| **Oversea Chinese Mission v Well-Come Holdings, Inc.** |
| --- |
| 2014 NY Slip Op 34009(U) |
| December 12, 2014 |
| Supreme Court, New York County |
| Docket Number: 113480/2004 |
| Judge: Debra A. James |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

[* 1]

DA Digh E

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

PRESENT: DEBRA A. JAMES Justice — PART 59

OVERSEA CHINESE MISSION,

Plaintiff,

-v-

WELL-COME HOLDINGS, INC., FLINTLOCK CONSTRUCTION SERVICES LLC, and DIAMOND POINT EXCAVATION CORP,

Defendants.

Index No.: 113480/2004

Motion Date: 03/07/2014

Motion Seq. No.: 14

Motion Cal. No.:



The following papers, numbered 1 to 9 were read on these motions, inter alia, to set aside jury verdict.

| | PAPERS NUMBERED |
|---|---|
| Notices of Motions-Affidavits -Exhibits | 1, 2, 3, 4, 5, 6 |
| Answering Affidavits - Exhibits | 7 |
| Replying Affidavits - Exhibits | 8, 9 |



Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that Motion Sequence Number 014 shall be denied; Motion Sequence Number 15 shall be granted only to the extent that the court directs that there shall be a collateral source hearing pursuant to CPLR 4545; and Motion Sequence Number 016 shall be granted only to the extent that plaintiff Oversea Chinese Mission is entitled to pre-judgment interest on the jury award from January 1, 2005 to 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

date of the verdict pursuant to CPLR 5001.

Motions bearing sequence numbers 014, 015 and 016 are consolidated for disposition.

This property damage trial concerns plaintiff Oversea Chinese Mission (OCM)'s claim that its nine-story church building at 154 Hester Street, New York, New York (the building), sustained damages as a result of excavation, shoring and underpinning work carried out by defendant Flintlock Construction Services, LLC (Flintlock) in connection with an adjacent building project at 106 Mott Street, owned by defendant Well-Come Holdings, Inc. (Well-Come).

The defendants conceded liability prior to the commencement of the trial. As the amount of damages was the only issue to be decided by the jury, the verdict sheet comprised one interrogatory, to wit, "State the costs of repairs, if any, necessary to restore plaintiff's building to its condition prior to the excavation, underpinning, shoring and related construction activities of the defendants." On July 29, 2013, the jury (five jurors agreeing and one juror dissenting) rendered a verdict in the amount of $1,150,000.00.

Defendant Well-Come moves for a directed verdict and the entry of judgment in favor of defendants as a matter of law pursuant to CPLR 4404(a) (Motion Sequence Number 014).

Defendant Flintlock moves to set aside the jury verdict and for a remittitur and reduction of the verdict to $85,726, arguing that the jury award is against the weight of the evidence pursuant to CPLR 4404(a) (Motion Sequence Number 015).

OCM opposes both motions of the defendants, and moves to set aside the jury verdict and for a new trial on damages (Motion Sequence Number 016). In addition and apparently alternatively, OCM seeks a directed verdict, as a matter of law, to extent of a finding that it is entitled to pre-judgment interest upon the jury award from January 1, 2005, the date that the cause of action for property damage accrued under a stipulation among the parties, through the date of the verdict. Defendants Well-Come and Flintlock oppose the motion of OCM.

A motion for a directed verdict requires the court to assess whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" Cohen v Hallmark Cards, 45 NY2d 493, 499 (1978). In Cohen, supra, the Court of Appeals stated that a basic principle of our law is that

> it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. Similarly, in any case in which it can be said the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court many not conclude

> that the verdict is as a matter of law not supported by the evidence (citations omitted).

See also Lewis v Progressive Agency, 6 AD3d 293 (1st Dept 2004).

To set aside the verdict as against the weight of the evidence and order a new trial, the court must determine that the evidence so greatly preponderates in the moving party's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. See Pavlou v City of New York, 21 AD3d 74, 76 (1st Dept 2005). It is axiomatic that in its evaluation, the judge "cannot interfere with a jury's fact-finding process simply because [she] disagrees with its finding or would have reached a contrary conclusion based on different credibility determinations." See Cholewinski v Wisnicki, 21 AD3d 791 (1st Dept 2005).

The court may also set aside a verdict and order a new trial in the "interest of justice" where there was harmful error or some form of judicial or counsel misconduct. However, such relief is warranted only in circumstances where the error likely affected the verdict or where the misconduct was prejudicial. See Gilbert v Luvin, 286 AD2d 600, 600-601 (1st Dept 2001).

Defendant Well-Come seeks an order of the court that directs a verdict in favor of defendants and that finds that OCM proved no damages, and that OCM failed to offer any proof that the out of pocket expenses that it incurred in repairing the building

were reasonable. Well-Come also argues that the court should direct a verdict of no damages, contending that the estimate from GuideOne Taylor Ball Construction Services, Inc. (Taylor Ball), the 50% owned general contractor of GuideOne Insurance Company (GuideOne Insurance), was insufficient as a matter of law to prove damages above the amount that OCM's insurance carrier GuideOne Insurance allegedly paid Taylor Ball to repair the building. Well-Come asserts that once the repairs were made and completed, which OCM concedes was done by the time of the trial, proof of the reasonable costs cannot be established by the introduction of an estimate and that OCM must introduce copies of bills, invoices and/or cancelled checks that confirm the cost paid for the repairs.

Defendant Flintlock seeks an order setting aside the jury award and directing a new trial unless OCM agrees that the verdict be reduced to $85,726 on the grounds that OCM was reimbursed for that portion of the verdict in excess of such sum by a collateral source, i.e. the payment made by GuideOne Insurance under the first party or casualty insurance policy issued to OCM. Defendant Flintlock moves, alternatively, for a collateral source hearing pursuant to CPLR 4545. Defendant Flintlock contends that if the jury award is not so reduced, defendants are at risk of having to pay twice should GuideOne

Insurance, as subrogee of OCM, bring an action against defendants.

Defendants are entitled to a collateral source hearing. In Fisher v Qualico Contr Corp, 98 NY2d 534 (2002), a case practically on all fours with the action at bar, the Court of Appeals affirmed the opinion of the Appellate Division, Second Department affirming the judgment of the trial judge at the collateral source hearing. The Court reasoned that the jury award of $467,230 against the defendant contractor/tortfeasors was subject to an offset in the amount of the insurance proceeds that plaintiff homeowners received under their casualty insurance policy pursuant to CPLR 4545 ( c) in order that the homeowners would not "recover great compensation from the defendants and their insurer than they would be entitled to in the absence of insurance". 98 NY2d at 540.

Contrary to the argument of OCM, as stated by the Court of Appeals in its opinion in Fisher:

> [T]his conclusion does not create a windfall for negligent defendants by allowing them to escape liability where a homeowner has insured against the loss of real property. Rather, a defendant still may be held responsible in subrogation to the homeowners, insurer, as apparently was the case here.

Ibid.

Here, non-party GuideOne Insurance has the right to commence a subrogation action and would be entitled to payment from the defendant tortfeasors of the amount of the collateral

source offset, (i.e., the collateral source offset amount of the judgment that defendants did not pay OCM) to the extent of its subrogation rights. Defendants will not have made OCM entirely whole, and to that extent non party Guide One Insurance would be entitled to assert its subrogation rights. In other words, non party GuideOne Insurance has the right to subrogation to the extent that the amount paid by defendants to OCM does not represent the full recovery represented by the total jury award. Such jury award amount would have preclusive effect on the issue of OCM's replacement costs in any subrogation action brought by GuideOne Insurance against the defendants. See State Farm Mutual Automobile Insurance Company v Baltz Concrete Construction, Inc, 29 AD3d 777 (2d Dept 2006).

Defendants make much of OCM's failure to supplement its discovery responses to provide records of the actual repairs of the building and the associated responses that were commenced in 2009 and completed in 2011.

At the commencement of the trial and prior to jury selection, this court denied defendants' motion to dismiss the case on the basis of OCM's failure to disclose the records of the actual repairs. As defendants declined a continuance to review the documents, this court also granted defendants' motion in limine and precluded OCM from introducing evidence of the actual repairs and associated expense records. It also granted

defendant's application that the jury receive a negative inference charge. Therefore, the jury was charged that it could conclude that if such records had been produced they would not have supported the OCM's position on the issue of damages, and would not contradict the evidence offered by defendants on the question.

Contrary to OCM's argument, the court did not preclude OCM based on its failure to supplement its bills of particular, but instead for its admitted failure to disclose the actual records of the repairs and their associated costs, which repairs were prosecuted and expenditures made nearly two years before the action was on the trial calendar.

In denying defendants' motion for a directed verdict at the conclusion of plaintiff's case, the court stated that the proper measure of damages was the reasonable cost of repairing the injury to the building, or the cost of restoring the building to its former condition, provided that such cost is less than what is shown to be the diminution in the market value of the whole building by reason of the injury. See Fisher v Qualico Contracting Corp, id.

On its case, OCM came forward with evidence of the reasonable cost of restoring the building, including evidence of certain out-of-pocket expenses that OCM had paid and introduced

the testimony of a professional engineer and a construction services estimator who opined, respectively, about the scope of work required to repair the damages to the building arising from defendants' construction activities, and the estimated costs of carrying out such scope of work. Defendants have neither introduced any evidence of the diminution in the market value of the whole building by reason of the damage they caused nor made any argument that such diminution is less than the evidence of the cost of the repairs proffered by plaintiff, as would be their burden. Jenkins v Etlinger, 55 NY2d 35, 39 (1982).

Both sides make much of the lack of evidence of the actual repairs and expenditures incurred. OCM argues that the court committed harmful error in precluding it from introducing such evidence[1], and defendants contend that the weight of the evidence preponderates in their favor due to the absence of evidence of the actual repairs and expenditures. Such arguments miss the mark.

In Prashant Enters v State of New York, 228 AD2d 144 (3d Dept 1996), the Appellate Division, Third Department, reversed the order of the Court of Claims assessing damages in that real property damage case. The appellate court held that once

---

[1]As defendants argue, OCM has come forward with no explanation, let alone shown "extraordinary and unusual circumstances", to justify the conduct further discovery on the eve of trial as required pursuant to 22 NYCRR 202.21(d).

claimant established its damages by means of the estimated cost of restoration, it had no burden to establish its damages by any other measure. The appellate court ruled that having no competent evidence of the property's actual decline in market value, the trial court had no reasonable alternative but to accept the undisputed evidence as to the estimated reasonable costs of the repairs, and erred in making a downward adjustment of the award based upon a comparison between the diminution of the income produced by the property in question being less than the cost of repairs that had actually been made.

In Prashant, the appellate court made clear that the plaintiff is entitled to the cost of repair "at the time the damages occurred", 228 AD2d, id, at 148, irrespective of the repairs and the costs of same that actually take place. The Prashant court held that the trial judge committed reversible error in rendering a compromise verdict "in the face of the sharp contrast between...the uncontroverted testimony as to the repairs that *needed to be made* and ...the account of the repairs that *were actually made*" (italics in original), 228 AD2d, id.

So too here, the cost of the repairs that were actually made is not the proper measure of damages. The evidence of the reasonable estimate of the repairs necessitated by the damage caused by the defendant tortfeasors introduced by plaintiff supported the jury award by a fair preponderance of the credible

evidence. In fact, the testimony of the expert witnesses called by defendants also establish the reasonableness of the jury award.

Finally, pursuant to CPLR 5001, OCM is entitled to pre-judgment interest on the jury award for damage to property, based upon the proof of replacement costs as of the date of the damage (Lizden Indus, Inc v Franco Belli Plumbing & Heating and Sons, Inc, 95 AD3d 738, 739 [1st Dept 2012]), i.e. from January 1, 2005, which is accrual date stipulated to by the parties. The pre-judgment interest shall be computed at the time of the collateral source hearing.

Based upon the foregoing, it is

ORDERED that the motion of defendant Well-Come Holdings, Inc for a directed verdict and the entry of judgment in its favor pursuant to CPLR 4404(a) (Motion Sequence Number 014) is denied; and it is further

ORDERED that the motion of defendant Flintlock Construction Services, LLC to the extent that it seeks a collateral source hearing pursuant to CPLR 4545 is granted (Motion Sequence Number 015), but is otherwise denied; and it is further

ORDERED that the motion of plaintiff Oversea Chinese Mission to the extent that it seeks pre-judgment interest on the jury

award is granted, but is otherwise denied (Motion Sequence Number 016); and it is further

ORDERED that the parties shall appear for a collateral source hearing pursuant to CPLR 4545 (c ) in IAS Part 59, 71 Thomas Street, Room 103, New York, New York on January 7, 2015, 11 AM.

This is the decision and order of the court.

**Dated:** December 12, 2014

**ENTER:**

DEBRA A. JAMES J.S.C.

FILED
DEC 16 2014
COUNTY CLERK'S OFFICE
NEW YORK