

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

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JOAN GABRIELE,

Plaintiff,

Index No. 114372/11

Decision and Order

-against-

JOSE MATIAS,

Defendant.

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ORDER OF THE SUPREME COURT, NEW YORK COUNTY: PART 81R

By decision and order of the Honorable Doris Ling-Cohan dated August 20, 2012, the issue of the amount of damages to be awarded plaintiff against defendant, was referred for assignment to a Special Referee to hear and determine.¹

This matter was assigned to the undersigned Special Referee on October 25, 2012, at which time only counsel for plaintiff appeared. Appearances were as follows:

For Plaintiff,
Barbara H. Katsos, Esq.
and Jane R. Slavin, Esq.
Law Offices of
Barbara H. Katos, P.C.
59 E. 54th Street-Suite 52
New York, N.Y. 10022

For Defendant (Default),
Maria Malave, Esq.
Law Offices
558 West 184th Street-Suite B
New York, N.Y. 10033

Jose C. Matias
150 West 197th Street -Apt.#16
Bronx, New York 10468

An inquest with respect to the referenced issue was held on October 25, 2012.

Findings of Fact

(1) Plaintiff is the owner of cooperative apartment#6C (the "subject apartment"), which is

¹The court granted the motion made by plaintiff for a default judgment against defendant and referred the instant matter. The verified complaint alleges a claim for breach of contract.

located at the premises known as 290 6th Avenue, New York (the “subject premises”). The subject premises is owned by Badad Management. In early May 2011, plaintiff discussed with a co-worker her desire to renovate her kitchen. The co-worker recommended to plaintiff that she hire defendant, a contractor. Cooperative owners in the subject premises are required to get permission from the Board of Directors of the cooperative (“Board of Directors”) prior to commencing any renovation work in their cooperative apartments.

(2) Also in early May, 2011, defendant met with plaintiff at her apartment, and the parties discussed the scope of the work to be performed to renovate plaintiff’s kitchen. Defendant thereafter presented plaintiff with a “plan,”² which contained depictions of what her kitchen would look like after the renovations were completed. The parties agreed that defendant would perform the renovation work in plaintiff’s kitchen.

(3) On or about, May 11, 2011, plaintiff received a document from defendant setting forth the scope of the work to be performed in the plaintiff’s kitchen.³ Shortly thereafter, the Board of Directors advised plaintiff that defendant was not a licensed electrician or plumber, and that approval to renovate her kitchen would not be granted unless and until she retained a licensed electrician and plumber to perform the work.

(4) Defendant thereafter recommended to plaintiff a licensed electrical company known as Alstyne Electrical Services, LLC (“Alstyne”), and a licensed plumbing company known as Skyview Mechanical (“Skyview”), to work in the subject apartment under his supervision.

²A folder entitled, “JCM Contractors,” was admitted into evidence as Plaintiff’s Exhibit#3.

³A copy of this document was admitted into evidence as Plaintiff’s Exhibit#1.

Plaintiff accepted defendant's recommendations.

(5) On May 27, 2011, the parties executed a "Final Agreement" with respect to the renovation work to be performed by defendant in plaintiff's kitchen.⁴ The Final Agreement set forth the removal and installation work to be performed by defendant in plaintiff's kitchen. The Final Agreement states that "total cost of labor" is \$5,500. The Final Agreement also states that plaintiff agreed to pay defendant the "first payment" of \$2,500 "at the beginning of the job." The agreement indicates that on June 11, 2011, plaintiff paid defendant "cash" in the amount of \$2,500, with respect to the first payment. The Final Agreement also states that plaintiff agreed to pay defendant the "second payment" of \$2,000, at the "beginning of the installation," and the final payment of \$1,000, "upon completion."

(6) On June 4, 2011, purchased certain supplies from Century Supply, Inc., including tiles, at the cost of \$440.94.⁵ On June 11, 2011, defendant purchased certain "Mocha Maple" custom made cabinet to be installed in the subject kitchen. The purchase price of the custom made cabinet was \$4,300. Defendant made a \$2,000 deposit towards the purchase price.⁶

(7) Defendant began the renovation work in plaintiff's kitchen on June 27, 2011. During the week of June 27, 2011, defendant performed demolition work in the kitchen by removing tile from the floor, removing the kitchen cabinets, as well as removing the stove and sink. Prior to

⁴A copy of this document was admitted into evidence as Plaintiff's Exhibit#2.

⁵A copy of a receipt dated June 4, 2011, from "Century Supply, Inc.," and signed by plaintiff, was admitted into evidence as Plaintiff's Exhibit#15.

⁶A copy of a printout of the custom made cabinet, together with a handwritten notation of the \$2,000 deposit being received from plaintiff to "Ada Larin," was admitted into evidence as Plaintiff's Exhibit#16.

the beginning of the demolition work, plaintiff traveled with a female friend to Ely's Stone Kitchen & Bath, Inc. ("Ely's") in Queens, New York, in order to purchase new cabinets, plus granite for the renovation work to be performed.

(8) Plaintiff paid Ely's the total sum of \$5,458 for the cabinets, plus granite, which were delivered in the afternoon of August 17, 2011.⁷ The cabinets, without the granite, were delivered by the "supplier" to the lobby of the subject premises, as is its policy.

(9) On June 30, 2011, Skyview began and completed plumbing work in the subject apartment, with respect to sealing the gas line and water valve and other work.⁸ Plaintiff paid Sky-view the total sum of \$400 for the work it performed in the subject apartment. Skyview accepted the amount paid by plaintiff, rather than the sum of \$1,019.21 it billed her.⁹

(10) On July 1, 2011, plaintiff executed an agreement with Alstyne to perform certain work, including shutting down electrical power in the subject apartment in order to replace the "existing Federal Pacific" panel and to install a "new Cutler Hammer" panel.¹⁰ The agreement states that Alstyne would "coordinate" the work in the subject apartment with defendant. Plain-

⁷A copy of a an invoice in the amount of \$5,458 from Ely's to plaintiff dated August 17, 2011 was admitted into evidence as Plaintiff's Exhibit#10. A receipt in the amount of \$5,458 is attached to Plaintiff's Exhibit#10. Additionally, photographs of the cabinets purchased by plaintiff were admitted into evidence as Plaintiff's Exhibit#s 11A and 11B.

⁸A photograph taken August 18, 2011 of a water valve worked on by Skyview was admitted into evidence as Plaintiff's Exhibit#9. The painting and plastering work performed by defendant is depicted in the photograph as well. Additionally, a photograph taken August 18, 2011 of the gas line closed by Skyview was admitted into evidence as Plaintiff's Exhibit#9A.

⁹A copy of an invoice dated July 5, 2011 from "Skyview Mechanical" to plaintiff, in the amount of \$1,019.21, was admitted into evidence as Plaintiff's Exhibit#8. A copy of an invoice "receipt" is attached to Plaintiff's Exhibit

¹⁰A copy of this agreement was admitted into evidence as Plaintiff's Exhibit#5.

tiff agreed to pay Alstynne the total sum of \$3,800 to perform services under the terms of their agreement, and paid this amount to Alstynne.¹¹ Alstynne began performing work in the subject kitchen in early July, 2011.¹²

(11) On July 5, 2011, defendant returned to the subject apartment to continue the renovation work. On that day, defendant laid tile in the kitchen.¹³ Later in the month of July, defendant painted the kitchen while plaintiff was not in the subject apartment. In early August, 2011, plaintiff hired a plumber at defendant's direction to clear a pipe in the subject kitchen. Plaintiff paid the plumber the sum of \$300 perform the work.¹⁴

(12) On August 15, 2011, defendant "walked off" the job without completing the renovation work he agreed to complete, due to an ongoing disagreement with plaintiff. On August 17, 2011, Richard Ventura ("Ventura"), a friend of plaintiff's, loaded the delivered cabinets onto the elevator of the subject premises, and placed them in the hallway and kitchen of the subject apartment. Plaintiff attempted to return the cabinets to Ely's since defendant had walked off the job and she had no one to install them, but Ely's refused their return.

(13) Due to cooperative rules prohibiting work being performed after 5 p.m., defendant asked

¹¹A "customer's copy" of a cashier's check dated June 30, 2011, in the amount of \$3,800, from Emigrant Savings Bank and made payable to "Alstynne Electrical Service, LLC, was admitted into evidence as Plaintiff's Exhibit#7.

¹²A photograph taken on August 18, 2011 depicting the electrical work performed by Alstynne in the subject kitchen was admitted into evidence as Plaintiff's Exhibit#6.

¹³Photographs taken on August 18, 2011 of the tiles laid by defendant in the kitchen were admitted into evidence as Plaintiff's Exhibits#s 4A, 4B, 4C, and 4D.

¹⁴A handwritten piece of paper with the words "paid in full-\$300.00," as well as the phone number "(917) 771-0091" and "290 6th Avenue-6C," was admitted into evidence as Plaintiff's Exhibit#14.

Ventura and another neighbor to place the cabinets onto the sidewalk. Ventura and the other person placed the cabinets onto the sidewalk in the evening of August 17, 2011.

(14) Thereafter, Ventura and a neighbor named "Shamus" agreed with plaintiff to complete some of the work in the subject apartment that defendant failed to complete. Plaintiff paid Ventura the sum of \$250 to repaint parts of the subject kitchen and hallway wall. Plaintiff paid Shamus the sum of \$750 for sealing the kitchen floor and fitting the "saddle." Ventura and Shamus completed their work in the subject apartment on August 19, 2011.

(15) Subsequent to August 19, 2011, plaintiff inquired of the manager of the subject premises about a contractor who could complete the work to be done in the subject kitchen. The manager of the subject premises recommended to plaintiff a contractor known as Modern Kitchen & Bath ("MK&B").

(16) On December 21, 2011, plaintiff executed an agreement with MK&B with respect to certain work to be performed in the subject kitchen.¹⁵ The parties agreed that plaintiff would pay MK&B the total sum of \$6,530.04 to perform the work. MK&B provided plaintiff with a "rendering" with respect to the renovations to be performed in the subject kitchen.¹⁶ Plaintiff approved of the "rendering" on December 21, 2011, when she executed the agreement.

(17) Due to defendant's removal of the stove in the subject apartment in June 2011, plaintiff was unable to cook any food in the subject apartment for approximately 6 months, when MK&B installed the cabinetry and the stove was delivered in December 2011. Plaintiff purchased meals during that approximate 6 month period.

¹⁵A copy of this document was admitted into evidence as Plaintiff Exhibit#12.

¹⁶A copy of this document was admitted into evidence as Plaintiff's Exhibit#13.

Conclusions of Law

- (1) The Special Referee's query is limited by the scope of the instant reference (*see, Marshall v. Pappas*, 143 AD2d 979 [2nd Dept. 1988]-[a referee is controlled by the order of reference, and must comply with the decision therein]; *Volk v. Volk*, 254 AD2d 274 [2nd Dept. 1998]).
- (2) In determining the referenced issue, the referee is to consider the character, demeanor, and interest of the witness. As the trier of fact, the referee determines whether or not the testimony is colored intentionally or unintentionally by those factors (*see, Lauria v. Lauria*, 187 AD2d 888, 889 [3rd Dept. 1992]).
- (3) Although the witness may have an interest in the outcome of the litigation (*see, Coleman v. New York City Tr. Auth.*, 41 AD2d 812, *affirmed* 37 NY2d 137 [1975]), which is highly material to the assessment of the credibility of the witness (*see*, 65 NY Jur., Witnesses, 71, pp. 233-234), it does not mean that the witness has not told the truth (*see, Calandra v. Norwood*, 81 AD2d 650, 651 [2nd Dept. 1981]; *Dobro v. Village of Sloan*, 48 AD2d 243, 247-248, *appeal dismissed* 37 NY2d 840 [1975]-[it is widely accepted that whether a witness has a personal interest in the outcome of the litigation is a factor that must be identified in order to adequately perform the unique duty of weighing the evidence and assessing the credibility of witnesses]).
- (4) As the trier of fact, the referee has the liberty to disbelieve the testimony of witnesses even though it is not otherwise impeached or contradicted (*see, Dominguez v. Manhattan & Bronx Surface Tr. Operating Auth.*, 46 NY2d 528, 534 [1979]-[issues of credibility are for the trier of fact]).
- (5) The parties must establish by a fair preponderance of the credible evidence that the claim they are making is true (*see, Spangenberg v. Chaloupka*, 229 AD2d 482, 484 [2nd Dept. 1996]). The

evidence must be relevant and have the tendency to make the existence of a fact more probable or less probable than it would be without the evidence (see, Epstein & Wessenberger, New York Evidence 1996/1997 Courtroom Manual 1996, Chap. 3-1, at 35; *People v. Lewis*, 69 NY2d 321, 325 [1987]-[evidence is relevant if it has any tendency in reason to prove any material fact]).

(6) It is well-settled that a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain language of its terms (see, *Morales v. Rotino*, 27 AD3d 433, 435 [1st Dept. 2006]).

(7) Damages for breach of contract must not be speculative, must be generally foreseeable, and within the contemplation of the contracting parties (see, *Dinicur v. Groff Studios*, 257 AD2d 218, 223 [1st Dept. 1999]). Damages awarded in breach of contract cases are intended to return the parties to the point at which the breach arose, and to place the non-breaching party in good a position as it would have been had the contract been performed (see, *Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 261 [1998]).

Analysis

(1) I have considered all of the relevant evidence, and I find that plaintiff has established, by a preponderance of the credible evidence, that she is entitled to an award of damages against defendant in the total sum of \$15,098.94 (see, *Spangenberg v. Chaloupka, supra*).

(2) Specifically, I find plaintiff's testimony to be substantially credible and such testimony is significantly corroborated by the documentary evidence (see, *Lauria v. Lauria, supra*). I find that defendant's failure to complete the renovation work he agreed to perform pursuant to the parties' Final Agreement (see, *Morales v. Rotino, supra*), resulted in plaintiff sustaining damages with regard to incurring additional expenses in her effort to complete such renovation work, including

[for example] retaining another contractor to perform the work.

(3) I find that the damages sustained by plaintiff as a result of defendant's failure to fully perform under the terms of the parties' "Final Agreement," total the sum of \$15,098.94, representing the amount of \$2,500 paid by plaintiff to defendant under the terms of the Final Agreement, minus \$500 for the work performed by defendant in the subject kitchen, leaving the amount of \$2,000; the amount of \$440.94 paid by plaintiff to Century Supply, Inc.; the amount of \$2,000 deposit paid by plaintiff for the "Mocha Maple" custom made furniture; the amount of \$5,458 plaintiff paid to Ely's; the amount of \$400 plaintiff paid to Skyview; the amount of \$3,800 plaintiff paid to Alstyne; the amount of \$250 plaintiff paid to Ventura; and the amount of \$750 plaintiff paid to Shamus (*see, Dinicur v. Groff Studios, supra; Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C., supra*).

(4) I find that although plaintiff testified that she paid MK&B the amount of \$6,530.04 to perform renovation services in the subject kitchen pursuant to their agreement, plaintiff failed to corroborate such testimony with any documentary evidence (eg., bank statement) (*see, Spangenberg v. Chaloupka, supra*).

(7) Further, I find that plaintiff has failed to provide sufficient evidence of the costs she incurred purchasing meals during the 6 months she was without a stove, (*id*), or that plaintiff is not entitled to damages in the amount of \$300 for plumbing services, given that such expense was incurred during the performance of the parties "Final Agreement" and was satisfactorily rendered.

Conclusion

Upon review of all the testimony presented, the considered credibility to be

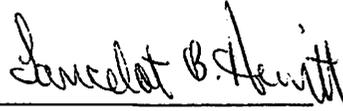
afforded the witness, and review of all exhibits admitted into evidence, I find that plaintiff is entitled to an award in damages against defendant in the total sum of \$15,098.94.

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Joan Gabriele, and against Jose Matias, in the total sum of \$15,098.94.

ORDERED that the interest on the judgment shall be calculated at the statutory rate, together with costs and disbursements, to be taxed by the Clerk of the Court upon submission on an appropriate bill of costs.

The foregoing constitutes the decision and order of the court.

March 7, 2013.



**Lancelot B. Hewitt,
Special Referee**

Enter:

Clerk of the Court

Joan Gabriele

-against-

Jose Matias

INDEX NO. 114372/2011
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

The following papers, numbered 1 to 2 were considered on this motion for : DEFAULT JUDGMENT

Papers
Notice of Motion/Order to Show Cause - Affidavits - Exhibits
Answering Affidavits - Exhibits (Memo)
Replying Affidavits (Reply Memo)

Numbered
1,2

Cross-Motion: [] Yes [] No

Upon the foregoing papers, submitted without opposition, it is

ORDERED that this motion by plaintiff for a default judgment is granted against defendant(s) based upon defendant(s)' failure to answer or move; it is further

ORDERED that plaintiff shall to proceed to inquest on damages before a Special Referee, who shall hear and determine, in accordance with CPLR 4317(b); and it is further

ORDERED that within 45 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Judicial Support Office, to arrange a calendar date for the reference to a Special Referee.

FILED

AUG 22 2012

Dated: 8/20/12

NEW YORK COUNTY CLERK'S OFFICE
Hon. Doris Ling-Cohan, JSC

Check One: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

Check if Appropriate: [] DO NOT POST [X] REFERENCE