

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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B&G CONTRACTING LTD., THOMAS BERTUSSI,
LOUIS BERTUSSI, LOUIS BERTUSSI as Executor of
the Estate of JOHN BERTUSSI and BERTUSSI
CONTRACTING, INC. d/b/a BERTUSSI'S,

Index No. 034697/2018

Plaintiffs,

-against -

JUDGMENT AFTER TRIAL

EUGENE CERVINI, JOHN CERVINI and GRACE
CONTRACTING & DEVELOPMENT LLC,

Defendants.

-----X
In the Matter of the Application of

THOMAS BERTUSSI, LOUIS BERTUSSI and
LOUIS BERTUSSI as Executor of the Estate of
JOHN BERTUSSI, Holders of Shares Representing
More than One-Half of the Votes of All Outstanding
Shares of B&G Contracting Ltd.,

Petitioners,

-against -

B&G CONTRACTING LTD., JOHN CERVINI and
EUGENE CERVINI,

Respondents,

For the dissolution of B&G CONTRACTING LTD.,
a Domestic Corporation, Pursuant to Section 1104 of
the Business Corporation Law.

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WHEREAS, on August 1, 2018, an action was commenced entitled *B&G Contracting Ltd., et al. v. Eugene Cervini, et al.*, Rockland County Supreme Court Index No. 034697/2018

("Action No. 1"); and

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**ROCKLAND COUNTY
CLERK'S OFFICE**

WHEREAS, at or about the same time, a proceeding was commenced entitled *Matter of Thomas Bertussi, et al. v. B&G Contracting Ltd.*, Rockland County Supreme Court Index No. 034717/2018 (“Action No. 2”); and

WHEREAS, Action No. 1 and Action No. 2 have been consolidated under the above caption (NYSCEF Doc. No. 612); and

WHEREAS, the case proceeded to trial before a jury on October 19, 20, 21, 24, and 26, 2022 before it was converted to a bench trial, which proceeded to conclusion on November 4, 19, 21, 22, 23, 29 and 30, 2022; December 1, 2022; January 4, 5, 6, 9, 11, 19, 20, 24, 25 and 30, 2023; and February 6, 2023; and

WHEREAS, by Decision and Order After Bench Trial dated and entered December 29, 2023 (the “Order”), a copy of which is annexed hereto, it was:

ORDERED that on the first and second causes of action, Defendants John Cervini and Eugene Cervini (collectively, “Defendants”) shall pay to Plaintiffs Thomas Bertussi, Louis Bertussi and Louis Bertussi as Executor of the Estate of John Bertussi (collectively, “Plaintiffs”) the sum of \$739,538.04 in damages comprised of 60% of the Port Jervis and Goshen IT profits, or \$167,002.20, and 60% of the post-April 2018 disputed expenses incurred due to the Defendants’ conduct. In addition, the Court awards another \$320,000 to Plaintiffs, which represents 40% of the \$800,000 line of credit draw down, which was used to float various B&G jobs, and \$32,000, which reflects 40% of the interest paid on the line of credit. Thus, Plaintiffs are awarded the total sum of ONE MILLION NINETY-ONE THOUSAND FIVE HUNDRED THIRTY-EIGHT DOLLARS and 04/100 CENTS (\$1,091,538.04), plus pre-judgment interest from the date of commencement of the action in accordance with the CPLR; and it is further

ORDERED that Plaintiffs shall pay to Defendants (which may be paid by way of an offset) the sum of \$3,999.48, reflecting their 40% share of the profit on the Clarkstown Auditorium job after all the expenses and deductions are accounted for, plus pre-judgment interest from the date of commencement of the action in accordance with the CPLR; and it is further

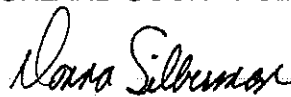
ORDERED that Plaintiffs may enter Judgment in accordance with this Decision and Order directly with the Rockland County Clerk.

NOW, upon the motion of Lachtman Belowich & Cohen P.C., 245 Main Street, Suite 230, White Plains, New York 10601, as attorneys for Plaintiffs, it is hereby

ORDERED, ADJUDGED, DECREED AND DECLARED that Plaintiffs Thomas Bertussi, Louis Bertussi, and Louis Bertussi as Executor of the Estate of John Bertussi, all with an address of 60-70 Dexter Plaza, Pearl River, New York 10965, are entitled to judgment against Defendants John Cervini and Eugene Cervini, both with address of 205 Rose Road, West Nyack, New York 10994, in the amount of One Million Eighty-Seven Thousand Five Hundred Thirty Eight Dollars and 56/100 Cents \$1,087,538.56 (\$1,091,538.04 less offset of \$3,999.48), together with interest thereon from August 1, 2018 through the date of Judgment in the amount of \$532,029.44, plus \$ 1375.00 in costs and disbursements, for a total Judgment amount of \$ 1,620,943.00 as of the date of Judgment, and that Thomas Bertussi, Louis Bertussi, and Louis Bertussi as Executor of the Estate of John Bertussi have execution thereon.

Dated: New City, New York
January __, 2024

**DONNA G. SILBERMAN
ROCKLAND COUNTY CLERK**



Judgment Clerk

JUDGMENT DEBTORS:

John Cervini
205 Rose Road
West Nyack, New York 10994

Eugene Cervini
205 Rose Road
West Nyack, New York 10994

JUDGMENT CREDITORS:

Thomas Bertussi
60-70 Dexter Plaza
Pearl River, New York 10965

Louis Bertussi, Individually and as
Executor of the Estate of John Bertussi
60-70 Dexter Plaza
Pearl River, New York 10965

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
In the Matter of the Application of

**DECISION AND ORDER
AFTER BENCH TRIAL**

Index No. 034717/2018

THOMAS BERTUSSI, LOUIS BERTUSSI and JOHN
BERTUSSI, Holders of Shares Representing More than
One-Half of the Votes of All Outstanding Shares of B & G
CONTRACTING LTD,

Plaintiffs,

-against-

B & G CONTRACTING LTD, JOHN CERVINI and EUGENE
CERVINI,

Defendants.

For the dissolution of B & G CONTRACTING LTD, a
Domestic Corporation, Pursuant to Section 1104 of
The Business Corporation Law.

-----X
B & G CONTRACTING LTD, THOMAS BERTUSSI, LOUIS
BERTUSSI, JOHN BERTUSSI and BERTUSSI
CONTRACTING INC. d/b/a BERTUSSI'S

Index No. 034697/2018

Plaintiffs,

-against-

EUGENE CERVINI, HOHN CERVINI and GRACE
CONTRACTING & DEVELOPMENT LLC,

Defendants.

-----X
Sherri L. Eisenpress, J.S.C.

Statement of Facts

A. Background

In and around mid-2015, Bertussi Contracting, Inc. (d/b/a "Bertussi") and Grace Contracting & Development LLC ("Grace") began working together on school and public works general construction projects [Defendants' Exhibit ("DX") 684 Para. 4.] Bertussi was

wholly owned by brothers, John, Thomas and Louis Bertussi (together "the Bertussis") [Id. at Paras. 2,4], while Grace was wholly owned by John Cervini who ran the company together with his father, Eugene Cervini (together the "Cervinis") [Id. at Para. 4].

As of 2015, Bertussis had been in business for over sixty years [Id. at Para. 5] and had more than twenty-five years of experience working on school and public works GC, HVAC and plumbing projects. [Id.]. Grace was a general contractor working on various projects including at least one public works project, and had, as of the time it began working with Bertussis, significant debt. [Id.; Trial Transcript ("Tr.") 1259:7-1260:18; DX 684 Paras. 17-18]. In 2015 and 2016, Bertussi and Grace informally joined together and worked on multiple school and public works projects together, with Grace operating as one of Bertussis' sub-contractors. [DX 684 Paras. 4, 14-30]

In or about late 2015-early 2016, the Bertussis and the Cervinis began discussions about formalizing their relationship and the creation of a new company to work on school and public works general construction projects together. In furtherance of these discussions, in or about June 2016, B&G Contracting Ltd. was incorporated as a New York Corporation [Tr. 1868], and on or about November 14, 2016, "S" Corp. status was elected. [(Plaintiffs' Exhibit ("Pl. Ex.") 5]. It is undisputed that the newly formed entity had five shareholders: the three Bertussi brothers and the two Cervinis. In what, in hindsight, is certainly a cautionary tale for the parties, the B&G shareholders never finalized or executed a shareholder's agreement. [Tr. 350:9-12].

While there is no definitive written agreement between the parties, based on the documents proffered in evidence, B&G formally began operating as of January 1, 2017. From the commencement of the B&G operations, and throughout the parties short-lived working relationship, each of the five shareholders was denominated on tax filings and other corporate documents as the owner of 20% of B&G. During this period, Bertussis managed the B&G finances, handled bids, contracts, insurance, bonding and warranties on all the B&G projects, and, at times, also functioned as the GC and/or HVAC contractor, performing HVAC

or mechanical work as necessary. Grace would prepare bid estimates and act as a B&G subcontractor, supervising the work in the field and getting paid for its work plus the Cervini share of the profits. [DX 684 Paras. 14-30].

It is undisputed that beginning in or about January 2017, B&G worked on eight projects: (i) Dobbs Ferry GC; (ii) Yonkers Saunders Auto Wing, GC; (iii) Clarkstown Boiler GC; (iv) Middleton Phase 2 GC; (v) Clarkstown Auditorium GC; (vi) Yonkers Officer Fire GC; (vii) Yonker's Vive 10 GC; and (viii) East Ramapo School District GC. A ninth job, Briarcliff, is in dispute. See infra at p 11 fn2. As these jobs progressed, the relationship between the parties deteriorated. By the end of 2017 and into early 2018, the relationship between the Cervinis and the Bertussis began unraveling and accusations were leveled by both sides accusing the other of theft of intellectual and physical property and trade secrets; unfair competition; the diversion and mismanagement of company assets; and other fraudulent conduct.

There were various discussions, conversations, and gatherings between the parties to discuss the issues between them, which culminated in meetings held on April 12, 2018, and April 21, 2018. What was discussed and agreed to during these meetings is the subject of some dispute between the parties, as are many aspects of the parties' relationship including who is owed what following the dissolution of B&G, but ultimately by the final meeting, it was definitively agreed that the parties did not wish to continue working together.

The Litigation

On August 1, 2018, the Bertussis commenced a proceeding under Index No. 03471/2018 (the "Dissolution Action" or "Action #1") seeking a judicial dissolution of B&G, pursuant to § 1104(a)(3) of the Business Corporation Law. At or about the same time, the Bertussis filed a second action (Index No. 034697/2018 "Action #2") alleging multiple causes of action against the Cervinis and Grace, including breach of fiduciary duty, usurpation of corporate opportunities, misappropriation of trade secrets and unjust enrichment.

Defendants answered the complaint on or about September 5, 2018, and asserted counterclaims against the Bertussis for embezzlement, breach of fiduciary duty, breach of implied in fact contract, quantum meruit and unfair competition.

In April 2019, Plaintiffs served an Amended Verified Complaint which added additional corporate and individual Plaintiffs and Defendants and asserted additional causes of action. An Answer to the Amended Complaint was served and filed on or about May 8, 2019, which included counterclaims.

On or about January 8, 2020, Defendants filed a third-party complaint against Joan Bertussi and Pearl River Sheet Metal, Inc. ("PRSM") alleging multiple causes of action including tortious interference with contract, business relationships and prospective business opportunity; unjust enrichment and unfair competition. An Answer was served on or about February 13, 2020.

After extensive and contentious discovery (and various COVID-19 related interruptions), the parties moved for summary judgment. Following submission and argument on these motions, the Court, on September 29, 2020, issued a Decision and Order [NYSCEF doc. #368] which:

1. Granted Plaintiff's motion in Action #1 for dissolution;
2. Denied Plaintiff's motion for summary judgment on their causes of action for Breach of Fiduciary Duty, Unfair Competition and Unjust Enrichment;
3. Granted Plaintiff's motion to dismiss Defendants counterclaims except those for Breach of Fiduciary Duty and Implied Covenant of Good Faith and Fair Dealing;
4. Granted the third-party Defendants' motion to dismiss the action against them in its entirety;
5. Denied Defendant's motion in Action #2 for summary judgment on their tortious interference with contract, breach of fiduciary duty and usurpation of corporate opportunity claims and to dismiss the claim of unjust enrichment against them; and

6. Dismissed Plaintiff's affirmative defenses of failure to state a cause of action, failure to plead with particularity and statute of limitations.

Following additional COVID-19 related delays and other pretrial motion practice, the case proceeded to trial before a jury on October 19, 2022, with an agreed upon expectation as to how long the trial would take to complete. The case proceeded in front of a jury on October 19, 20, 21, 24, 2022 and October 26, 2022. However, after about four full days of trial before a jury, it became apparent to all counsel and the Court that the trial would, in fact, take much longer than anticipated. As a result of this miscalculation, the level of complexity of the financial documents being proffered in evidence and various scheduling issues, the parties stipulated and agreed to convert the jury trial to a bench trial which then proceeded to conclusion (with some settlement conferences sprinkled in) on November 4, 19, 21, 22, 23, 29 and 30, 2022; December 1, 2022; January 4, 5, 6, 9, 11, 19, 20, 24, 25 and 30; and February 6, 2023.

During various settlement conferences certain issues were resolved and certain facts were stipulated. [PX 137]. Following the conclusion of the trial, and upon agreement of the parties, the parties made post-trial submissions which have been considered by the Court and the Court now rules as follows:

- I. Plaintiff's First Cause of Action for Breach of Fiduciary Duty and Second Cause of Action for Usurpation of Corporate Opportunities as Against the Cervinis

In order to establish a claim for breach of fiduciary duty, a plaintiff must prove, by a preponderance of evidence, the existence of a fiduciary relationship, misconduct by the defendant and damages directly caused by such conduct. Fitzpatrick House III, LLC v. Neighborhood Youth and Family Services, 55 A.D.3d 664, 868 N.Y.S.2d 212 (2d Dept. 2008). It is beyond cavil that shareholders in a closely held corporation such as B&G, have fiduciary duties to one another. United Telecard Distrib. Corp. v. Nunez, 90 A.D.3d 568, 936 N.Y.S.2d 17 (1st Dept. 2011).

The doctrine of 'corporate opportunity' provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the company. Alexander & Alexander of N.Y., Inc. v. Fritzen, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530 (1st Dept. 1989). A corporate opportunity is defined as "any properly informed or prospective business dealing in which the corporation has an interest or tangible expectancy on which is essential to its existence or logically and nationally adaptable to its business." Moser v. Devine Real Estate, Inc. (Florida), 42 A.D.3d 731, 734-735, 839 N.Y.S.2d 843 (3d Dept. 2007).

On their first cause of action, B&G argues that the evidence at trial establishes that the Cervinis breached their fiduciary duty as officers, directors, shareholders and employees of B&G by withholding and refusing to provide the Bertussis with B&G files, including project files and B&G's vendor list, while at the same time misappropriating confidential B&G information, infrastructure and goodwill, and soliciting B&G employees to successfully bid on school and public works GC projects through Grace instead of B&G.

In contrast, Defendants argue that Plaintiffs have failed to establish that the Cervinis breached their fiduciary duties to B&G. Instead, they argue that at the time of the alleged misconduct by Defendants, the parties were in the process of a voluntary dissolution and B&G was winding down its affairs. They argue further that the evidence demonstrates that B&G did not directly submit bids on projects but rather did so through PRSM and that the information on that vendor list (regardless of ownership) was not used to prepare the bids.

Plaintiffs further contend that on March 29, 2018, while they were still formally officers, directors and shareholders of B&G, the Cervinis submitted a winning bid on the Port Jervis Media Center Project through Grace using B&G's confidential information, infrastructure and goodwill (see Exs. 43-44). More specifically, they assert that:

- The Cervinis started working on the Port Jervis bid three weeks before submission while they were officers, directors and shareholders of B&G;

- The Cervinis listed B&G Projects in the Port Jervis bid as projects on which Grace bid as the Prime Contractor (as opposed to subcontractor); and
- The bid was submitted without notice to B&G and was the type of job B&G would have bid on in the same manner as they bid on all the other B&G jobs.

Moreover, Plaintiffs argue that in mid-April 2018, again pre-dissolution, B&G's entire labor force left B&G to move to Grace (Tr. Pp. 588-589); on April 19, 2018, the Cervinis submitted a winning bid on the Goshen IT Project through Grace (Ex 45-46); the Cervinis started working on the Goshen IT Project bid at least ten days before April 19, 2018, while they were still formally officers, directors and shareholders of B&G; and, as in the Port Jervis bid, improperly and falsely listed B&G projects in the bid as projects on which Grace had been the prime contractor.

In response, Defendants argue that at this time the parties' relationships had been constructively terminated based on a March 29, 2018, letter that they contend was sufficient to constructively terminate the relationship.

The Court finds that, based on the evidence presented, the March 29, 2018, letter does not constitute a constructive termination, particularly in light of the parties subsequent meetings which were held in order to define the course of the company going forward, all of which were going on while the Cervinis were already, unbeknownst to the Bertussis, using B&G employees, submitting bids and soliciting work that fell squarely in the B&G wheelhouse.

Accordingly, the Court finds that the solicitation and acceptance by the Cervinis of the Port Jervis Media Center Project and the Goshen IT Project constitute a breach of fiduciary duty and usurpation of corporate opportunities by the Cervinis. Specifically, the Court finds that Plaintiffs have proven by a preponderance of the evidence that the actions of the Cervinis prior to the parties' final meeting in April, in submitting and accepting the Port Jervis Media Center Job and the Goshen IT Project without first offering the opportunity to

B&G, constituted a breach of their fiduciary duties to B&G and a usurpation of these two corporate opportunities.

The affirmative defense asserted by the Cervinis - - to wit that the March 29, 2018, letter constituted a constructive termination of the parties' relationship - - is unavailing as that letter clearly states that business was paused until a resolution of the disputed issues was reached and agreed in writing. Nowhere in that letter was termination mentioned and indeed, by the Cervinis' own admission, there were several meetings after that letter where the disputed issues were discussed. Buttressing these contentions by the Plaintiffs is the evidence that the Cervinis (and Grace) were in debt in excess of \$500,000 prior to joining the Bertussis and B&G and then, following their short-lived time with B&G, reported in excess of \$4.6 million in revenue for 2018, with profits in excess of \$300,000, and an additional \$2 million plus to be realized in the following year for the ongoing work on Port Jervis and Goshen IT or contracts entered into in 2018, while B&G went from a \$500,000 plus profit in 2017, to a \$331,000 plus loss in 2018, and ultimately went out of business. [DX 684 paras. 17-18;29].

Damages

The measure of damages for the breach of a fiduciary duty is the amount of the loss sustained, including lost opportunities for profit by reason of the faithless fiduciaries conduct. Herman v. Herman, 162 A.D.3d 459 (1st Dept. 2018); 105 E. 2nd St. Assn v. Bobrow, 175 A.D.2d 746 (1st Dept 1991). Punitive damages are also available for breaches of a fiduciary duty where a high threshold of moral culpability is satisfied. Giblin v. Murphy, 73 N.Y.2d 769 (1998).

Plaintiffs called expert witness, Anthony Bracco, CPA, to opine on the damages sustained by Plaintiffs as a result of Defendants' alleged breach of their fiduciary duties and theft of corporate opportunities, goodwill, infrastructure and confidential information. (Testimony of Anthony Bracco, CPA ("Bracco") TR. 2474-2632). Bracco testified as to the methodology he used to determine damages, *i.e.*, the average of the capitalization approach and the M&A approach, which resulted in him opining that Plaintiff's damages totaled

\$1,148,500 (representing 60% of the value of B&G as of 12/17/2017), plus the outstanding \$800,000 loan.¹ On the second cause of action, for theft of corporate opportunities, Bracco did a more straightforward lost profits analysis, for the Port Jervis and Goshen IT projects.

The Court rejects Bracco's valuation of the business using either the capitalization or the M&A approach, as it is inappropriate in a case such as this. Instead, the Court adopts the lost profits methodology, which is a more appropriate measure based on the facts of this case (e.g., no shareholder agreement, no non-compete agreements, no confidentiality agreements and the short duration of B&G's operations before the breakdown of the relationship between and among the shareholders).

Applying the lost profits methodology, the Court finds that the conduct of Defendants prior to April 21, 2018, (*inter alia*, preventing access to B & G's vendor list and project files and soliciting projects and employees) did breach their fiduciary obligations to B&G, and usurped B & G corporate opportunities and that, in addition to the disgorgement of the Port Jervis and Goshen IT project profits, such conduct warrants repayment to the Bertussis of all additional expenses unnecessarily incurred to complete or finalize the B&G projects after the Cervinis departed. Indeed, the gravamen of the Cervinis' affirmative defenses is that these expenses were excessive and unnecessary. The disputed expenses, which it seems both parties agree should not have been necessary, were in this Court's opinion made necessary, as a direct result of the Cervinis' conduct (failure to turn over project documents, etc.).

By Defendants' own reckoning, the total in disputed expenses for work performed post April 2018, on B&G jobs, equals \$1,179,605.07. Of the total disputed expenses, for the reasons set forth infra at pages 11-12 and 16-17, the Court agrees with Defendants and will disallow \$20,758 on the Ramapo High School project and \$204,378.68

¹ Plaintiffs' expert testified that he would add back into his analysis the entire \$800,000 loan from the Bertussis to B&G. However, even had B&G continued to operate, the Cervinis, as 40% shareholders, would only have been responsible for 40% of that loan. Accordingly, the Court will add only \$320,000 to the final damages award.

on the Dobbs Ferry project, for a total in disallowed expenses of \$225,378.68. Deducting this sum from the other disputed expenses incurred following, and as a result of, the manner and method of, the Cervinis' departure, leaves \$954,226.39 in expenses which the Court finds would not have been incurred by B & G but for the Cervinis' conduct, which certainly could have been avoided. Sixty percent of that amount (\$572,535.84) would have been realized as additional revenue by the Bertussis had the Cervinis not breached their fiduciary obligations to B&G.

Accordingly, the sum of \$572,535.84 will be added to the Bertussis' 60% share of the Port Jervis and Goshen IT projects profits of \$278,337 [Tr. P. 2573] or \$167,002.20, for a total damages award on the first and second causes of action for breach of fiduciary duty, and theft of corporate opportunity and good will of \$739,538.04.

The Court does not find that the Cervinis' conduct, put in context of the deterioration of the parties' relationship, rises to the level of high moral culpability, and thus declines to award punitive damages.

II. Plaintiffs third and fourth causes of action for unfair competition based upon the alleged theft by, John Cervini, of Bertussi's confidential vendor list.

While the evidence adduced at trial demonstrated that the vendor list in question was (i) created by Thomas Bertussi, over many years; (ii) was important to Bertussis business; and (iii) was emailed by a Bertussi employee to John Cervini, presumptively at John's request, without the consent of Bertussis, the evidence also demonstrated that the information contained in this list was readily available through public sources and thus was not the type of information the theft of which would give rise to unfair competition or breach of fiduciary duty claim.

Similarly, while the Cervinis exercised poor judgment and breached their fiduciary duties in the manner, method, and timing, of their solicitation of B&G employees, ultimately, these same employees were solicited by the Bertussis and, no one having executed any kind of non-compete agreement, the employees were free to choose whether

to leave with the Cervinis or stay and could have been solicited one minute after the parties decided to dissolve B&G.

Thus, even if this conduct constituted unfair competition, under the circumstances of the deterioration of the parties' relationship and the ultimate decision by the end of April 2018 to dissolve B&G, the Court finds that no additional damages were incurred by Plaintiffs in connection with this conduct.

III. Claims by the Cervinis for money owed to them on B&G Projects.

On October 7, 2022, ten days before trial and four years into this litigation, the Cervinis filed a motion for leave to amend their counterclaims and defenses and allege misappropriation of B&G funds by the Bertussis. The Court denied that motion but permitted the Cervinis to offer evidence regarding these allegations, as they supported their affirmative defenses and pre-existing counterclaims for breach of fiduciary duty and Implied Covenant of Good Faith and Fair Dealing.

The Court considered the allegations with respect to each of the B&G projects.²

Ramapo High School Project

The Cervinis contend that B&G is owed an additional \$100,635.14 on this project. The Bertussis claim that, in fact, B&G lost \$176,771.01 on the project. The difference lay in \$243,663.23 in expenses ascribed to the project which the Cervinis argue should have been deducted from other non-B&G jobs or should not have been incurred at all.

Specifically, the Cervinis dispute:

- a) \$53,885.28 paid to Bruce Riffard;
- b) \$53,880.00 paid to Donald Guterl Construction ("Donald Guterl")

² Also at issue is whether or not the "B&G jobs" consisted of eight or nine projects with the Bertussis arguing that there are only 8 and the Cervini's arguing that 9 are included. Specifically, the Bertussis dispute the inclusion of Briarcliff as a B&G job. This job was bid, awarded and commenced in or about September of 2016 [Tr. 926-927], prior to the commencement of B&G operations and, as such, the Court finds that Briarcliff is not a B&G project and thus, all profits and expenses of that job belong to Bertussis.

- c) \$31,842.38 paid to Devries
 - d) \$27,500.00 paid to NYS Pool Management ("NYS Pool")
 - e) \$33,150.00 paid to Pearl River Sheet Metal ("PRSM")
 - f) \$43,404.57 paid to Bertussi's employees
- A) Bruce Riffard testified at trial that he performed the work listed in the invoices (Exhibit Nos. ("Exh.") 636 and 146) on or about the dates thereon and he was paid in full for those invoices. He denied he paid any kickbacks on these invoices to the Bertussis. Defendants failed to overcome this credible testimony and failed to prove by a preponderance of the evidence³ that any of the charges paid to Bruce Riffard should have been paid or were otherwise fraudulent or inaccurate. Thus, the Riffard expense of \$53,885.28 stands.
- B) Like Mr. Riffard, Donald Guterl testified that his invoices accurately reflected the work performed on the Ramapo High School Project for which his company was paid in full and was not fraudulent or misleading, and no kickbacks were paid. However, on this Project, Donald Guterl was paid \$58,600.00 on a \$35,122.00 invoice. While there was testimony on this topic, the Court is not satisfied that this overpayment was not either an error or related to charges more properly ascribed to another project. Accordingly, the \$55,880.00 claimed by Bertussis as a Ramapo High School Project expense, is reduced to \$35,122.00. As to this reduced sum, the Court finds that Defendants failed to prove the basis for the dispute of these expenses by a preponderance of the evidence.
- C) Defendants contend that \$30,000.00 out of the total Devries invoices should not be paid. Defendants contend that the fact that a prior invoice stated "complete concrete" the payment for more concrete after that is inappropriate. Defendant has not provided any proof to support this contention, while Plaintiff proffered testimony on this topic.

³ Affirmative defense standard of proof.

Accordingly, the \$30,000.00 disputed by the Cervinis stands as a legitimate expense of the Ramapo High School Project.

- D) The Cervinis dispute \$27,500.00 in expenses paid to NYS Pool on this project but offered no evidence regarding the dispute. Accordingly, the NYS Pool expense stands as a legitimate expense of the Ramapo High School Project.
- E) The Cervinis dispute \$33,150.00 paid to PRSM because (i) the work on the project was completed prior to the date of the PRSM invoices and because the invoices are excessive. Thomas Bertussi testified that PRSM was brought in to clean up the "mess" left at some of the B&G sites by the Cervinis and had to familiarize themselves with the projects and do punch list and warranty work. Joan Bertussi testified that PRSM performed all the work reflected in the invoices and paid no kickbacks. The Cervinis failed to rebut this testimony and indeed conceded that they were not working for B&G when the disputed work was performed or paid for. Accordingly, the \$33,150.00 paid to PRSM stands as a legitimate expense on the Ramapo High School Project.
- F) The Cervinis contend that \$43,404.57 paid to Bertussi employees on the Ramapo High School Project was really for work attributed to the HVAC Contract which is not a B&G contract and thus these expenses should not be charged to B&G. Other than John Cervini's testimony that was based on his recollection of the remaining punch list items, and the state of the project when he left B&G that there was no further work to perform, no evidence was introduced to directly rebut the credible testimony that, in fact, there was much work remaining, including but not limited to the testimony of Ray Breit of PRSM who listed significant work that was performed after the Cervinis departure from B&G. Accordingly, these expenses stand.

Spring Valley High School Project

The Cervinis dispute \$286,465.08 of the \$675,129.70 in expenses that the Bertussis claim to have incurred on the Spring Valley High School Project.

Specifically, the Cervinis dispute:

- a) \$80,634 paid to Bruce Riflard;
 - b) \$18,000 paid to Crafc0;
 - c) \$70,250 paid to Donald Guterl;
 - d) \$30,000 paid to Devries;
 - e) \$33,150 paid to PRSM;
 - f) \$16,734 paid to Yaboo Fence Company; and
 - g) \$37,427.08 paid to Bertussi employees.⁴
- A) Bruce Riflard took the stand and testified credibly that he performed the work outlined in the disputed invoices; he did not submit invoices for work he did not perform; the invoices accurately reflect the work performed; he did not submit false or fraudulent invoices; he was paid for the invoices submitted; and did not receive or pay kickbacks. The argument the Cervinis advance in support of their position is that because Riflard didn't recall all specifics of the work performed, because Riflard was paid a flat fee for certain work, and because there was no proof of payment, that this expense should be disallowed. Nevertheless, the Cervinis failed on this defense to Plaintiff's claims to demonstrate, by a preponderance of the evidence, that any of Riflard's invoices were in error, inaccurate or fraudulent or should for some other reason be reduced or to rebut the clear unequivocal and credible testimony of Mr. Riflard. [See Tr. 2341-2366; Ex. 146].
- B) Similarly, the Cervinis failed to meet their burden of proof with respect to the \$18,000.00 in expenses paid to Crafc0 which they dispute. The only evidence presented as to this claim is the testimony of Thomas Bertussi which sets for the basis for the validity of the charge. Thus, this expense stands.
- C) Likewise, the Cervinis failed to meet their burden with respect to their dispute of

⁴ This claim appears to have been withdrawn by the Cervinis as it is not addressed in their post-trial submissions. The Cervinis do appear, however, to be disputing the application of 10% overhead and 10% profit claimed by Bertussis.

\$70,520.00 in expenses paid to Donald Guterl on the Spring Valley High School Project. Their sole contention with respect to these charges is that there was no proof of payment, other than one check for \$9240.00, and as such, this expense should be accordingly limited. However, Donald Guterl himself testified credibly that the invoices accurately reflected the work performed; were not false or fraudulent; were paid in full; and no kickbacks were paid. [See Tr. 1698-1691]. This testimony stands as the only evidence regarding these charges and, as such, they stand as chargeable against the Spring Valley High School Project.

- D) and E) The Cervinis also failed to introduce proof that requires a reduction of the invoice payments to Devries or Yaboo or that rebuts the credible testimony of Thomas Bertussi as to the work performed and the payment made.
- F) and G) The same result must obtain with respect to the PRSM invoices and payments on the project to Bertussis employees. It is not sufficient to satisfy their burden of proof for the Cervinis to simply contend that the invoices seem excessive or duplicative, particularly when credible witness testimony to the contrary stands uncontroverted by any proof.

Thus, the Cervinis' affirmative defenses on the Spring Valley High School Project are rejected and no additional funds are due and owing to B&G on this Project.

Middletown Phase 2 GC Project

Once again, the Cervinis dispute multiple charges ascribed by the Bertussis to the Middletown Phase 2 GC Project. Specifically, the Cervinis dispute \$229,722.95 of the \$270,638.09 in expenses, including:

- a) \$2,450 paid to Adams Painting;
- b) \$86,111 to Donald Guterl;
- c) \$17,468.17 to Joe Lombardo Plumbing and Hearing ("Lombardo");
- d) \$2,640 to NYS Pool;

- e) \$114,996.00 to PRSM; and
- f) \$6,143.78 to Bertussi employees.

With respect to each of these charges, the Cervinis claim that the charges were applicable to the other non-B&G projects (*i.e.*, an HVAC project) or were excessive. Nevertheless, the testimony proffered to this effect did not rise to the level of proof sufficient to contradict the credible straight-forward testimony and invoices of the witnesses; to wit: that all the work billed was actually performed; the invoices were accurate; were paid; and there were no kickbacks.

Thus, the Court finds no money is due to B&G from Bertussis on this Project.

The Dobbs Ferry GC Project

The Cervinis dispute \$148,796.66 of the \$185,395.01 in expenses incurred by the Bertussis on the Dobbs Ferry GC Project including:

- a) \$6,250 to Aquinas;
- b) \$21,647.80 paid to Blueline Rental;
- c) \$28,400 paid to Donald Guterl;
- d) \$16,614.43 paid to G. Guterl Services, LLC;
- e) \$49,805 paid to PRSM;
- f) \$20,871 paid to Trevis Weatherproofing Technologies, Inc.; and
- g) \$4,938.43 paid to Bertussi employees.

Similarly, the Cervinis assert that Bertussis was paid \$939,745.69 on the Dobbs Ferry GC project of which they dispute \$353,147.34 (including the above delineated charges). Additionally, the Cervinis dispute another \$204,620.68 in what appear to be "overpayments" made to PRSM.

Firstly, the Court finds that of the \$939,745.69 paid to Bertussi on the Dobbs Ferry GC project, \$550,000 was paid to B&G and \$36,598.35 in expenses are undisputed. Accordingly, this results in a dispute totaling \$353,147.34, which means that in addition to

the disputed items listed in a-g above, which total \$148,526.66, there is \$204,620.68 in additional disputed sums.

On the Dobbs Ferry GC project, the Court finds that Defendants failed to meet their burden to demonstrate that items a-g above did not represent payments made for legitimate work performed to complete the project.

On the other hand, Defendants have sustained their burden as to the \$204,620.68 in expenses primarily, if not all, payments to PRSM. The credible testimony on this score is that PRSM was paid sums over and above the work actually performed, ostensibly to compensate it for clients lost when it stepped in to "clean up the messes" uncovered on various projects following the Cervinis departure. The Court does not find this to be a legitimate expense of this project and so will disallow the \$204,620.68 in expenses paid to PRSM. The Court finds that re-calculation, after elimination of the \$204,620.68 in payments to PRSM, would convert the currently stated loss of \$185,395.01 to a profit to B&G of \$19,225.67 (again before calculating what if any overhead and/or profit to which Bertussis is entitled. If this were divided 20% to each of the five shareholders, the Cervinis would be entitled to be paid out a total of \$7,690.27 on this project.

Nevertheless, because the Court finds that Bertussis, on this and each of the projects, is entitled to a 10% overhead charge (see discussion infra at pg. 20), this project again winds up in the red, and thus no monies are due and owing to B&G or any shareholders on this project.

The Yonkers Saunders Office Fire Project

Bertussis was paid \$2,533,372.93 on the Yonkers Saunders Office Fire Project. Of this sum, the Court finds these were payments to B&G in the sum of \$1,646,257 and the total paid for Bertussi's separate HVAC contract was \$525,874.30; thus, leaving a balance of \$360,971.63. The Bertussi's claim that from this sum, \$113,194.51 in expenses should next be deducted. The Cervinis dispute \$82,492 of these expenses as follows:

- a) DG Construction \$35,122;

- b) Olori Grave + High Real LLC, \$2,250; and
- c) PRSM in the amount of \$45,120

In addition, the Cervinis dispute the payment of any sums to Bertussis for overhead or profit. As noted previously, and as set forth infra, the Court finds Bertussi is entitled to 10% overhead on each project.

As to the DG Construction, Olori Grave & High Real, LLC and the \$45,120 PRSM payment, the Court finds Defendants have failed to prove that these expenses should be deducted as improperly ascribed to this project or otherwise inaccurate or fraudulent. Deducting the \$113,194.51 in allowed expenses, leaves a balance of income remaining of \$247,777.12. As discussed, infra, the Court will permit Bertussis a 10% overhead charge (but not 10% profit), which in this case would total \$253,337.29. Deducting this overhead amount from that \$247,777.12 remaining balance, would mean that this project lost money to the tune of \$5,560.17.

The Yonkers Saunders Auto Project

Bertussis was paid \$645,681.67 on the Yonkers Saunders Auto Project from which the Court finds B&G was paid \$508,618 and the mechanical portion of the job cost \$60,795, leaving \$74,268.67. Of this, the Bertussis claim \$34,057.47 in expenses all of which are disputed by the Cervinis including:

- a) \$1,100 to Aquinos Pantry;
- b) \$14,845 to Donald Guterl;
- c) \$21,856 to PRSM; and
- d) \$30.51 to Bertussi employees

The main thrust of the Cervinis dispute of these expenses is the timing of the charges; i.e. that they were incurred after the job was purportedly completed and after the Cervinis had left B&G. While the Cervinis contentions are correct, without more, the credible testimony of Tom Bertussi, Donald Guterl, and Joan Bertussi, all of whom testified that the work was performed was necessary, invoiced and paid for, is not overcome.

Accordingly, these disputed expenses stand leaving \$40,211.20. Ascribing a 10% overhead charge to the job of \$58,288.61, leaves this project also with a negative balance.

The Yonkers Vive 10 GC Project

The Bertussis were paid \$296,448 on this project. B&G was paid \$242,613.01 leaving \$53,834.99 in revenue. The Bertussis claim the expenses incurred with this project were \$63,043.66, which left the project in the negative.

The Cervinis dispute \$55,016 of the \$63,043.66 in expenses claimed. Specifically, the Cervinis dispute:

- a) \$11,501 to Donald Guterl;
- b) \$24,075 to PRSM;
- c) \$19,440 to Precision Steel

Again, the primary focus for the Cervinis objections are that the work was done after the project ended and the invoices seem excessive. These amorphous, non-specific contentions are not sufficient for Defendants to meet their burden of demonstrating, by a preponderance of the evidence, that the expenses were fraudulent or inaccurate. To the contrary, the credible testimony of Mr. Guterl, Joan Bertussi and Tom Bertussi persuade this Court that these expenses are legitimate expenses of this project. Thus, after deducting all of the claimed expenses, this project likewise lands in the negative.

The Clarkstown Boiler GC Project

The Bertussis were paid \$366,611.71 on this project and B&G received \$236,520.41 of that amount, leaving a balance of \$130,091.30 against the claimed expenses of \$121,488.92, of which the Cervinis dispute \$96,892.68 including:

- a) \$8,400 to Donald Guterl
- b) \$13,405.75 to Fan Share;
- c) \$41,032 to PRSM

The Cervinis claim that these represent charges incurred after they left B&G

for work that had previously been performed or for work that was ascribable to the HVAC contract and not the GC contract.⁵

Nevertheless, again despite this speculation, the credible testimony of Donald Guterl, Thomas Bertussi and Joan Bertussi is not overcome solely by the doubts of the Cervinis. The Court finds that the claimed expenses of \$121,488.92 are legitimate expenses of this project, leaving a balance of \$8,602.38, which barely makes a dent in what would be a legitimate overhead charge of \$36,661.20. Thus, no funds are owed to B&G on this project.

The Clarkstown Auditorium Project

Bertussis was paid \$546,732.33 on this project for which B&G was paid \$471,832, leaving a balance of \$74,900.33, of which Bertussis claim \$10,228.53 in expenses, \$2,500 of which the Cervinis dispute. However, the Cervinis failed to demonstrate by a fair preponderance of the evidence that the charge should not be sustained as the only evidence and the testimony is credible testimony of Tom Bertussi.

Once the \$10,228.33 in expenses are deducted, the balance stands at \$64,672. Applying the 10% overhead charge (\$64,673.30) leaves \$9,998.70, 40% of which (or \$3,999.48) which is payable to the Cervinis and shall be used to offset the sums owed by the Cervinis to the Bertussis.

Overhead and Profit

The Cervinis argue that Bertussis is not entitled to overhead and profit. However, both Eugene and John Cervini testified that they have never worked on any projects where the Prime Contractor (in this case Bertussis) did not retain any overhead and/or profit (Tr. pp. 1914). Moreover, Thomas Bertussi testified credibly that the agreement was that Bertussis would take care of all the finances and administrative aspects of the business and retain 10% of all accepted bids as overhead (Tr. pp. 15-16, 23-24, 32-33). In addition, it stands uncontroverted that 10% overhead is standard in the construction industry.

⁵ On each of these projects, the Court notes that John Cervini signed a final lien waver and release on behalf of B&G attesting to the fact that B&G was owed no money.

On the other hand, the Court declines to award profits to Bertussis. Based on the nature of the business relationship between the parties and the testimony at trial, and despite the lack of written agreement, the court finds credible the Cervinis' testimony that all of the profits on the B&G jobs were to flow through B&G to be distributed to the B&G shareholders.

Line of Credit Interest

The Cervinis dispute an \$80,000 charge to B&G for interest on Bertussis' line of credit. The Court finds that this charge is a legitimate charge, payable to B&G. The Cervinis would be responsible for 40% of that cost, or \$32,000.

Accordingly, it is hereby

ORDERED that on the first and second causes of action, the Defendants shall pay to Plaintiffs the sum of \$739,538.04 in damages comprised of 60% of the Port Jervis and Goshen IT profits, or \$167,002.20 and 60% of the post-April 2018 disputed expenses incurred due to the Defendants' conduct. In addition, the Court awards another \$320,000 to plaintiffs, which represents 40% of the \$800,000 line of credit draw down, which was used to float various B&G jobs, and \$32,000, which reflects 40% of the interest paid on the line of credit. Thus, Plaintiffs are awarded the total sum of ONE MILLION NINETY-ONE THOUSAND FIVE HUNDRED THIRTY-EIGHT DOLLARS and 04/100 CENTS (\$1,091,538.04), plus pre-judgment interest from date of commencement of the action in accordance with the CPLR; and it is further

ORDERED that Plaintiffs shall pay to the Cervinis (which may be paid by way of an offset) the sum of \$3,999.48, reflecting their 40% share of the profit on the Clarkstown Auditorium job after all the expenses and deductions are accounted for, plus pre-judgment interest from date of commencement of the action in accordance with the CPLR; and it is further

ORDERED that Plaintiffs are directed to distribute the funds remaining in any B&G bank account, as well as any funds realized from the sale of any B&G assets, as follows:

40% towards the sums awarded to Plaintiffs herein (to be credited in favor of Defendants) and 60% to the Bertussis, after which all accounts shall be closed; and it is further

ORDERED that Plaintiffs may enter Judgment in accordance with this Decision and Order directly with the Rockland County Clerk.

The foregoing is the Decision and Order of this Court after trial of this action.

Dated: New City, New York
December 29, 2023



HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO:

All parties via NYSCEF