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Index No: 2744/2008

SHORT FORM ORDER

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

Post-Trial Memorandum

PRESENT:

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

FLORENCE CORPORATION, d/b/a FLORENCE BUILDING MATERIALS, Plaintiff(s), - against - JAMES B. K. MANBAHAL, individually and d/b/a BAHAL'S CUSTOM HOMES and BAHAL'S CUSTOM HOMES, INC., Defendant(s).	LAW OFFICE OF ELIAS C. SCHWARTZ, ESQ. Attorney for Plaintiff 343 Great Neck Road Great Neck, NY 11021 RAGANO & RAGANO, ESQS. Attorneys for Defendants 95-09 101st Avenue Ozone Park, NY 11416

The non-jury trial of this matter was conducted before the undersigned on May 16th, 17th, and 18th, 2011. Upon completion of the testimony and submission of the documentary evidence and exhibits, both sides rested but were afforded the opportunity to submit their respective written memoranda of law and arguments in lieu of summations. Those memorandum having since been received[1] and reviewed, the decision of the Court is as follows:

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 established sufficient credible information and, simultaneously, has filtered out that which is less than reliable. Secondarily, it should go without saying that in evaluating the 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 witness, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence,* 2d ed., Sec 1090. Additionally, during the course of its fact-finding analysis, the undersigned's task included, of course, segregating the competent evidence from that which was not, an undertaking for which the

[1] The post-trial submissions by both counsel were unavoidably delayed due to an unforeseeable and unfortunate but totally blameless obstacle to the expeditious preparation of the stenographic record. Counsels' cooperation, patience and professionalism during this period, which mirrored their behavior during the trial, is noted and appreciated.

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).

That being noted, the court is satisfied that the plaintiff has more than exceeded its burden of proof and established the merits of its case by more than the minimum requirement of a mere preponderance of the credible evidence. Simultaneously and with equally overwhelming persuasiveness it has established its account of the facts, which the Court finds to be as follows:

The defendant James B. Manbahal (hereinafter "Manbahal") is also the owner of the defendant entities. He is an experienced, veteran builder of hundreds of homes and has over twenty years' experience in the various aspects of home construction. As regards his participation in this matter, it began in late 2004 or early 2005 when he met with a supervisor at one of plaintiff's branch offices. At that time and place, Manbahal indicated he was building a large house for himself and his family and wanted "Andersen" brand windows. He presented an architect's drawing of the proposed structure as well as his (Manbahal's) list of the "rough opening" dimensions for the widows. The documents were copied by the supervisor who subsequently typed the "rough opening" measurements into the Andersen window product computer program and determined the windows' availability.[2] At a second meeting a few weeks later, the defendant - who didn't have a budget for the windows - was presented with a written interim proposal. That proposal was approved.

A few more weeks later, the order and prices were finalized and memorialized in another writing. Manbahal was presented with this writing and was orally informed that due to the fact that the widows would be custom made, none would be returnable nor would any payments be refundable.

The original price exceeded $100,000.00. The defendant, however, presented a New York State Department of Taxation and Finance "Exempt Organization Certificate". As a result, plaintiff reduced the sales price so as to reflect a deduction of sales tax (over $8,000).[3] Additionally, a further, smaller discount was provided and a final, "round" figure of $92,000.00 was agreed upon. Manbahal signed the final order's last page, a page which also included the final, reduced price. Also, albeit neither signed nor initialed, the page also contained a stamp which stated in large letters: "NON-STOCK SPECIAL ORDER NON-REFUNDABLE". Next, Manbahal paid one-half of the $92,000.00; to wit: $26,000 by check, $26,000 by Bahals Custom Homes' "AMEX" card. The

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[2] Apparently none of the widows were in the plaintiff's stock. Some were not even stock items for Andersen and had to be individually designed and constructed. As a result, the windows had to be custom ordered and some custom made

[3] The exempt tax certificate was apparently issued in favor of the "The Miracle Makers, Inc." but defendant "Barhal's Custom Homes, Inc." had been added. The defendant subsequently withdrew his tax exemption request, but it is not clear whether the tax was paid and, if so, when and by whom.

balance was to be paid "C.O.D."

Thereafter the windows were delivered. There were, however, two problems. The first was that a so-called "transom" or large front window was the wrong size due to an error by the manufacturer. That problem was apparently resolved to everyone's satisfaction when the window was replaced and installed free of charge.

The other problem—and the focus of this litigation—is fourteen smaller windows meant to be installed throughout the house. Manbahal was dissatisfied with their appearance and wanted a larger "eyebrow" (the half-circle window above the main, somewhat rectangular window). Other than that, he did not, however, voice any complaints about the windows' size or color. As a result, the rough openings were re-measured, and a new price quoted. Simultaneously, it was explained to Manbahal that since this was a new order he'd be responsible for the additional cost. He was also advised that there would be no credit, refund, or return for the previously ordered and delivered windows.[4] Satisfied, Manbahal authorized the plaintiff to charge the AMEX card for the payment for the re-ordered windows. Thereafter, deliveries were made in installments. Soon after they were delivered, they were installed.[5] The final amount due for this, the second order, was $14,358.24.

As to payment, there were three charges made on the AMEX card, one for each delivery. All such charges, however, were later disputed and reversed at Manbahal's request. Although the charges were challenged in writing and on a number of grounds[6], it merits noting that there were no indications that any use of the AMEX cards had been unauthorized. Indeed, it appears that during separate conversations with the plaintiff's billing department as well as one of its field representatives, no such issue was ever raised. Moreover, in speaking with the billing department, Manbahal not only didn't make any such claim, he indicated he would withdraw the dispute. The $14,358.24 was, however, never paid, despite demand therefor, and the full amount of that debt still remains unsatisfied. As a result, the plaintiff began this action.

As to the defendants' case, neither their defense nor their counterclaim have merit.

Focusing first on the defense, the defendants' version of the facts was far from satisfying and any modicum of credibility was clearly overwhelmed by the plaintiff's case. Indeed, defendant Manbahal's testimony is unworthy of belief and rejected. In simplest terms, his account strains logic and common sense. Moreover, in some cases, it defies any objective view of the proof.

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[4] Apparently as a courtesy and accommodation to him as a customer, he was told that some could be stored at the plaintiff's place of business until he retrieved them.

[5] Although there were issues about window jambs and hardware, it appears that the plaintiff extended itself to be cooperative and please its customer, sending materials and men to the job-site.

[6] Any complaints were either unfounded or corrected.

For example, while he is by no means a layman *vis-a-vis* home construction, his testimony is inconsistent with his admitted wealth of knowledge and experience. As indicated within the record, besides his qualifications, he also admits to providing the initial window measurements. Despite those admissions, he holds himself blameless for the alleged result: ill-fitting widows. Furthermore, and according to his account, after the plaintiff allegedly ordered the first set of wrong windows, Manbahal essentially stood by idly and left the re-ordering to the plaintiff. When placed under the light of Manbahal's self-proclaimed professional experience, augmented by his alleged bad experience with the first set of windows, this contention is at best difficult to comprehend. Indeed, a number of times during this witness' cross-examination, plaintiff's counsel indicated the account was "confusing". Such a characterization might also be applied to Manbahal's inaction, disinterest or whatever with ordering the second set of windows.

He also claimed the AMEX charges were not authorized. That allegation was not only refuted by plaintiff's witnesses, it was overcome by the documentary evidence which, as was indicated above, was noticeably silent as to any such complaint. The Court, therefore, is unable to find any support, much less merit, to any such defense; moreover, in view of the evidence to the contrary, this defense is rejected.

His credibility was further wounded by those portions of his testimony which were inconsistent with his pre-trial deposition. Moreover, it is at best difficult to reconcile his trial and deposition testimony *vis-a-vis* the tax exemption certificate.

Similarly with respect to the counter-claims, none survived. They were either withdrawn, unproven, or unfounded. For example, the "hardware" claim was withdrawn in open court. The claim for broken windows lacks any proof of causation: there is no proof of any culpable act or omission by the plaintiff. That charge is, at best, speculation without a scintilla of objective support. Somewhat similarly speculative is the testimony supplied by defendants' non-party witnesses. For example, the "bill" presented does not itemize or segregate labor and materials. This is insufficient as there is proof that materials - at least in part - were delivered. Moreover, that "bill" allegedly includes the cost of moldings for the attic windows, yet the testimony is clear that early on Manbahal opted against finishing the attic windows' interior. Additionally, any testimony that a witness "didn't see" screens at the job-site does not prove they weren't there (which apparently, they were).

It is by no means a coincidence that neither side's post-trial submissions contain any legal analysis nor did either cite case or statutory law. Clearly, there are no unusual or esoteric issues of law in this matter as it is purely a question of simple facts and elementary principles. As to those facts and in basic terms, the plaintiff performed its contractual and agreed upon obligations. In return, however, it did not receive all that was due. Instead, it merely received the defendants' partial performance, performance which was not only less than adequate but was also defenseless. Finally, and in addition to failing to demonstrate their compliance with the agreement or an excuse for their neglect of their contractual obligations duties, they could not supply any facts or legal theory for any counterclaim.

It is, therefore, the determination of the court that by a preponderance of the credible evidence, the plaintiff has demonstrated the merits of its cause of action and its claim for $14,358.24 and shall have judgment therefor, with interest. It is also the Court's determination that the defendants' counterclaim has not been proven by a preponderance of the credible evidence, and it is therefore dismissed in all respects.

Submit judgment on notice.

Dated: 9/14/11
RIVERHEAD, NY

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

FINAL DISPOSITION