected of a bill auditing company such as ATUC and that Plaintiff was properly compensated for these discoveries as required by Clauses III and IV of the Contract. However, the jury properly rejected ATUC's claim for compensation for BIMC's approximately $1 million purchase of a Con Edison transformer which eliminated a distribution charge Con Edison otherwise would charge if it still owned this equipment resulting in a future billing reduction (*i.e.*, the MHT rate). Parenthetically, the

low tension rate Con Edison was previously charging defendant was neither an overcharge nor an overpayment. The jury similarly concluded that the PFJ program did not fall within the ambit of Clause II because it was not a bill auditing discovery. Rather, it was an economic incentive program administered by a State agency to discount the cost of electricity to qualified applicants who, *inter alia*, agreed to maintain and/or increase their workforce. The conduct of the parties, as borne out by the testimony and documentary evidence, played a central role in the jury determining the overarching notion that the Contract primarily entailed ATUC auditing utility bills, not communicating future billing reduction ideas which were otherwise clearly known to Defendant and which entailed serious financial commitments to obtain future savings.[7]

Based on the trial record, this court finds there were valid lines of reasoning and permissible inferences for the jury to draw upon that would lead these rational jurors to reach their conclusions based upon the testimonial and other admitted evidence presented at trial and decide the triable issue of whether ATUC sustained a breach of contract claim against BIMC . Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 410 N.Y.S.2d 282 (1978). This ample trial record does not justify a judgment notwithstanding the verdict reinstating the breach of contract cause of action and awarding a monetary judgment in favor of Plaintiff as a matter of law. LePatner v. VJM Home Renovations, Inc., 295 A.D.2d 322, 744 N.Y.S.2d 337 (2nd Dept., 2002); *cf.*, Carnavalla v. Osso, 301 A.D.2d 620, 753 N.Y.S.2d 887(2nd Dept., 2003).

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[7] In determining overcharges and overpayments, ATUC was inherently successful in achieving future billing reductions without any serious capital outlay on BIMC's part. Conversely, the success of economic incentive programs rests solely on an entity's qualifications as dictated by such programs and its willingness to make the financial commitments necessary to obtain the long term benefits of such programs.

Having found sufficient evidence in the trial record to support the verdict, this court must then inquire as to whether the conflicting testimonial and documentary evidence presented by the parties and which resulted in "a verdict for the defendant. . . so preponderate[d] in favor of the plaintiff that [the verdict] could not have been reached on any fair interpretation of the evidence. . . " Moffatt v. Moffatt, 86 A.D.2d 864, 447 N.Y.S.2d 313 (2nd Dept., 1982) and quoted with approval, with bracketed matter added, in Lolik et al., v. Big V Supermarkets, Inc., 86 N.Y.2d 744, 631 N.Y.S.2d 122 (1995). In conducting a factual inquiry of the trial record, this court further finds no basis to set aside the verdict as against the weight of the evidence and direct a new trial.

Concerning the remaining unjust enrichment cause of action, the parties are directed to simultaneously file post-trial memoranda of law with the Part Clerk no later than September 30, 2005, marshaling the appropriate evidence contained in the trial record and stating the legal conclusions they believe should be drawn to support their respective positions.

This constitutes the decision and order of this court. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
August 15, 2005

HON. MARTIN SHULMAN, J.S.C.