

47 Third Residential Invs. LLC v Georges

2018 NY Slip Op 30989(U)

May 22, 2018

Supreme Court, New York County

Docket Number: 155636/2017

Judge: Robert D. Kalish

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

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

47 THIRD RESIDENTIAL INVESTORS LLC,

INDEX NO. 155636/2017

Plaintiff,

MOTION DATE 4/4/18

- v -

MOTION SEQ. NO. 002

GREGORY GEORGES,

Defendant.

NYSCEF Doc Nos. 20–25 were read on this motion to confirm or reject a referee’s report.

Motion by Plaintiff 47 Third Residential Investors LLC pursuant to CPLR 4403 for an order confirming the February 15, 2018 recommendations made by J.H.O. Gammerman, as Special Referee, is denied, with leave to renew.

BACKGROUND

Plaintiff commenced the instant action on June 21, 2017, by e-filing a summons and complaint. Plaintiff alleged in its complaint that it was the owner of a residential condominium unit comprising five floors and all development rights of the six-story building located at 101 East 10th Street, New York, New York 10003 (the “Building”). Plaintiff further alleged that it retained Defendant Gregory Georges in 2015 to investigate and determine the structural impact of adding new floors to the Building (the “Project”). Plaintiff then alleged that it relied on Defendant’s finding that the Building could support the addition of six new floors on top of the existing Building and purchased air rights from the neighboring property owner at 55 Third Avenue in furtherance of the Project. Plaintiff next alleged that it commissioned structural and architectural drawings and other engineering services from Defendant in furtherance of the Project. Plaintiff then alleged that it added at least one floor to the Building based on Defendant’s services and conclusions. Plaintiff further alleged that it made several payments to Defendant.

Plaintiff alleged that, in or about March 2016, it retained three separate engineering firms—Active Design Group Engineering DPC, Rosenwasser Grossman Consulting Engineers, P.C., and Structural Engineering Technologies—to conduct a peer review of Defendant’s findings and study the structural impact of the proposed addition on the critical structural components of the Building. Plaintiff then alleged that the peer review resulted in unequivocal recommendations that differed greatly from Defendant’s in that other and additional major structural work not recommended by Defendant would be necessary to complete the Project. As a result, Plaintiff terminated Defendant from the project on February 29, 2016. Plaintiff then

sued Defendant in the instant action for professional malpractice, alleging that Defendant has cost Plaintiff at least two years of delays on the Project, during which time it had paid for materials which would turn out to be useless and has had to continue paying substantial carrying costs on several vacant residential floors.

On October 12, 2017, this Court granted Plaintiff's September 11, 2017 motion pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant. (Affirmation of Skillman, exhibit A.) The Court found that Plaintiff had shown prima facie based upon an affidavit of service that Defendant had been served personally with process pursuant to CPLR 308 (1) on July 8, 2017, at 34 Wedgewood Drive, Coram, NY 11727. The Court found further that Defendant had failed to answer or appear in the instant action and his time to do so had expired. The Court found further that Plaintiff had submitted adequate proof of the facts constituting its claim by means of the affidavits of merit of Mr. Zampetti, an authorized representative of Plaintiff, and Mr. Nusbaum, a managing member of Plaintiff. As such, the Court directed the Clerk to enter a judgment in favor of Plaintiff and against Defendant on the issue of liability and further directed an assessment of damages.

On February 15, 2018, J.H.O. Gammerman held the inquest on damages. (*See* affirmation of Skillman, exhibit B [Tr].) Defendant appeared pro se at the inquest in his first appearance in this action. J.H.O. Gammerman began by explaining to Defendant that a default judgment had been entered against him as to liability establishing that Defendant was negligent in his profession. Defendant responded by asking to open the default judgment. J.H.O. Gammerman replied that Defendant would need to make a motion to do that. Defendant replied by saying he would like to move now, but J.H.O. Gammerman told Defendant that the issue was not before him.

J.H.O. Gammerman then reiterated that he had spoken with Defendant on the phone prior to the inquest and had recommended that Defendant retain an attorney. Defendant stated that he had received a notice a day or two prior that his insurance, Navigator's Insurance, would not be covering him. Plaintiff's counsel confirmed that it had received a copy of a no-coverage letter in the prior day or so and explained that the primary basis of their no-coverage determination was that Defendant did not give the carrier notice timely under the policy. Plaintiff's counsel then stated that the carrier did not hear of the claim until Plaintiff notified the carrier of its default judgment motion in September 2017. Among other things, Plaintiff stated—and the Defendant confirmed—that the policy had a limit of \$1,000,000.00.

Defendant stated that he had previously failed to appear in the instant action “[b]ecause [he himself] was in the hospital.” (Tr at 7, line 3.)

J.H.O. Gammerman swore in the first witness at the inquest, Jeffrey Yachmetz, Vice President of Development and authorized representative of Plaintiff. J.H.O. Gammerman first questioned Mr. Yachmetz regarding Plaintiff's damages. Mr. Yachmetz stated that Plaintiff had to stop work, retain other experts, and remediate faulty work that was installed pursuant to Defendant's designs and plans. Mr. Yachmetz stated that \$1,464,057.00 of additional, remedial construction work was required because of Defendant's professional malpractice. (Tr at 18, line

13.) Mr. Yachmetz further stated that Plaintiff incurred approximately \$433,589.00 of architectural costs (“completely throw away [sic] work”) that would not have been incurred if not for Defendant’s professional malpractice. (Tr at 17, line 17.) Mr. Yachmetz then stated that Plaintiff had sustained carrying costs due to Defendant’s professional malpractice of \$4,295,000.00, consisting of real estate taxes, interest payments, insurance premiums, lost rental income, and broker commissions associated with releasing apartments past what Plaintiff had initially planned for in reliance upon Defendant. (Tr at 19, lines 3–17.) The direct examination concluded with Mr. Yachmetz calculating based upon the aforementioned sums that a total of \$6,194,662.39 is due and owing to Plaintiff from Defendant.

Defendant then cross-examined Mr. Yachmetz. In sum, Defendant did not ask questions about damages, but instead began testifying himself and denying his own liability. J.H.O. Gammerman stated to Defendant that “[a]ll of the things you saying . . . [a]ll of the things that you are arguing about now should have been argued . . . when the case started.” (Tr at 26, lines 22–26.) J.H.O. Gammerman reiterated that the liability issue was not before him and further reiterated his earlier recommendations that Defendant retain an attorney. Defendant then said that he had a lawyer named Peter Metis who knows J.H.O. Gammerman. J.H.O. Gammerman then gave Defendant his own phone number and said that he would talk to Mr. Metis if Defendant had Mr. Metis call J.H.O. Gammerman later in the day.

J.H.O. Gammerman concluded by recommending damages of \$6,192,662.00. J.H.O. Gammerman further directed Plaintiff’s counsel to add an affidavit, sworn to by Mr. Yachmetz and already prepared by Plaintiff’s counsel for submission to the court, to the transcript and to send it to Defendant.¹ On March 13, 2018, J.H.O. Gammerman “so ordered” the transcript of the February 15, 2018 inquest.

Plaintiff now moves pursuant to CPLR 4403 for an order confirming the February 15, 2018 recommendations made by J.H.O. Gammerman and directing the Clerk to enter a judgment in favor of Plaintiff and against Defendant in the amount of \$6,192,662.00.

DISCUSSION

CPLR 4403 provides, in relevant part, that “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part, . . . the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing.” Generally, a “report of a referee should be confirmed if its findings are supported by the record.” (*Baker v Kohler*, 28 AD3d 375, 375–376 [1st Dept 2006].) “Generally, New York courts will look with favor upon a referee’s report inasmuch as the referee as trier of fact is considered to be in the best position to determine the issues presented.” (*European*

¹ Plaintiff’s counsel stated, “I’ve had Mr. Yachmetz put together an affidavit for submission to this court.” J.H.O. Gammerman replied, “[a]dd it to the transcript, and send it to Mr. Georges.” Plaintiff’s counsel then stated, “[i]t includes all of the back up [sic], the documents.” J.H.O. Gammerman then stated, “[a]dd whatever you want to the transcript.” Plaintiff’s counsel replied, “[o]kay.” J.H.O. Gammerman then stated, “[b]ut whatever you add, send it to Mr. Georges.” Plaintiff’s counsel replied, “[a]ll right.” (Tr at 29, lines 20–26; at 30, lines 2–6.)

American Bank & Trust Co. v Frenkel, Ltd., 163 AD2d 154, 154 [1st Dept 1990] [internal citation omitted].)

In the instant unopposed motion, Plaintiff has failed to submit the affidavit of Mr. Yachmetz as directed by J.H.O. Gammerman. While it was Plaintiff's counsel who suggested the submission of the affidavit, it was then J.H.O. Gammerman who accepted the suggestion and directed its addition to the inquest transcript. Further, while J.H.O. Gammerman did also subsequently direct that Plaintiff could add whatever it wanted to the transcript, the Court finds that this was an invitation to Plaintiff to add whatever else it wanted to the transcript in addition to Mr. Yachmetz's affidavit, which J.H.O. Gammerman had just directed Plaintiff to add to the transcript. As such, the Court considers Plaintiff's motion submission incomplete.

The Court nevertheless grants Plaintiff leave to file a new motion seeking the same relief as the instant motion if Plaintiff further submits not just the documents submitted with the instant motion but also the affidavit of Mr. Yachmetz, including "all of the [backup] [and] the documents" referenced by Plaintiff's counsel at the inquest, as directed by J.H.O. Gammerman. Upon the Court's receipt of the new motion, the Court will consider the recommendations of the Special Referee along with the submitted evidence and decide the issue in accordance with its mandate pursuant to CPLR 4403.

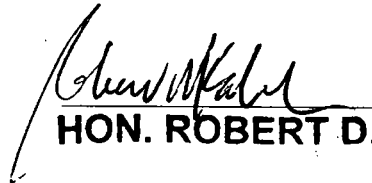
CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff 47 Third Residential Investors LLC pursuant to CPLR 4403 for an order confirming the February 15, 2018 recommendations made by J.H.O. Gammerman, as Special Referee, is denied, with leave to renew.

The foregoing constitutes the decision and order of the Court.

Dated: May 25, 2018
New York, New York

 J.S.C.
HON. ROBERT D. KALISH

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE