Index No: 35214/2007

SHORT FORM ORDER

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

Post-Trial Decision

PRESENT:

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

Seth Joyce, et.al.,	:	Long, Tuminello, Besso, et.al.
	:	120 Fourth Avenue, Suite 1
Plaintiff(s),	:	Bay Shore, N.Y. 11706
- against -	:	
	:	Karen E. Gunkel, Esq.
Mark J. Harris and Keely E. Harris,	:	Nine Station Court
	:	Bellport, N.Y. 11713
Defendant(s).	:	

The non-jury trial of this matter was conducted before the undersigned on June 11, 2013. The plaintiffs' complaint contains two (2) causes of action: unjust enrichment and *quantum meruit*.[1] In addition to a number of items of documentary evidence, the parties relied upon but two (2) witnesses: For the plaintiff, Seth Michael Joyce and, for the defendant, Keely E. Harris. At the conclusion of the proceedings and in lieu of summations, both sides were invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by July 12, 2013[2]. Those memoranda having since been received and reviewed, the Court's determination is as follows:

To begin with, there are a number of background facts which are not in serious dispute and were stipulated and agreed to by the parties at the trial's commencement. Specifically, there is no

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[1] A third cause of action, sounding in breech of contract, was previously dismissed by the order of this Court (Molia, J.) dated April 26, 2010.

[2] Due to a difficulty with the transcript, the submission date was adjourned to mid-August, 2013

contest that this matter evolves from certain repairs and remodeling made by the plaintiffs at the defendants' residence, 58 Thompson Avenue, Babylon, New York. There is also no dispute that the plaintiff performed construction and carpentry work at that location, that the work was accepted by the defendants, and there is no issue with the quality of the work. Additionally, there is no dispute that the defendants paid the plaintiffs the sum of $137,864.24. It was also agreed that the plaintiffs were duly licensed to perform the services rendered.

Supplementing those facts is the trial's evidence which included of course, the testimony. As to that testimony, its essence and its major and/or most relevant contentions may summarized as follows:

Mr. Joyce's testimony indicated that he is presently employed as cabinet maker, constructing and installing cabinets. At the time of this matter, he was self-employed, repairing and re-modeling homes, everything, in his words, "from frame to finish" and had been doing it for ten years. He first met Ms. Keely towards the end of 2005 when he was working at a home opposite the defendants'. A few weeks later he met with her and her co-defendant husband and they explained the work they wanted performed. That residence is three (3) stories tall, stucco, over 100 yrs old, and its rear borders on a canal. As to the project, the work would entail essentially renovations: gutting much of the existing rooms and constructing a larger bedroom, bath and a laundry room/office. In addition to Mr. Joyce, it was anticipated that his uncle, Danny Joyce, as well as a number of sub-contractors would do the work. At a subsequent meeting, the parties discussed the cost and, owing to the scope and amount of work, the plaintiff was unable to give them a price; instead, he gave them a figure based on a daily basis computation. He calculated that at $31.25 an hour, and the same for his uncle. Additionally, he alleged that he advised the defendants that there would be a 20% old profit margin on the entire cost of the project and that he would bring in sub-contractors who would, of course, also have to be compensated and their costs included in the calculation.

The project was started at the beginning of April, 2006 and ended that October when he was "thrown off the job."

With respect to the sub-contractors, there was a demolition contractor who removed everything down to the studs in all three rooms, a shower door installer, tile and marble contractor, cabinet maker for the bed/armoire, an electrician, and air conditioning technician, and a painter. They were paid in cash, some by him and some by the defendants. He charged the defendants "cost" for the materials, the customary mark-up being 20%.

As regards the defendant Joyce's tasks, he stated that in addition to supervising and/or working with the sub-contractors, he and his uncle took down the sheet rock, as well as removed and re-installed the moldings and windows. The moldings were reproduced to exactly resemble the rest of the house. A mud room was constructed essentially from "scratch" and the master bathroom window removed, entirely remade, and reinstalled.

Towards the end of the project he went to the defendants. By then, other than a few items such as installing one piece of the armoire and some finishing touches, the job was completed. He demanded payment and was refused.

The memoranda he submitted regarding his costs and charges is, at best, unique. Without an explanation, however, it is indecipherable; with an explanation it is confusing and conflicting.

His cross-examination revealed that some of his overhead was allocated in a questionable manner. As to the subcontractors, Also, and although the subcontractors were part of his claim, it was demonstrated that a number of them were previously known to, paid by, and/or retained by the defendants.

After the plaintiff rested, Ms. Harris testified on behalf of the defense. Albeit of less duration, her presentation contradicted the plaintiff's on a number of key issues. In essence, her testimony indicated the following: they hired the plaintiff in March of 2006 and agreed to pay him on an hourly basis at $31.00 "and something." They paid for him for his hours and his uncle's, and they made such payments whenever and whatever was requested. Joyce was not involved in the design of the project. She alleged that she contacted many of the sub-contractors and-other than the plumber and electrician he recommended-Joyce never gave a list. The painter was the same one she had used before. She paid the subcontractors direct, including the designer. Specifically, she alleged she had hired and paid the painter, air conditioner tech, as well as the marble and tile workers. The plaintiff was not involved in selection of tile and never asked its cost. Although she appeared satisfied with the work, she specifically and adamantly contended that neither her nor her husband had ever agreed to pay a percent of subcontractors.

DETERMINATION

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*, §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., §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. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See, e.g., Latora v. Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Hom v. Hom,* 101 AD3d 816 (2d Dept 2012). 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, there is also 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 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.

Focusing upon those requirements on the matter at bar's and causes of action, and after reviewing the evidence under the light of the law and logic, the undersigned cannot find that the plaintiff has sustained its burden of proof as to either. Indeed, its proffered testimonial evidence was not sufficiently persuasive, and its credibility undermined by cross-examination as well as its irreconcilable conflicts with the defendant's testimony, a presentation which was at least equally - if not more - persuasive. Similarly, there was too little, if any, in the way of corroboration or support for the plaintiff's testimony. Additionally, while the plaintiff's words have been memorialized within the cold record, some of the quality of that testimony has not. Indeed, having observed, first-hand, his testimony, the undersigned must note that it was undermined by difficulties which albeit by nature *de hors* the record would be perceived by an objective, neutral and casual onlooker, who was able to observe, hear, and sense the subtle nuances of the presentation. Stated otherwise, some of the difficulty with the plaintiff's testimony is not what was said, but how.

Also, and again contrary to that offered by the plaintiff, the defendant's version of the facts, albeit brief, is not only harmonious, it is logical. Moreover, and as was also noted, of the two versions, the defense witness's testimony was the more persuasive. In simplest terms, in the competition for credibility between the two versions, the defense's outweighed that of the plaintiff.

The following should also be noted; Unjust enrichment requires sufficient proof that 1) the defendant was enriched, 2) such enrichment was at the plaintiff's expense, and 3) in equity and good conscience, the defendant should be required to return the money or property to the plaintiff. *See, e.g., Cruz v. McAneney*, 31 AD3r 54 (2006). *Quantum meruit* requires sufficient proof of 1) performance of the services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) the reasonable value of the services, and 4) the expectation of compensation therefor. *See, e.g., Atlas Refrigeration-Air Conditioning v. Lo Pinto*, 33 AD3rd 636 (2006). In the

matter at bar, and in the absence of sufficient proof that the plaintiff explained and/or the defendant should have reasonablely understood the payment obligations, he should not have anticipated nor should equity now require payment. Indeed, there is a deficiency of proof that there was any agreement, meeting of the minds or understanding as to the defendants' financial obligation. Moreover, as to the issue of the subcontractors, the only thing that is clear and uncontraverted is that some were paid directly by the defendants. It is, however, cloudy as to whom they "belonged," who retained them, et cetera, but it appears as to the parties herein, the defendants were the prime movers.

This result is not disturbed by the plaintiff's post-trial arguments or legal authorities. Indeed, the arguments are all predicated upon embracing the facts as contended by the plaintiff. For the reasons above-stated, the undersigned is disinclined to adopt that view.

In sum, having failed to sustain its burden of proof by a preponderance of the credible evidence, each of the plaintiff's two (2) causes of action are dismissed.

The foregoing constitutes the decision of the Court.

Dated: 8/28/13
Riverhead, NY

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

NON-FINAL DISPOSITION