

19 A.D.3d 378

Supreme Court, Appellate Division,
Second Department, New York.

MALONEY CARPENTRY, INC., respondent,

v.

George BUDNICK, et al., appellants.

June 6, 2005.

Attorneys and Law Firms

Brown & Fox, P.C., New York, N.Y. (Ryan J. Whalen of counsel), for appellants.

Richard I. Goldsand, Brewster, N.Y., for respondent.

Opinion

*378 In an action to recover damages for breach of contract, the defendants appeal from a judgment of the Supreme Court, Putnam County (Sweeney, J., on judgment; Hickman, J., at trial), entered January 22, 2004, which, upon a jury verdict, is in favor of the plaintiff and against them in the principal sum of \$63,144.48.

ORDERED that the judgment is reversed, on the law, and a new trial is granted, with costs to abide the event.

If a jury charge is “ambiguous, inconsistent, erroneous, confusing, one-sided, incomplete or overly technical

a new trial *379 will be ordered if prejudice has resulted to any party” (*Smith v. Midwood Realty Assocs.*, 289 A.D.2d 391, 392, 734 N.Y.S.2d 237 [citation and internal quotation marks omitted]). “[A] primary tenet of the doctrine of substantial performance is that the extent of recovery must be limited to reflect an adjustment for those items which were not duly performed” (*Pilgrim Homes & Garages v. Fiore*, 75 A.D.2d 846, 847, 427 N.Y.S.2d 851; see *Teramo & Co. v. O'Brien-Sheipe Funeral Home*, 283 A.D.2d 635, 637, 725 N.Y.S.2d 87). The charge given on this issue was erroneous, incomplete, and ambiguous. Consequently, since the defendants were prejudiced by the charge, a new trial is required (see *Witherspoon v. Columbia Univ.*, 7 A.D.3d 702, 703, 777 N.Y.S.2d 507; *Smith v. Midwood Realty Assocs.*, *supra*; *Carefree Bldg. Products v. Belina*, 169 A.D.2d 956, 957–958, 564 N.Y.S.2d 852).

The defendants' remaining contentions are without merit.

FLORIO, J.P., SCHMIDT, ADAMS and MASTRO, JJ., concur.

Parallel Citations

19 A.D.3d 378, 795 N.Y.S.2d 911 (Mem), 2005 N.Y. Slip Op. 04547