[* 1]

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

PRESENT: DEBRA A. JAMES PART 59
Justice

LIZDEN INDUSTRIES, INC.,
Plaintiff,

- v -

FRANCO BELLI PLUMBING AND HEATING AND SONS, INC., OKANAGA U.S.A. CO., LTD., and KAZUHIDE YAMAZAKI,
Defendants.

Index No.: 601420/06
Motion Date: 04/12/11
Motion Seq. No.: 03
Motion Cal. No.: ____

FILED

AUG 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 7 were read on this post-trial motion.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5 - 7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

Defendant Okanaga U.S.A. Co., Ltd.'s (Okanaga) moves pursuant to CPLR 4404 to vacate the jury verdict rendered on June 7, 2010, which found that Okanaga was negligent and 75% liable for plaintiff Lizden Industries, Inc.'s (Lizden) property loss. Okanaga seeks an order, notwithstanding the verdict, either directing entry of a judgment dismissing the complaint and cross claims against it or a re-apportionment of 10% fault against Okanaga and 90% against defendant Franco Belli Plumbing and Heating and Sons, Inc. (Franco Belli). Alternatively, Okanaga requests a new trial on the issue of liability, alleging that the

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

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

court erred in its charge to the jury. Finally, Okanaga moves to vacate the damages award, and for a new trial on damages, claiming that plaintiff failed to prove its loss within the required reasonable degree of certainty.

Lizden cross-moves for an order amending the jury verdict to include the sum of $40,109.19 as an award for the rent abatement cause of action which was tried without a jury, and adding the sum of $524,047.56, which is the alleged amount of prejudgment interest on both the awards for property damage and lost profits.

Defendant Franco Belli settled plaintiff's claims against it for $595,000 In addition, Lizden also seeks to apply General Obligations Law § 15-108 to the jury verdict, by subtracting Franco Belli's settlement, resulting in an adjusted award of $1,116,976.00, and entering a judgment against Okanaga in the amount of $1,681,132.75 to the date of the verdict, taking into account the prejudgment interest and the calculation for the rent abatement.

Lizden suffered damage to its property, and incurred lost profits, as a result of a flood which occurred on its premises on March 2, 2005. Its summons and complaint initially contained six causes of action against Franco Belli, Okanaga and Kazuhide Yamazaki (Yamazaki).

A jury trial was held from May 19 through June 7, 2010.

During the trial, plaintiff withdrew several causes of action. The court determined that the jury would try the first cause of action for negligence against Okanaga and Franco Belli, with the fourth cause of action for breach of the lease for failure to abate the rent decided by the court. During the trial started, Franco Belli settled with Lizden for $595,000.

Lizden is a clothing and accessories designer and manufacturer whose clients include QVC-US and JCPenney. Lizden's offices are located on the third and fourth floors of a building located at 100 Vandam Street, owned by Okanaga. Yamazaki is the manager/superintendent of the building and is employed by Okanaga. Yamazaki, his wife, Mariko Iita (Iita), and their daughter reside in the fifth floor of the apartment building.

In February 2005, the fifth-floor boiler stopped working. At that time, there was one boiler in the basement which provided heat for the first four floors and there was one boiler on the fifth floor which provided heat for the fifth floor only. Yamazaki hired Franco Belli to fix the fifth-floor boiler. Franco Belli advised Yamazaki that the boiler would have to be replaced. Yamazaki requested that Franco Belli, instead of replacing the fifth-floor boiler, reroute the basement boiler so that it would also provide heat for the fifth floor. The evidence showed that this alternative would be substantially

less expensive than replacing the boiler completely. Yamazaki gave the mechanical drawings of the pipes to Franco Belli.

George Franqui, one of Franco Belli's plumbers who was working on the heating system for the building, testified that the mechanical drawings of the pipes did not show the valve placement, which turned both the heat and the water on and off. He explained that the blueprints were older than the piping that was supplying heat to the fifth-floor radiator.

Franqui testified that in late February 2005, during his work, he turned off the valve on the fifth-floor boiler, and then cut the pipes. He thereafter left for the day. The record is unrefuted that the pipes were left uncapped, meaning that if the water was turned on, water would flow from the pipe; if the pipes had been capped, no water would have flowed from the pipes. Further, if the valve was left closed, water would also not flow out of the open pipe. When Franqui left the job, there was no water coming out of any of the pipes.

On March 1, 2005, Yamazaki left for Japan and told Iita to call him if there were any problems with the work being done on the heating system. Iita was the only person who had keys to the fifth floor and the fifth-floor boiler room area.

Iita called Franco Belli around six in the evening on March 1, 2005 since there was still no heat coming to her apartment.

She had also seen dripping water in the basement and wanted Franco Belli to fix this problem.

Iita testified that the plumber from Franco Belli arrived at the building and worked in the basement and on the fifth floor. The plumber then advised her that no more water would be dripping in the basement and that the heat would be coming up soon. At that time, there was no flooding on the fourth floor. Iita testified that she went to sleep around 1 A.M. Her testimony was that it was cold in her apartment, but admitted in evidence was her deposition testimony that she "probably" did not touch the thermostat. She testified that she did not touch any valves.

Sometime in the early morning of March 2, 2005, hot water started coming with force out of the uncapped fourth-floor pipe. Iita observed water coming down from the ceiling of Lizden's offices like a "waterfall."

Franco Belli (Belli) testified that if someone turned on the valve on the fifth floor boiler, water would be discharged from the open pipe. He stated that the source of the flooding water was from the fifth floor boiler.

Beth Terrell Newman (Terrell Newman), one of the Lizden principals, testified as to nature of Lizden's business and to the property damage that occurred as a result of the flooding. She also explained how when she arrived at work on March 2, 2005, she saw the following:

> There was water pouring from every high-hat light fixture in the ceiling, water coming down the walls. The windows were steamed because it was hot water. The water had pooled on top of all the artwork and all the presentations, and it was black water. So, anything that was light colored was now dark, dank. There was a stench. It was a disaster.

Terrell Newman testified that her artwork had turned to "pulp" and that many of her prototype garment samples got ruined. Lizden was working on presentations for QVC UK and QVC USA, and, as a result of the flooding, those presentations were ruined. Terrell Newman testified that half of Lizden's office space was ruined and that Lizden could not fully operate its business for five months after the flooding.

Another Lizden principal, Dennis Newman (Newman), also testified as to Lizden's business and the damage due to the flooding. He claimed that the total lost profits due to the flood were $2,051,720, and that the total amount of property loss as a result of the flood was $630,787. A witness from QVC UK also testified as to the potential lost profits that Lizden experienced as a result of the flood damage to its offices and products. Okanaga supplied a witness who analyzed Lizden's financial documents including tax returns, and testified as to the amount of alleged lost profits.

Okanaga also retained an engineer whose testimony was read at the trial. The engineer stated that the sole responsibility for the flooding was due to Franco Belli's work on the pipes and

the failure to cap the pipe. He testified that, even if the valve was opened, if the cap had been closed, the water would not have come out.

The jury was charged with determining if Okanaga and Franco Belli were negligent, and if so, the apportionment of their negligence. Specifically as to Okanaga, the Justice charged the following:

> In order to recover against the owner Okanaga, plaintiff Lizden Industries must prove, and this is on this particular theory, jurors, that the premises were not reasonably safe, that the defendant Okanaga was negligent in not keeping the premises in a reasonably safe condition, and that Okanaga's negligence in allowing the unsafe condition to exist was of a substantial factor in bringing about Lizden's loss.

The jury was also charged that, despite Belli being an independent contractor, the jury may find Okanaga responsible for Lizden's loss if Okanaga negligently interfered with Franco Belli's work or directed how part of the work should be done.

Also included in the instructions were the factors to consider to determine property damages, including valuation based upon materials and labor, and the depreciation of such items. It was further instructed as to what factors to use to calculate lost profits and how this calculation, although an approximation, must be based on known reliable factors.

The jury deliberated and rendered its verdict on June 7, 2010. In its verdict sheet, the jury found that Franco Belli was negligent and that Franco Belli's negligence was a substantial

factor in bringing about Lizden's loss. The jury also found that Okanaga was negligent and that Okanaga's negligence was a substantial factor in bringing about Lizden's loss. The jury found that Franco Belli was 25% at fault while Okanaga was 75% at fault. The jury set forth awards for lost property and loss of net profits in the following amounts:

Plaid library - $11,000
Prototype Garments - $284,000
Computer and IT - $4,000
Leather Suitcase - $800
Concept Boards - $3,000
Framed Press Pieces - $576
Color Cards - $700
Library of designer publications - $350
Fabric print artwork - $5,000
Labeling and packaging development - $20,000
Design Portfolio - $40,000
Labor involved in cleaning and sorting garments and records - $9,000
Loss of net profits - $1,333,550
Total: $1,711,976

After applying GOL § 15-108 (a) and subtracting Belli's settlement of $595,000, the value of Lizden's award was reduced to $1,116,976.

Okanaga now moves, pursuant to CPLR 4404, among other relief, for an order vacating the part of the verdict which found that Okanaga was negligent and dismissing all claims against it.

Lizden cross-moves for an order amending the verdict to include prejudgment interest and for an award for rent abatement.

CPLR 4404 (a) provides the following, in pertinent part:

> Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury,

> upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . .

In determining whether a jury verdict should be set aside as against the weight of evidence pursuant to CPLR 4404 (a), the court must find that "'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.'" Curiale v Peat, Marwick, Mitchell & Co., 214 AD2d 16, 24 (1st Dept 1995), citing McDonald v Metropolitan Street Railway Company, 167 NY 66, 69-70 (1901). The question involves a "discretionary balancing of many factors.'" McDermott v Coffee Beanery, Ltd., 9 AD3d 195, 205 (1st Dept 2004). Every favorable inference must be given to "the party in whose favor the verdict was rendered." Editex, Ltd. v Centennial Insurance Company, 272 AD2d 150, 152 (1st Dept 2000). Moreover, the court may not "employ its discretion simply because it disagrees with a verdict." McDermott v Coffee Beanery, Ltd., 9 AD3d supra at 206.

Okahaga seeks to vacate the jury verdict which found that Okanaga was negligent contending that there was no rational basis for this finding. Among other things, Okanaga argues that Franco Belli was the negligent party for failing to cap the pipes.

Okanaga contends that there is no evidence that Iita may have turned on a valve which started the flow of water and claims that even if the mechanical drawings given to Franco Belli were not up to date, this was not the cause of the leak.

The jury heard the testimony from Okanaga's expert, who opined that the cause of the leak was from the uncapped pipes. It also heard testimony that the mechanical drawings may or may not have been up to date. The jury also listened to Iita as she testified that she probably did not turn on the thermostat in her apartment and did not turn any valves after the plumbers left for the day on March 1, 2005.

However, along with Okanaga's version of the events, the jury heard Lizden's version of events. This included the fact that Yamazaki rejected Franco Belli's proposal to replace the boiler instead of rewiring the basement boiler to the fifth floor; that Yamazaki then went to Japan, leaving Iita to summon Franco Belli to fix the heat and water leak problems; that Iita called the plumbers back in the evening of March 1, 2005 to check on a leak in the basement and to ask them about the lack of heat in her fifth-floor residence. Lizden also emphasizes that when the plumber left on the evening of March 1, 2005, no pipes were leaking, but that the next day, March 2, 2005, there was hot water spewing from a pipe, whose valve had been left opened at the fifth-floor boiler. If the valve had not been opened, the

water would not have started to flow. This water was traced back to the fifth floor. The only ones in the apartment that evening were Iita and her daughter and they were the only ones with the key to the fifth-floor boiler.

Given those two versions of the events, it was not "utterly irrational" for the jury to conclude that Franco Belli's failure to cap the pipes was not the only cause of the flood. See Cohen v Hallmark Cards, Inc., 45 NY2d 493, 499 (1978). In this situation where there was a testimonial conflict, the "jury merely resolved the conflict in expert testimony as it was entitled to do." Gamiel v University Hospital, 216 AD2d 80, 81 (1st Dept 1995). Moreover, the "jury need not accept testimony offered by a party simply because the opposing party offered no contrary testimony." McDermott v Coffee Beanery, Ltd., 9 AD3d at 210.

As an alternative to vacating the verdict, Okanaga states that it would consent to a change of apportionment of its fault to 10%. However, the court finds that the jury reached their apportionment verdicts by a "fair interpretation" of the evidence. Gamiel v University Hospital, 216 AD2d at 81. The jury was instructed to consider all the facts and the circumstances and then decide a "fair division" of responsibility between any and/or all of the defendants for causing the accident. The jury's fact finding function must be given "great

deference." Gamiel v University Hospital, 216 AD2d at 81. Moreover, "[a]pportionment of liability among defendants is a weight-of-evidence question for the trier of facts." Nowlin v City of New York, 182 AD2d 376, 379 (1st Dept 1992), affd 81 NY2d 81 (1993). In the present situation, a fair interpretation of the evidence supports a finding of a greater culpability on Okanaga's part in light of his responsibility as landlord to exercise reasonable care to keep in safe condition the portions of the premises over which he retained control. In discharge of this duty, Okanaga was obligated to ensure that there would be no leaking or flooding. See Arthur Richards, Inc. v 79th Fifth Avenue Company, 57 NY2d 824 (1982), revg on dissenting mem below 88 AD2d 517 (1st Dept 1982). In summary, there was a sufficient basis for the jury to impose liability upon Okanaga because (1) the pipe was cut only because Okanaga directed that Franco Belli re-route it rather than replace the fifth floor boiler; (2) no water was leaking when Franco Belli's technician left on March 2, 2005, at which time Iita alone, with permission of Okanaga, had access to the fifth floor boiler room where the shut off valve was located. Okanaga who retained and lived with his family in the part of the premises where the flood emanated was entirely unlike the owner in Davison v Wiggand, 239 AD2d 799 (1st Dept 1999), an out of possession landlord, who neither retained control of the premises nor specifically contracted to repair or

maintain the property, nor assumed a responsibility to repair or maintain the property. Hence, since the jury considering the evidence could reasonably determine that Okanaga was 75% negligent, Okanaga's motion to vacate the verdict finding Okanaga negligent and/or reallocating the apportionment of fault is denied.

Okanaga seeks to vacate the verdict arguing that the court committed error as to its charges as to res ipsa loquitur, and to a principal's liability for the acts of an independent contractor.

The court instructed the jury as to the concept of res ipsa loquitur, stating, inter alia, that "the requirement of exclusive control is not rigid. It implies control by a particular defendant of such a kind that the probability that the accident was cause by someone else is so remote there is a fair inference, or it is fair to permit an inference that such a defendant was negligent." It also stated that the law "permits but does not require" an inference of negligence if the instrumentality of the loss was in the exclusive control of either or both of the defendants. The court neither found nor instructed the jury that one or both of the defendants had exclusive control of the pipe. In finding this instruction applicable, the court relied on controlling case law, including

Payless Discount Centers, Inc. v 2529 North Broadway Corporation, 83 AD2d 960 (2d Dept 1981).

As to the independent contractor charge, the court instructions to the jurors were that even though Okanaga hired Franco Belli, as a company with specialized plumbing skills, they might find Okanaga responsible for Lizden's loss if Okanaga negligently directed Franco Belli how that part of the plumbing work that resulted in the loss should have been done, if such interference was a substantial factor in causing the loss. See Kleeman v Rheingold, 81 NY 270 (1973). The charge left it to the jury to determine whether, despite Franco Belli's status as an independent contractor, Okanaga was still liable for any alleged negligence on Franco Belli's part in that he directed Franco Belli to re-route the pipes from the fifth floor to the basement rather than replace the fifth floor boiler.

The Appellate Division, First Department, has held that "[i]f the charge is ambiguous, inconsistent, erroneous, confusing, one-sided, incomplete or overly technical a new trial will be ordered if prejudice has resulted to any party." Gannon Personnel Agency, Inc. v City of New York, 55 AD2d 548, 549 (1st Dept 1976) (internal quotation marks and citation omitted). In the present case, the charge as a whole cannot be described by any of those terms since it was the correct statement of the applicable law. The court's instructions to the jury on the

topics of "exclusive control" and "independent contractor" did not "cloud[] the issue or negatively influence[] the jury's determination." Nestorowich v Ricotta, 97 NY2d supra at 401.

In pertinent part, the court instructed the jury with respect to Okanaga:

> In order to recover against the owner Okanaga, plaintiff Lizden Industries must prove, and this is on this particular theory, jurors, that the premises were not reasonably safe, that the defendant Okanaga was negligent in not keeping the premises in a reasonably safe condition, and that Okanaga's negligence in allowing the unsafe condition to exist was of a substantial factor in bringing about Lizden's loss.

The court also summarized Okanaga's contentions to the jury by stating the following, in pertinent part:

> On the other hand, Okanaga contends that it did not cause the water to be released, that it did not cause anyone to open any valves or raise any thermostat, and that, in any event, it hired defendant Belli Plumbing as the plumbing and heating specialist, and that Belli Plumbing was entirely at fault with respect to the release of water into plaintiff's premises when Belli Plumbing failed to place a cap on the open pipe where Belli Plumbing employees alone had performed the cutting and connecting work.

Accordingly, as the res ipsa loquitur and independent contractor charges were accurately rendered, Okanaga is not entitled to a new trial.

Okanaga also argues that the jury's damages award should be vacated since the lost profits claim was speculative and the property damages claim was based on original cost and not on depreciated value.

During the course of the testimony, the jury heard four witnesses testify with respect to the lost profits and the property damage. Lizden's principals testified that the lost profits, including potential sales and presentations, were a direct result of the flood. The court instructed the jurors on how to calculate the lost profits. Lizden sought $2,051,720, and, after careful deliberation, the jury awarded it $1,333,550. The court concurs that Newman's testimony about how Lizden's loss was directly related to the flood provided evidence that such loss were "certain or specific enough to warrant recovery in damages." See Milliken and Company v City of New York, 210 AD2d 49, 51 (1st Dept 1993), modified, 84 NY2d 469 (1994). Accordingly, the award for lost profits will not be disturbed.

The property damages award is also supported by the evidence and will not be vacated. The jury was given substantial evidence adducing the amount needed to recover or replicate property which was destroyed as a result of the flood. The court instructed the jury on how to assess property damages, and they were specifically told to consider depreciation value in their calculations. For instance, although the claim for 254 prototype garments was $473,801, the jury awarded $284,000.

Okanaga also argues that the property damage award was speculative since Newman used 2005 costs to calculate the value of the prototypes created in the 1980s at 1980's costs. However,

as argued by Lizden, "an owner of property, with a modicum of qualifying experience, may offer a lay opinion as to its value." S.A.B. Enterprises, Inc. v Village of Athens, 164 AD2d 558, 565 (3d Dept 1991). Moreover,

> so long as the figure arrived at had a reasonable basis of computation and was not merely speculative, possible or imaginary, the Surrogate had the right to resort to reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgment and common sense in arriving at that amount

Curiale v Peat, Marwick, Mitchell & Co., supra, 214 AD2d at 25 (internal quotation marks and citation omitted). Accordingly, the award for property damages will not vacated.

Lizden seeks prejudgment interest on both the property and lost profits awards from the date of the flood until the verdict date.

In addition to the prejudgment interest on the awards, Lizden seeks to have interest applied to the entire verdict, prior to the subtraction of Franco Belli's settlement. This request is denied and prejudgment interest will not be computed prior to subtracting Franco Belli's $595,000 settlement.

According to CPLR 5001 (a), "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." See also Manufacturer's & Traders Trust Co. v Reliance Ins. Co., 8 NY3d 583, 588 (2007). The jury determined

that Okanaga was negligent, and that its negligence interfered with the Lizden's use and enjoyment of its property. Okanaga's claim that only cases grounded in breach of contract are entitled to prejudgment interest is without merit. Accordingly, Lizden is entitled to have the judgment amended to reflect prejudgment interest on the property damage award from March 2, 2005 until the date of the verdict. See CPLR 5001 ©.

Contrary to awards for property damage, there is no requirement in the CPLR which entitles a party to prejudgment interest on awards for lost profits. As such, Lizden's request is denied, and the jury's award for lost profits will not amended to include interest from March 2, 2005.

Lizden also seeks to have the award calculated to reflect a rent abatement award of $40,109.19. Lizden and Okanaga agreed that the court would hear the fourth cause of action for breach of contract by Okanaga based on its alleged failure to abate the rent for that part of Lizden's premises damaged by the flood. Newman testified that Lizden's monthly rent was $13,369.73. He also testified that although he sought a rent abatement from Okanaga, his request was denied. Newman also calculated the amount of rent abatement that he believed Lizden was entitled to by taking into consideration the amount of unusable portions of the premises and the length of time they were unusable.

Okanaga argues that the court requires additional testimony and evidence before it can try the rent abatement issue. Such testimony may include any offsets that Lizden received from insurance or a specific allotment of the property space that could not be used and for how long.

Okanaga's argument is without merit. During the trial, the court specifically ruled that "there is sufficient evidence in the record to determine this question." Therefore, Lizden is entitled to an award of $40,109.19 on its cause of action for rent abatement cause of action, which represents three months of rent, the period that Lizden was constructively evicted from its premises.

Based upon the foregoing, it is

ORDERED that defendant Okanaga U.S.A. Co.'s motion to vacate the jury verdict of June 7, 2010 is denied in its entirety; and it is further

ORDERED that plaintiff Lizden Industries Inc.'s cross-motion is granted with respect to

(1) assessing prejudgment interest on the jury verdict as to property damages and

(2) awarding the amount of $40,109.19, on plaintiff Lizden Industries, Inc.'s cause of action for a rent abatement, and is denied with respect to

(1) Lizden's application for prejudgment interest on the award for lost profits and

(2) prejudgment interest on the entire award before the offset of defendant Franco Belli Plumbing and Heating and Sons, Inc.'s settlement pursuant to GOL § 15-108; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: August 24, 2011

ENTER:

J.S.C.

DEBRA A. JAMES