

<b>Air Professional Assoc., LLC v Siialin Rd. Dev. Corp.</b>
2018 NY Slip Op 33442(U)
October 16, 2018
Supreme Court, Putnam County
Docket Number: 50045/2016
Judge: Janet C. Malone
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To commence the statutory period for appeals as of right under CPLR §5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
PUTNAM COUNTY

-----X  
AIR PROFESSIONAL ASSOCIATES, LLC,

INDEX NO.: 50045/2016

Plaintiff,

***CORRECTED***  
DECISION AND ORDER  
AFTER TRIAL

-against-

SHALIN ROAD DEVELOPMENT CORP.,  
TRI MAR INDUSTRIES, INC., and MARTIN  
PARENTI, individually.

Defendants.

-----X  
MALONE, J.

Plaintiff Air Professional Associates, LLC (“Air Professional”) commenced this action on January 19, 2017<sup>2</sup> against Defendants Shalin Road Development Corp. (“Shalin Development”), Tri Mar Industries, Inc. (“Tri Mar”), and Martin Parenti (“Mr. Parenti”), individually (hereinafter collectively “Defendants”), for breach of contract, account stated, unjust enrichment, foreclosure of a mechanic lien and to pierce the corporate veil. The Court granted partial summary judgment to Defendants dismissing Air Professional’s first cause of action for breach of contract. *See*, Decision and Order (*Summary Judgment*), (Malone, J.) dated January 18, 2018.

The bench trial on Plaintiff’s remaining four causes of action commenced on March 13, 2018 and concluded on March 14, 2018, with Post-Trial Memoranda being submitted on April 30,

<sup>1</sup> This Decision and Order After Trial has been corrected to reflect the correct calculation of *quantum meruit* damages on Plaintiff’s third cause of action for unjust enrichment in the total amount of **\$70,327.80**, by deducting the second award of sales tax in the amount of \$2,396.76 from the calculations at the second full paragraph on page 7 and to reflect the correct spelling and name of Proformance Inc. on page 7. *See*, CPLR R 4404.

<sup>2</sup> Air Professional Associates, LLC commenced this action by way of a Summons dated November 16, 2016 and an Amended Verified Complaint dated January 18, 2017. Issue was joined by the filing of Defendants’ Amended Verified Answer dated February 4, 2017.

2018. Plaintiff offered the testimony of Justin Pfeifer, Carlo Nero, and William Carroll; John Perricelli testified for Defendants and Mr. Parenti testified for Air Professional and Defendants. Plaintiff moved Exhibits 1-8 and 10-16 into evidence without objection from Defendants.

Now, with the Court having had the opportunity to observe the demeanor of the witnesses, determine their credibility, and assign weight to the testimonial and documentary evidence, the Court makes the findings of fact and conclusions of law set forth herein. *See, Massirman v. Massirman*, 78 A.D.3d 1021 (2d Dept. 2010); *see also, Goldstein v. Guida*, 74 A.D.3d 1143 (2d Dept. 2010).

Air Professional is a commercial and residential heating, ventilation and air conditioning (“HVAC”) company in North Salem, New York, and relevant here, is licensed in Putnam County, New York. Mr. Parenti is the president of Tri Mar and owns Shalin Development, both doing business at the same address in Brewster, New York. The four (4) bedroom private house at 30 Shalin Lane in the Town of Patterson, County of Putnam, State of New York (the “Shalin Property”) is owned by Shalin Development (*see*, Trial Exhibits 12, 13 and 1, respectively) and is where Mr. Parenti resides with his wife and children and supposedly pays rent to Shalin Development.

At the prompting of Mr. Parenti in 2015, and without any discussion of compensation or an express contract, Air Professional’s vice president of operations, Justin Pfeifer and Mr. Parenti, orally agreed that in exchange for Air Professional installing an HVAC system at the Shalin Property, Tri Mar would perform excavation and foundation work for the installation of a loading dock and front entrance way at Air Professional.

The oral agreement between the Parties could be construed as bartering: as a system of exchanging goods or services for other goods or services (*see*, Merriam-Webster Online Dictionary), however, Tri Mar submitted a proposal dated October 13, 2015 for the amount of \$35,050.00 for a loading dock (\$22,850.00) and a front entrance (\$12,200.00) at Air Professional, inclusive of labor and materials. *See*, Trial Exhibit 15.

From about October of 2015 to January of 2016, Tri Mar performed excavation work, and installed a loading dock and front entrance way at Air Professional and from February of 2016 to August of 2016, Air Professional performed work at the Shalin Property. In a text message on

August 22, 2016, Mr. Pfeifer inquired of Mr. Parenti when Mr. Parenti would be forwarding money to Air Professional as it was Mr. Pfeifer's position that Air Professional had already invested \$120,000.00 in labor, services and materials at the Shalin Property without compensation. Mr. Parenti responded that he meant to send money to Air Professional (Trial Exhibit 3), however, Mr. Parenti did not remit any funds to Air Professional.

Despite Mr. Pfeifer's belief that Air Professional performed \$120,000.00 worth of work at the Shalin Property between February of 2016 and August of 2016, when Air Professional ceased work at the Shalin Property, Mr. Pfeifer had no explanation for why Air Professional sent Mr. Parenti and Tri Mar an invoice dated September 15, 2016 for the amount of \$108,100.00 for air conditioning, heating, radiant floor heating, baseboard work, materials and services, and requesting payment in full by September 30, 2016. *See*, Trial Exhibit 4.

In a letter dated October 12, 2016, demanding \$80,000.00 to Mr. Parenti and Tri Mar, Air Professional's attorneys state that Air Professional ". . . deduct[ed] \$29,000.00, which is the value of the material and services provided to [Air Professional] in connection with your October 13, 2015 proposal . . ." from Air Professional's September 15, 2016 invoice in the amount of \$108,100.000. *See*, Trial Exhibit 5. Mr. Parenti testified that the work performed by Air Professional was acceptable to him, despite believing that the September 15, 2016 invoice was inclusive of Air Professional's profits and overhead, and referred the matter to his attorneys. On August 23, 2017, Air Professional filed a Notice of Mechanic's Lien for \$80,000.000 dated October 27, 2016, with the Clerk of the County of Putnam, State of New York. *See*, Trial Exhibit 6.

Air Professional argues it has established damages in the amount of \$139,442.15 inclusive of materials and labor, profits and overhead, and predecision interest retroactive to September 15, 2016 (*see*, Plaintiff's Post-Trial Submission at page 2) while Defendants concede they owe Air Professional \$27,577.80 after offsetting \$42,750.00 against \$70,327.80 arguing that Air Professional has not shown an expectation of compensation and is therefore not entitled to damages in *quantum meruit* (*see*, Defendants' Post-Trial Brief at page 14.)

While Plaintiff Air Professional failed to strictly comply with General Business Law §771 and Putnam County Code Chapter 135-5, which bars recovery for breach of contract under an oral home improvement contract, such failure does not preclude its recovery for completed work under

the principle of unjust enrichment. *See, Kitchen and Bath Design Gallery v. Lombard*, 950 N.Y.S. 2d 723 (Sup. Ct. 2012).

On the issue of unjust enrichment, it is clear that Air Professional has shown that the work performed at the Shalin Property far exceeded the work performed by Tri Mar at Air Professional making it reasonable to conclude that Defendants were enriched at Air Professional's expense, and that it is essentially against equity and good conscience to permit Defendants to retain what is sought to be recovered. *See, Branch Servs., Inc. v. Cooper*, 102 A.D. 3d 645 (2d Dept. 2013).

Based on the foregoing, Air Professional has established that it performed services for Defendants in good faith, that Defendants Mr. Parenti and Shalin Development accepted Air Professional's services and that Air Professional had an expectation of compensation for its services, leaving Air Professional only to satisfy the element of the reasonable value of its services in order to recover in *quantum meruit*. *See, Tesser v. Allboro Equip. Co.*, 73 A.D. 3d 1023, 1026 (2d Dept. 2010).

Carlo Nero, Air Professional's chief financial officer testified that he records and prepares monthly and annual reports, is responsible for payroll, managing benefits and risk management. To calculate the cost of labor at the Shalin Property, weekly, Mr. Nero would collect dispatch tickets (*see*, Trial Exhibit 7) multiply the hours the employee worked by the employee's hourly rate and employee's tax rate and summarize those numbers on to a spreadsheet (*see*, Trial Exhibit 8.)

Inexplicably Air Professional seeks labor expenses in the amount of \$41,727.55 inclusive of labor expenses for salaried employee Mr. Pfeifer in the amount of \$10,498.50 (*see*, Plaintiff's Post-Trial Submission at page 12), which contradicts the credible testimony of Messrs. Pfeifer<sup>3</sup> and Nero that there is no dispatch or work ticket for Mr. Pfeifer at the Shalin Property because Mr. Pfeifer was a salaried employee at the rate of \$120,000.00 per annum in 2016. Therefore, Air Professional is **denied** relief in the amount of \$10,498.50. Further, there is no evidence in the record to support Mr. Nero's testimony that labor was \$31,000.00 when the figures that he based

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<sup>3</sup> Mr. Pfeifer designed and supervised the work of ten (10) Air Professional employees performed at the Shalin Property as the modular home that Mr. Parenti was building came with a HVAC system that had to be removed and reinstalled. Mr. Pfeifer was also responsible for ordering materials for the Shalin Property, checking the invoices after the materials arrived and that materials were ordered by job name and labeled for that project. *See*, Trial Exhibits 2 and 10 and 4 and 8.

his calculations on were not produced at the trial or to Defendants during discovery, and is therefore **denied**. Finally, as Air Professional failed to offer any evidence as to the remaining amount sought of \$229.05<sup>4</sup>, such relief is also **denied**. *See, Crane-Hogan Structural Sys., Inc. v. State of New York*, 88 A.D. 3d 1258 (4<sup>th</sup> Dept. 2011) (stating “. . . claimant bears the burden of establishing its damages...and ‘damages are limited to awards based upon a definite and logical connection between what is proven and the damages sought to be recovered’ ”); *see also, Manshul Constr. Corp. v Dormitory Auth. of State of N.Y.*, 79 AD2d 383, 387 (1<sup>st</sup> Dept. 1981). As such, Air Professional is **granted** the **cost for labor** provided at the Shalin Property at the conceded amount of **\$24,115.53**. *See*, Defendant’s Post-Trial Brief at page 14.

In addition, as the aggregate of the sums on the last four pages of Trial Exhibit 11 total \$46,212.27, Mr. Nero’s testimony that the cost of the materials used at the Shalin Property was \$46,212.27 as opposed to the handwritten figure of \$43,815.51 on Trial Exhibit 11 is credited. *See, Crane-Hogan Structural Sys., Inc. v. State of New York*, 88 A.D. 3d 1258 (4<sup>th</sup> Dept. 2011) and *Manshul Constr. Corp. v Dormitory Auth. of State of N.Y.*, 79 AD2d 383, 387 (1<sup>st</sup> Dept. 1981). As for the charge of \$9,275.00 for sheet metal, there is no testimony that sheet metal was used at the Shalin Property. Additionally, there is no evidence regarding the cost to Air Professional for purchasing sheet metal in bulk to support Mr. Nero’s testimony that Air Professional proportioned the cost of the sheet metal to each off its customers at 20%. Even if the Court were to consider Air Professional’s request for damages for sheet metal, the amount for sheet metal would be **\$9,242.45**, not \$9,275.00 as 20% of \$46,212.27 is \$9,242.45, not \$9275.00<sup>5</sup>. *See*, Plaintiff’s Post-Trial Submission at pages 9-10 and Defendants’ Post-Trial Brief at page 11. Air Professional is **granted** total **cost for materials** in the amount of **\$46,212.27**.

Although Air Professional is correct that damages on a *quantum meruit* basis are customarily calculated on the actual job costs plus an allowance for overhead and profit minus the amounts paid for the work performed, there is no basis in the record for Air Professional to recover 15% of \$97,214.82 or \$14,582.22 as a reasonable allowance for Air Professional’s overhead expenses and 10% of \$111,797.00 or \$11,179.70 as a reasonable allowance for profit. *See*,

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<sup>4</sup>\$31,000 + 10,498.50 = \$41,498.50 + \$229.05 = \$41,727.55

<sup>5</sup>\$46,212.27 x 20% = \$9,242.45, which Air Professional rounded up by \$32.55 to arrive at \$9,275.00.

*Whitmyer Bros., Inc. v. State*, 47 N.Y.2d 960, 962 (1979); *Mirano Contr., Inc. v. Perel*, 57 A.D.3d 956, 958 (2d Dept. 2008) and *Tesser v. Allboro Equip. Co.* 73 A.D. 3d 1023, 1026 (2d Dept. 2010).

Mr. Nero testified that overhead and profit are usually included in Air Professional's contracts, that he did not know if overhead and profit were included in the amount of \$108,100.00 in Air Professional's September 15, 2016 invoice (*see*, Trial Exhibit 4), that none of Air Professional's projects are billed on a time and materials basis, that his spreadsheets usually include profit and overhead, and that Air Professional was just calculating costs for the Shalin Property project. Although the Court found Mr. Nero to be credible, his testimony on the issue of overhead and profits was too fragmented and inconclusive. Moreover, besides Air Professional not making a claim for profit and overhead, the Court gave no weight to the testimony of William Carroll as his testimony had no probative value. Mr. Carroll, who has been in construction management for over 20 years and in the field of construction for 50 years, testified he had experience in the area of "HVAC trade", and general knowledge in the pricing of HVAC trade contracts, but that he did not view the Shalin Property and did not know what was installed or functioning at the Shalin Property, and had no knowledge of New York industry standard for profit and overhead.

In the case of *Crane-Hogan Structural Systems, Inc. v. State of New York* cited by Air Professional to support its claim that the Court should calculate reasonable profit and overhead, the parties agreed to *Crane-Hogan* being compensated for additional work on a "time and materials basis" inclusive of among other charges, profit and overhead, which is not the scenario in this case. *See, Crane-Hogan Structural Systems, Inc. v. State of New York*, 88 A.D. 3D 1258 (4<sup>th</sup> Dept. 2011). Therefore, Air Professional's claim for 15% allowance for overhead and a 10% allowance for profit is **denied**.

In Defendants February 6, 2016 Amended Verified Answer they raised six affirmative defenses but did not assert a counterclaim. *See*, CPLR § 3011. As such, Defendants claim here for an offset could not be considered as Defendants did not move for same in their Amended Answer, and is therefore **denied**. *See, Richard Deeves & Son v. Manhattan Life Ins. Co.*, 195 N.Y. 324, 326 (1909) (holding "If a counterclaim is relied upon, it must be alleged in the answer and not left to inference). Even if the Court were to consider offsetting \$35,050.00 for the loading dock and front entrance at Air Professional, the Court is not able to determine whether Tri Mar's October 13, 2015 proposal (*See*, Trial Exhibit 15) was accepted as Air Professional's attorneys demand letter

dated October 12, 2016 speaks to crediting Tri Mar \$29,000.00 for what Air Professional claimed was the value of the material and services provided to Air Professional. Similarly, Defendants' claims for an offset in the amount of \$6,500.00 is not supported by the evidence as John Perricelli, owner of *Proformance Inc.*, who credibly testified that on or about November 10, 2016 he made repairs to the HVAC system at the Shalin Property at the cost of \$6,500.00 because the Shalin Property was without heat and not because he finished work at the Shalin Property that was not completed by Air Professional in the amount of \$10,911.12 as Mr. Parenti would have the Court believe. *See*, Trial Exhibit 16. As a matter of fact, Mr. Parenti did not come out of pocket for any services performed by *Proformance Inc.* as Mr. Parenti bartered for the services of *Proformance Inc.* in exchange for services not known by the record. Defendants request to offset \$35,050.00 for Tri Mar's services to Air Professional and the amount of \$6,500.00 bartered with *Proformance Inc.* are **denied**. Additionally, Defendants' request for cost overruns at Air Professional is also **denied** as unsupported by the record.

Accordingly, Air Professional may foreclose (fourth cause of action) on a Mechanic's Lien in the amount of **\$70,327.80** for material (\$46,212.27) and labor (\$24,115.53) only. *See*, Lien Law §§3, 4 (1); *SMI Bldg. Sys., LLC v. W. 4<sup>th</sup> St. Dev. Grp., LLC*, 83 A.D. 3d 687, 688 (2d Dept. 2011), *DiSario v. Rynston*, 138 A. D. 3d 672, 673 (2d Dept. 2016), *Sky Materials Corp. v. Frog Hollow Industries, Inc.*, 125 A.D.3d 751, 752 (2d Dept. 2015) and *Midtown Contracting Co. v. Goldsticker*, 165 A.D. 264, 150 N.Y.S. 809 (1<sup>st</sup> Dept. 1914).

Air Professional Associates, LLC's third cause of action for unjust enrichment has been established by *quantum meruit* damages in the total amount of **\$70,327.80**: \$24,115.53 for labor and \$46,212.27 for materials. Statutory interest from October 12, 2016, when Air Professional demanded payment shall be applied to **\$70,327.80** upon presentation of a judgment for the Court's signature. *See*, CPLR §5001 (a) and (b), and *See*, *Tesser v. Allboro Equip. Co.*, 73 A.D. 3d 1023, 1026 (2d Dept. 2010).

In conclusion, as there is no evidence as to Air Professional's second cause of action for accounts stated and Air Professional's fifth cause of action to pierce the corporate veil of Shalin Road Development Corp. and Tri Mar Industries, Inc. such causes of action are dismissed. *See*, *Episcopal Health Servs., Inc. v. POM Recoveries, Inc.* 138 A.D. 3d 917, 919 (2d Dept. 2016) and *Matter of Edrich v. MMAL Corp.*, 134 A.D. 3d 935, 936 (2d Dept. 2015).



Trial Exhibits will be disposed of on August 6, 2018 unless arrangements are made to retrieve same from the Court Clerk's office in advance of August 6, 2018.

This constitutes the Decision and Order of the Court.

DATED: October 16, 2018  
Carmel, New York

ENTER:

  
Hon. Janet C. Malone, J.S.C

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