Liberty Doorworks, Inc. v Baranello
2012 NY Slip Op 31217(U)
April 16, 2012
Sup Ct, Suffolk County
Docket Number: 16902/2003
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Index No: 16902/2003

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Post Trial Decision

PRESENT:
Hon. RALPH T. GAZZILLO
A.J.S.C.

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LIBERTY DOORWORKS, INC.,

Plaintiff(s),

- against -

MICHAEL BARANELLO, STEVEN BARANELLO, THE BARANELLO ORGANIZATION, INC.,ST. PHILIP NERI RC CHURCH, HARTFORD FIRE INSURANCE COMPANY, APOLLO HVAC CORP., D/B DRUMMER CONSTRUCTION, DEMONTE PLUMBING & HEATING CORP., GRANDVIEW CONTRACTING CORP., JOROB CONTRACTING & ELECTRICAL CO., KENNEDY ELECTRICAL SUPPLY CORP., ROEBELL PAINTING CORP., and WAVERLY IRON CORP., *et.al.*,

Defendant(s).

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An abbreviated and thumbnail sketch of this matter's background and procedural history is somewhat convoluted. It begins with a contract claim by Liberty Doors, Inc. against the Baranello Organization, Inc. and Steven Baranello; both defendants defaulted. There was also a mechanic's lien filed against St. Philip Neri Roman Catholic Church (hereinafter "the Parish"). Additionally, there was a Lien Law action against the Baranello Organization, Steven Baranello and Michael Baranello and a class action was thereafter certified with the following claimants: Liberty, Apollo HVAC Corporation, D/B Drimmer Construction, Jorob Contracting Company., Kennedy Electrical Supply Corporation, Roebell Painting Corporation, Waverly Iron Corporation, Del Monte Plumbing Corporation, and Grandview Contracting Corporation. The Apollo HVAC Corporation also had

another action against the Baranello Organization; it was consolidated with this action. Finally, Liberty had another, since-resolved, action against a bonding company, Hartford Fire Insurance Company.

On October 3rd, 4th, 5th, and 6th, 2011, the non-jury trial was conducted before the undersigned. As indicated during the trial's preliminary proceedings, and for the reasons then placed on the record, it was agreed that the first portion of the trial would be confined to the issue of the Parish's liability, if any. The matter of any damages would be subsequently determined in a separate proceeding if required.

As further contained within the trial record, upon completion of the testimony and submission of the documentary evidence and exhibits, the sides rested but were afforded the opportunity to submit their respective written arguments in lieu of summations as well as memoranda of law. Owing to an issue concerning counsel, submissions were not completed for over two months beyond the due-date. Those memorandum having finally been received and reviewed, the decision of the Court is as follows:

Preliminarily, a number of issues appear to be either uncontested or, in view of the evidence (predominately the documentary items), beyond serious dispute. For example: In 2001 the Baranellos were hired by the Parish as the general contractor (GC) to renovate the parish hall and install elevators. The contract was drafted by the Parish and entered into on October 29, 2001. Its cost of completion was listed as $1,736,400.00 (Art. 4.1)[1] and the anticipated date of completion fixed at September 1, 2002 (Art. 3.1)—slightly less than a year later. Both sides recognized that time was the essence of the agreement. (Art. 3.2). The Architect was David Lawrence Mammina (Art. 2.1). The Parish's on-site representative was Douglas M. Gubner of the Oxford Construction Group, Inc. (Art 2.2). The diocesan consultant for the project was Fitzpatrick, McGoldrick & Associates, Inc. (Art. 2.3).

Once the project began, the GC was required to submit monthly invoices for payment. Those invoices would indicate the amount requested by the GC. That amount which was subject to the approval, certification and adjustment by the diocesan representative (Art. 5). The contract permitted the Parish to withhold or

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[1] Matter within parentheses refers to "Articles" of the contract.

"retain" a portion of the certified amount due pursuant to the following formula: 10% until 50% of the project was completed; after that it was halved to 5% until the project was fully completed. (Arts. 5, 5.2.1, 5.3, 63 [3]). The project had to be completed prior to the release of any retainage. (Art. 63 [3]). Additional monies could be withheld due to, *inter alia*, a failure by the contractor to properly pay any sub-contractors. (Art. 63 [1][c]); such a failure could also result in the termination of the contract. (Art. 60 [1]). The contract additionally stated that the Parish could make corrections to any prior payments. (Art. 62 [4]).

As to the testimony, the first witness, Steven Baranello, was called by Apollo HVAC Corp.[2] His testimony spanned portions of the trial's first, second and last days.

Baranello indicated that he had been the general contractor on a number of projects and had built and renovated commercial and residential structures, projects which typically cost in excess of $500,000.00. He has been in this business since the 1990's. Over those years, he had performed services for the Catholic Dioceses of Long Island and Brooklyn. His brother Michael was his partner, as well as "possibly" his father and another.

With respect to the Parish's project, he[3] employed and paid a number of subcontractors or "subs" who were tasked with the various construction needs. On a monthly basis and for the better part of a year after the construction began, he had prepared eight invoices. Each of these invoices was submitted for payment for the work as-of-then completed. Each invoice was presented to a representative of the Parish and each included a deduction for retainage, a tally of accumulated retainage, and other adjustments. Once the list of work as-of-then completed and the figures were adjusted or accepted, each invoice was sent to the diocesan consultant for approval and payment.

Prior to his termination from the project, Baranello prepared eight invoices.

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[2]Mr. Baranello appeared without counsel. On the final day of the trial, James T. Murphy, Esq., appeared on his behalf but solely for the purpose of assisting in settlement negotiations.

[3]As to the "he" used herein, unless clearly inferred otherwise by the context, it is presumed that when Baranello referred to himself during his testimony he meant the Baranello Corporation.

They were for the following amounts and included the following tally of total retainage withheld:

DATE	CURRENT PAYMENT DUE & AMOUNT CERTIFIED	TOTAL RETAINAGE
12/4/01	$52,744.51	$5,860.50
1/14/02	$84,592.39	$15,259.66
2/15/02	$70,387.91	$23,080.55
3/7/02	$286,647.91	$52,930.32
4/16/02	$291,076.75	$85,272.16
6/10/02	$168,010.17 [4]	$103,939.98
8/5/02	$133,449.95	$118,767.75
9/9/02[5]	$41,365.60	$123,363.93
	(total $1,128,275.10)	

As was indicated during the presentation, and notwithstanding the contractual retainage formula referenced above(i.e., reduction to 5% upon completion of 50% of the project), each of the invoices reflected a constant retainage of 10% throughout.

Baranello indicated that despite the adjustment by Gubner and determination of a final "current payment due," any such amount was not necessarily the amount that Baranello would receive from the Parish. He also stated that he hadn't received *any* payment for the $41,365.60 requested in the eighth and final, September invoice. Additionally, throughout his appearance, he adamantly and persistently stated that he never received *any* of the retainage, at one time insisting he "was definitely not paid for the retainage."

Although he was not certain, he gave some indication that the Parish might have paid the subcontractors ("subs") directly and he understood that to be the Parish's desire (adding, "[t]hey certainly didn't pay" him). During his testimony, copies of the faces of thirty-five (35) of the Parish's checks were received into

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[4] The underlying exhibit has a number of corrections which were not satisfactorily explained. It appears that the "Amount Due" is as listed herein, and the "Amount Certified" was initially $184,668.57 but thereafter adjusted down to reflect $174,949.19.

[5] This is a week after the Sept.1st date of completion specified by the contract.

evidence, all payable to the Baranello Organization. The first was drafted on January 9, 2002, the last September 24, 2002.[6] They vary in amounts from as little as $360.00 to as much as $268,647.91 and their combined total $1,064,378.35.[7]

Baranello fully acknowledged receiving "some" checks from the Parish for payment of invoices and that he had received "some money" for the requisitions. (During another portion of his testimony, he indicated he didn't know how much money he had been paid, but he acknowledged that he had received "some" money.) He did not, however, directly acknowledge receipt of the checks. Also, and besides the retainage, he again denied receipt of the eighth and final invoice's payment, i.e., the above-indicated $41,365.60.

He did not deny the checks' total but would not acknowledge that it was the amount actually paid him. Moreover, in view of the fact that only copies of the checks' faces were produced, his endorsement was not demonstrated. Indeed, during his testimony it was inferred that he had never cashed some checks and that some were signed back over to the parish; neither scenario was conclusively demonstrated or decisively disproved.[8] Also, nothing was offered to substantiate the above-noted inference that subs were paid directly by the Parish.[9]

At one point, Baranello testified that he had paid the subs in full, but he subsequently admitted they were paid in the same proportion as he, *viz*, if - after the Parish deducted retainage - he received 90% of an invoice, a sub would be paid 90% of its invoice. With the exception of Grandview Construction Corp.,[10] he did not dispute the debts of the below-listed subs who are holders of mechanic's liens and

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[6] See n. 5, *supra*.

[7] Juxtaposing the checks to the invoices and was somewhat demonstrated during the trial, some of the checks are (individually or by combination) made out in amounts which precisely correspond to some invoices' amounts. The checks' total is, however, $63,876.75 less than the sum of the invoices.

[8] He "couldn't honestly remember."

[9] The record reflects that the Parish produced the records and their custodian, however, neither side called her nor placed any items evidence.

[10] Perhaps due to an oversight, he was not asked about Grandview Construction Corp.

he readily acknowledged that "[t]hey were not paid in full."

He was terminated from the project on October 10, 2002. Initially, he claimed he didn't know the cause. (By letter from McGoldrick, it was demonstrated that he had been notified that it was due to his failure to pay the subs and an insufficient number of workers on the site.) At the time he was fired, Baranello did not (nor has he since) contest or litigate his termination. Prior to the dismissal, the Parish "took over the work and they were dealing directly with the subcontractors." Another firm, Petrocelli, was also contemporaneously on the site with him and "contracting the job." Baranello left before the project was completed; after he left, Petrocelli took over.

When he was terminated, he was owed money, including "six figures" in retainage. He didn't sue; instead, he left it to a bonding company. It appears that thereafter he was successfully sued by a bonding company. Litigation resulted in a judgment against him for $172,993.76 but it included other lawsuits and other projects. He also stated that the Parish never sued him over his failure to complete their construction project.

The parties have filed a number of mechanic's liens with the Suffolk County Clerk and against the Parish. They are as follows:

i.	Apollo (heat & A/C)	$48,136.63
ii.	Drimmer (carpentry)	$44,464.00
iii.	Jorob (electrical)[11]	$50,582.50
iv.	Roebel Painting	$11,600.00
v.	Waverly Iron	$12,481.62
vi.	Liberty Door	$17,745.45 (judgment for $30,500.00)
vii.	Grandview Const	$13,641.00
viii.	Luanda Concrete	$19,600.00

Following Baranello, Gubner was called. His testimony generally outlined the

[11]Kennedy Electric had a claim of $22,661.44; as a sub of Jorob, it was incorporated into Jorob's claim

his duties as well as those of others. More specifically, he addressed the practice of preparing the on-site invoices, an account which closely mirrored Baranello's. He indicated that the final payment to Baranello was, on occasion, less than he had approved on the on-site invoice. Although not intimately aware of the internal workings of the separate links in the chain, he satisfactorily explained the steps towards payment: a) the Gubner-certified, on-site invoice would be forwarded to McGoldrick; b) McGoldrick would analyze the data, determine the correct amount due; c) McGoldrick would send that final figure to the Parish; d) the Parish would then forward a check in that amount to Baranello. The net result of this procedure was that Baranello might receive not only less than he originally requested, but less than Gubner approved.

Gubner also indicated a number of subcontractors approached him and complained that they were not being paid. He passed that information on to the Parish. The Parish did not establish a payment procedure for them, nor did they force Baranello to pay them. Additionally, he stated that "to the best of [his] knowledge" no retainage had been was paid to Baranello; he also acknowledged that by approximately the seventh requisition the project was 50% completed. He also testified that there is no further work being conducted on the project.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, Sec 1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter out that which is less than reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence,* 2d ed., Sec 1090. As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Also worthy of examination is any witness' interest in the litigation. *See, e.g.,* 1 NY PJI2d 1:91 *et seq*., at p.172.

The length of time taken by either side's case or any witness' testimony is, however,

clearly non-conclusive. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, even in the limited inquiry of this proceeding, there remains the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff or plaintiffs who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it. If the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail.

General evidentiary and procedural law aside and focusing instead on the substantive law more specific to the matter at bar, neither the Court's nor counsels' research have revealed any case squarely on point. There are, however, a number of decisions which offer some guidance.

Our Court of Appeals has "consistently recognized that the primary purpose of the *Lien Law* is to ensure that 'those who have directly expended labor and materials to improve real property . . . at the direction of an owner or a general contractor' receive payment for the work performed." *Canron v. City of New York,* 89 NY2d 147, 155 (1996) (citations omitted); *see, also, Ippolito v. TJC Dev., LLC,* 83 AD3d 57 (2d Dept 2011); *Matter of RLI Ins. Co. Sur. Div. v. New York State Dept. of Labor,* 97 NY2d 256 (2002);*Weber v. Welch*, 246 AD2d 78@ (3d Dept 1998). Stated otherwise, the intent of the legislation was "'to assure that the funds received from an owner should "reach [their] ultimate destination–material and labor."'" *Ciavarella v. People,* 16 AD2d 291, 293 (3d Dept 1962)(citations omitted). Obviously, the timing of such a fund's release may be determined by the parties via their contract, including deferring payment until the completion of the contracted-for services. *See, e.g., Pecker Iron Works, Inc., v. New York Trades Council Assn. of N.Y.C. Health Center Inc.*, 22 AD3d 259(1st Dept 2005).

The law embraces "any right to receive payment at a future time, even though contingent." *Canon v. City of New York, supra*, at 157 (citing *1959 Report of NY Law Rev Commn,* at 218, reprinted in *1959 NY Legis Doc No. 65* [F], at 34).

Indeed, "[a]rticle 3-A of the *Lien Law* creates 'trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction.'" *Aspro Mech. Contr. v. Fleet Bank,* 1 NY3d 324, 328 (2004)(citations omitted*); see also*, *Ippolito v. TJC Dev., LLC, supra.*

In recommending numerous amendments, the 1959 Law Revision Commission, noted that "'enactment of the trust fund provisions was prompted by the frequency of cases in which laborers and materialmen were in fact not paid. The trust concept was intended to forbid that an owner, contractor or subcontractor act merely as entrepreneur and was intended to require that he act, instead, as fiduciary manager of the fixed amounts provided for the operation.'" Aspro *Mech. Contr. v. Fleet Bank, supra,* at 328 (citing *1959 Report of NY Law Rev Commn*, at 214, reprinted in *1959 NY Legis Doc No. 65*, at 30.)

"To ensure this end, the *Lien Law* establishes that designated funds received by owners, contractors and subcontractors in connection with improvements of real property are trust assets and that a trust begins 'when any assets thereof come into existence, whether or not there shall be at that time any beneficiary of the trust.'" *Id.* at 328 (citing *Lien Law* § 70 [1], [3] and *City of New York v. Cross Bay Contr. Corp.,* 93 NY 2d 14, 19 [1999]).

A property owner may become trustee of any such funds. *Id.*; *Lien Law* § 70 (5); *see, also, Pellic Dev. Corp. v. Whitestone Equities Farmingdale Corp.*, 199 AD2d 483 (2d Dept 1993).

Even before funds are "due or earned," they become assets of the trust. *Matter of RLI Ins. Co., Sur. Div. v. New York State Dept. of Labor*, 97 NY2d 256 (2002). Any such

> "trust is 'broadly inclusive' and consists of assets of every conceivable type arising from the work, including rights of action, as well as realized assets. Trust assets are 'deemed to be in existence from the

> time of the making of the contract or the occurrence of the transaction out of which the claim arises'. Indeed, *Lien Law* §70 (1) (a) provides that a 'right of action ' includes 'any right to receive payment at a future time' even when such right 'is contingent upon the performance or upon some other event.' *Section* 70 (1) (a) thus 'extend[s] the right of action as a trust asset to contingent, not fully matured rights to receive payment for work in progress'. Accordingly, trust assets may come into existence *before* funds are actually due and earned by a contractor. While *section 70 (1) (a)* further provides that the 'fact that the right is a trust asset does not enlarge the right or excuse any performance or condition upon which it depends,' this proviso subjects trust beneficiaries' enforcement rights only to an 'owner's defenses to payment, if any, *under the contract*."

Id. at 262. (citations omitted) (emphases in original).

The right of action embraces funds due or earned as well as funds *"to become due or earned."* *Id.* at 263 (emphasis in original); *see, also, C.B. Strain & Son v. Baranello & Sons,* 90 AD2d 924 (3d Dept 1982). This also applies to subcontractors' mechanics' liens which attach to "funds due and owing to the general contractor at the time of the filing or which may thereafter become due and owing." *Hartman v. Travis*, 81 AD2d 692, 693 (3d Dept 1981).

Additionally, any statutory trustee must maintain appropriate records of trust transactions for inspection by beneficiaries. *See, e.g., Aspro Mech. Contr. v. Fleet Bank, supra.*

"Morever, trust claims which may legitimately be enforced against an owner include '*claims of . . . subcontractors* . . . arising out of the improvement, for which the owner is obligated.'" *Weber v. Welch, supra*, at 783, (citing *Lien Law* §71 [3] [a])(emphasis supplied). Furthermore, "a subcontractor is a beneficiary of trust asset received by the contractor or to which the contractor is entitled." *Pecker Iron Works, Inc., v. New York Trades Council Assn. of N.Y.C. Health Center Inc.*,

supra, at 260 (1st Dept 2005)(citing *Quantum Corporate Funding Ltd. v. LPG Assocs.*, 246 AD2d 320, 322, *lv. denied* 91 NY2d 814 [1998]). Additionally, payment to some but not all of a project's subcontractors does not extinguish the lien, and it continues until every claim has been extinguished. *City of New York v. Cross Bay Cont. Corp., supra.* Lastly, although a defense founded upon a subcontractor's lack of privity of contract might at first blush seem appealing, "[u]nder *section 3 of the Lien Law*, resort to a mechanics' lien can be had in a proper case absent any contractual privity." *Hartman v. Travis*, *supra*, at 693 (citation omitted).

DETERMINATION

Focusing initially on the witnesses, and objective review of Baranello's presentation reveals it to be worthy of belief and portraying a credible account of the relevant facts and issues. That is not to deny, however, that it was at times troublesome. Albeit understandable under the circumstances and his unenviable position, he initially appeared apprehensive and uncomfortable. Also, on occasion he had less than total recall, although clearly there have been a number of years since the events he addressed and he did not appear to have prepared to testify.[12] And of course as with every witness, any of his testimony which was speculative, beyond his recollection, or vulnerable to overpowering contradiction was subject to exclusion, as were any matters which otherwise violate the rules of evidence.

Those caveats notwithstanding, however, the undersigned fully and without reluctance credits his recollection and explanation of those facts which are relevant and pivotal. Indeed, his overall account made sense and was in accord with the other evidence and logic while finding support in other portions of the record. Moreover, on a number of key points, he was as convincing as he was consistent. For example, he was persuasively adamant and unwavering with respect to the retainage withheld by the Parish, leaving no doubt as to either its existence or the fact that it was never distributed. Even putting aside the retainage, he also established that he was not otherwise paid in full. For example, he adamantly denied receiving *any* payment for the last invoice and that strongly

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[12] Purely as a parenthetical, his initial failure to recall the facts surrounding his dismissal could at best be described as "awkward." Later in the trial, however, and following a demonstration that it was due to his failure to pay the subs, he offered somewhat of an acknowledgment,

voiced contention was not successfully overcome. Equally uncontroverted was his indication that the Parish's checks—albeit *made out* to him—were not all *paid out* to him. Similarly, he left no doubt that the subcontractors were not fully paid, and his admission of that at best embarrassing, if not painful failure not only established its veracity, but simultaneously served to buttress his candor and truthfulness. Lastly, it should also be noted that the late-in-the-trial assault on his credibility and his motives never gained any traction.

An evaluation of Gubner's testimony is by no means complex. Indeed, he was brief and neither he nor his appearance as controversial as Baranello, an observation which is perhaps evidenced by the more modest amount of attention he received in the post-trial memorandum. Indeed, he appeared credible, and his testimony supported and worthy of belief. Moreover, although at times he was reticent about certain issues, he was sufficiently crisp and his presentation adequately comporting with the other evidence.

Therefore and upon that basis, the undersigned finds that the following facts have been proven by a preponderance of the credible evidence:

a) the retainage was withheld by the Parish, thereby creating a fund;

b) the contract required the percent of retainage withheld to be reduced from 10% to 5% once the project was half-completed;

c) that point was reached,[13] yet the Parish continued to withhold the 10%;

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[13] Based upon the "on-site" invoices, it appears that near the time of the April 4th request was made the project was very close to (if not at) the 50% completion point. Indeed, that invoice indicates "Total Completed & Stored to date $852,721.63"or just a tad shy of half the $1,736,400.00 contract price. (The on-site invoices up to and including the April request totaled $785,449.46; when added to the then-accumulated retainage of $85,272.16, the sum is $870,721.62, or an amount which exceeds half the contract price.) Even after taking into consideration the Parish's demonstration that the full invoice demands might not always be paid, it is reasonable to assume that the half-way mark was in April if not shortly thereafter. Yet, after focusing upon the next three—June, August, and September—it appears that the retainage continued to be calculated at the 10% rate and not the 5% required. Obviously, at some point that served to double the retainage deduction while swelling the amount in reserve.

d) the contract required that once the project was fully completed, Baranello should have received the retainage;

e) the project was fully completed;[14]

f) Baranello did not receive any of the retainage;

g) Baranello did not receive any payment for the eighth and final invoice;[15]

h) Baranello did not pay the subcontractors in full;

I) Baranello retained a percentage of the monies due them;

j) the subcontractors were not paid by the Parish.

In sum, therefore, by a preponderance of the credible evidence, the plaintiffs have established the factual and legal merits of their claim as well as the defendant's liability. As to any damages which may have been thereby caused, that will be determined at a subsequent proceeding which, if practicable, will be consolidated with the inquest of the defaulting defendants.

In order to expeditiously resolve any remaining any trial issues and select a trial date, all parties and their attorneys are directed to appear before the undersigned on May 21, 2012, at 9:30 a.m.

Plaintiff Liberty Doorworks, Inc., is directed to serve a copy of this decision:

a) by regular mail upon counsel for the Parish;
b) personally upon the defendants Steven and Michael Baranello;

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[14] The contract, drawn by the Parish, specifically states payment is due upon "completion" of the project; it does not, however, specify that it has to be completed by Baranello. Indeed, even if this clause were viewed as inconclusive, it is well settled that any ambiguity is construed the drafter. *See, e.g., Guardian Life Ins. Co. of Am. v. Schaefer,* 70 NY2d 888 (1987).

[15] The facts that the faces of some checks were produced is not definitive. *Singer v. Neri,* 31 AD3d 738 (2d Dept 2006), a case submitted by counsel does not compel a different result as in that case there does not appear to be any denial that the checks were received. Additionally, there is no indication as to whether or not the backs of the checks had been examined.

[* 14]

c) pursuant to CPLR § 311 (a)(1) and BCL §§306 (a) and (b) on the Baranello Organization, Inc.;
d) as a courtesy, by regular mail to James T. Murphy, 40 Woodbine, Park Floral Park, New York.

The foregoing constitutes the decision and order of the Court.

Dated: 4/16/12
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION

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