

EXCLUSIVE PRESS RELEASE FOR NEW YORK LAW JOURNAL:

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Days after receiving a decision from Judge Warshawsky in the matter titled Emco Tech Construction Corp. v. Anthony Pilavas whereby the court after 13 days of trial ordered the plaintiff a mere \$3,300.00 after trial, the plaintiff Emco Tech Construction Corp. represented by the law firm La Reddola, Lester and Associates LLP made a motion under CPLR 4404(b) seeking a recalculation of damages. Upon reconsideration the court awarded Emco Tech \$128,028.00.

According to attorney Robert J. La Reddola, the new calculation for breach of contract damages was based solely upon the percent completion and did not take a second deduction for specific line items of work which the defendants claimed were unperformed.

If the court is measuring damages by the percentage complete, it is inconsistent to select a single large item such as this to further reduce the percent complete. Breach of Contract damages are either calculated by a "lost profits" formula or a "substantial performance" formula.

Under the lost profits formula, "the plaintiff is entitled to recover the reasonable value of the materials furnished and work performed by him, together with such reasonable profit as he might have earned had he been permitted to complete the performance thereof." Carlin v. The City of New York, 132 A.D. 90, 91, 116 N.Y.S. 346 (2d Dept. 1909); *see e.g. Plant Planners, Inc. v. Pollack*, 60 N.Y.2d 779, 469 N.Y.S.2d 675 (2d Dept. 1983); Tibbetts Contracting Corp. v. O & E Contracting Co., Inc., et al., 15 N.Y.2d 324, 206 N.E.2d 340 (1965). Under this formula, there is no offset for completion or remediation costs, as they are already accounted for by not awarding the plaintiff the full contract amount. This is the formula applied by the court.

Under the substantial performance formula, the damages awarded to the plaintiff are "the contract price less appropriate allowances for the cost of completing omissions and correcting defects" Pilgrim Homes & Garages, Inc. v. Fiore, 75 A.D.2d 846, 846, 427 N.Y.S.2d 851 (2d Dept. 1980); *see e.g. Mirisis v. Renda*, 83 A.D.2d 572, 441 N.Y.S.2d 138 (2d Dept. 1981). The cost of completion and remediation are deducted under this formula because the plaintiff is awarded the full contract amount.

The court initially used a combination of these two formulas, which resulted in EMCO only getting credit for 47% completion of the contracted amount of work rather than the 62% awarded by the court as part of its fact finding.

“Once the court awarded 62% completion, no further deductions should have been made for incomplete work” said attorney La Reddola. “As neither side ordered the record of the trial proceedings in this non jury trial, the court was left to review its notes”. “This probably helped contribute to the mixed decision”. “Once we pointed out the issue to the Court in our motion the court was quick to respond”.

“The court’s consideration of the motion and recalculation reflects the strength of the Nassau County Commercial Division system” said La Reddola. Decisions on construction cases have evolved into a rather consistent and predictable body of caselaw in Nassau Supreme.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

EMCO TECH CONSTRUCTION CORP.,

Plaintiff,

**INDEX NO.: 017967/2005
MOTION DATE: 05/07/2008
MOTION SEQUENCE: 003**

-against-

**ANTHONY PILAVAS, ANTHONY I. PILAVAS,
M.D., OLYMPUS 555 PROPERTIES, LLC,
ZEUS 31 REALTY, LLC, DELPHI REALTY, LLC,
STONEYTOWN DEVELOPMENT, LLC,**

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Affirmation in Opposition to Post Trial Motion of Peter Marinis & Exhibit Annexed	2
Affirmation of Robert J. LaReddola in Reply	3

After a thirteen day trial accomplished in one to two week blocks over three months, and after the submission of post-trial memoranda of law, the court rendered a forty-nine page decision dated April 1, 2008.

Plaintiff thereafter moved pursuant to CPLR § 4404(b) for an order setting aside the court's decision and a decision making new findings of fact and conclusions of law. Plaintiff

requests that a new judgment be rendered in favor of plaintiff in the amount of One Hundred Seventy-Three Thousand Eight Hundred Seventy-Three Dollars (\$173,873.00). Plaintiff contends that no remediation costs should be awarded defendant nor should defendant be given credit for uncompleted work from the already reduced award based upon (a) a completion percentage of 62%; (b) omitting any further deductions for uncomplete finish carpentry because the 62% already covers the incomplete finish carpentry; and (c) that defendant failed to meet his burden of proof on that issue directing judgment on the ground that the verdict is contrary to the evidence.

The defense disagrees with the plaintiff's re-calculations, and, in fact, argues that there was a \$500.00 calculation error by the court. The defendant is correct in that the court only credited the defendant with \$754,000.00 rather than the \$754,500.00.

A careful review of the notes taken at trial by the court shows that the amount that was claimed to have been paid was testified to as both sums. The court chose the smaller number incorrectly. Thus, one portion of the decision is modified. Plaintiff's Exhibit 54 and the testimony of Dr. Pilavas reflect payment of \$754,500.00. Instead of plaintiff being due a credit of \$29,820.00 on lost profit from the original contract amount, plaintiff is due a credit of \$29,785.00. Reducing the plaintiff's verdict by \$35.00.

The defendant received a credit for the difference between the amount paid \$754,000.00 and 62% of the contract price of \$731,600.00. In that the amount paid was \$754,500.00, the credit due defendant increases to \$22,900.00. The \$500.00 error is also reflected when the court totals credits due defendant. That amount then increases to \$192,250.00. The balance due EMCO must thus be modified:

Total Credits to EMCO:

Lost Profit:	\$ 29,785.00	
Miscellaneous Credits:	<u>\$164,843.00</u>	\$194,628.00

Credit to Defendant:	<u>\$192,250.00</u>	
TOTAL DUE PLAINTIFF:	\$ 2,378.00	

The above addresses the miscalculation.

Defendant then argues that the court's formula is correct and should not otherwise be changed. In the alternative, the defendant argues that the lost profits formula should be utilized as he does in his responsive papers. Finally, defendant argues that plaintiff's application must be denied or denied without prejudice pending plaintiff providing the court with a transcript of the trial.

Defendant then proceeds to reargue the court's findings on the issue of breach and percentage of completion. Defendant essentially, though not specifically, cross-moves for a finding that Pilavas was justified in terminating EMCO. The defendant has not cross-moved though his request is equivalent thereto and improper. The court will not re-try the case. The defendant's request that the court revisit the issues of breach and percentage of completion are rejected.

The first error claimed by plaintiff is addressed to the lost profit issue. Though plaintiff was paid \$754,500, and the court calculated lost profits based on that amount subtracted from the \$1,180,000.00 original contract price, plaintiff argues the lost profit of 7% should be based on the difference between the \$1,180,000.00 and the 62% of the contract price of \$1,180,000.00 or \$731,600.00.

Plaintiff thus argues, paraphrasing, since the court found "we" only did 62% of the contract rather than 63.94%, which \$754,500.00 would be equal to, we should be entitled to 7% of that difference - $\$448,400.00 \times .07 = \$31,388.00$. In other words, because the plaintiff did not do as much as he claimed he did, for which he was paid, he should get a lost profit percentage on a larger amount, on the work the court has concluded he did not do, but which he claimed he had done. That would be using "aardvarkean" logic (see plaintiff's memo on this motion referencing aardvarks, p.4). That theory is rejected.

The next argument of plaintiff is a bit more creative. The court found the defendant breached the contract, therefore, the defendant was not entitled to completion costs. The plaintiff does not disagree. However, he argues that remediation costs should be treated as completion costs and plaintiff should not be responsible for them. Plaintiff provides no statutory or case law

support for his theory and it is rejected. It is the opinion of this court that defendant is entitled to the cost of repairing the problems plaintiff left behind (reasonable value of work performed reduced by cost of repairs).

The more complex argument of plaintiff, and the one that warrants attention, is that to give credit to the defendant for work which EMCO contended it completed, but which the court specifically found it did not, would give the defendant a double benefit by taking line by line dollar deductions. More specifically, the court found that plaintiff billed as completed, but did not perform, \$127,850.00 worth of work. See Decision, pp. 47-48.

The 62% completion amount was determined from the testimony of the witnesses, mostly plaintiff's witnesses. What they used in reaching the diverse percentages as seen on page 35 of the Decision is not clear. They apparently eyeballed the project.

Mr. Ciancarelli testified that, in his opinion, when he left the job it was 65% complete. He was referred to defendant's Exhibit VV (same as Exhibit 17) during cross examination that finish carpentry was listed as 75% completed. Whether and how he considered that is not reflected in the court's notes. Al Gelsomino testified he determined the job was 64% complete, he meant the total job, not one or more specific items. Mr. Barbieri, the original architect, testified he made no estimate of the total percentage of work completed. Mr. Michelakis testified, by February 17, 2004, 70% of the work had been completed.

Exhibit 17, Contractor's Application for Payment, at item #12, lists finish carpentry - 75% complete - \$102,750.00. It was served upon defendant on or about the time the plaintiff and defendant parted ways in February 2005.

Mr. Winnacott, (defendant's witness), in referencing Exhibit 2, Cost Breakdown, testified that 40% of that list was done (last page of Cost Breakdown). Mr. Corva, another defense witness, also used the 40% number. None of the plaintiff's witnesses were asked whether any of the specific items the court has now determined as not having been done, or only partially done, were considered by them in rendering their opinion or percentage completion. Did they believe these items were done? Did they believe that finish carpentry was 75% complete? Did they take that into consideration in rendering their opinion? If the answer would have been yes, two

revisions would be proper. Either reduce the completion percentage by the percent the value of the work uncompleted has to the total job, or give credit to the defendant for the value of the work not done, not both. If, on the other hand, the answer is no, that they did not include, for example, the percentage of finish carpentry in reaching their opinion of work completed, or that when they said 64% complete, that did not include what the plaintiff has said is 75% complete "finish carpentry" (valued at \$102,000.00) then it would be wrong to credit the defendant with this or other similar amounts in a dollar or percentage amount. Winnacott's "40% completion" apparently would have included the areas of uncompletion covered in the court's decision.

The problem: The court's notes do not reflect what the witnesses had in mind when they gave their percentages, what they had reviewed in determining the percentage of completion, and there is no record of their testimony presented to the court, and as noted on page 36 of the court's Decision After Trial, both plaintiff and defendant failed in this area, perhaps it was intentional, perhaps not.

The court, in deciding the percentage of work completed, considered all of the testimony of the witnesses, as well as Exhibit 17, which listed finish carpentry as 75% complete.

In reaching the 62% amount, it factored in "finish" carpentry as not having been completed. Thus, it is not appropriate to credit defendant for that amount. However, the court did not consider as uncomplete the other items listed on page 4 of the Decision After Trial totaling \$25,100.00. Said amount could be used as a credit to defendant or used to reduce the completion percentage. The court will allow it as a credit. Thus, the final judgment is recalculated as follows:

Credits to EMCO Tech Construction Corp.:

Lost Profits:	\$ 29,785.00	
Miscellaneous Credits on Change Orders:	<u>\$164,843.00</u>	\$194,628.00

Credits to Pilavas:

Remediation:	\$41,500.00
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Credit for uncomplete work for
which plaintiff had claimed
completion not considered
in determining completion
percentage:

\$25,100.00

BALANCE DUE PLAINTIFF:

\$ 66,600.00

\$128,028.00

Submit Judgment on Notice.

Dated: June 12, 2008


J.S.C.