STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

DECISION AND ORDER
Index No. 804799/2014

v.

AMERICAN MULTI-CINEMA, INC., d/b/a AMC THEATRES WEBSTER 12 (as Successor in Interest to Loews Boulevard Cinemas, Inc., f/k/a Loews Boulevard Corp. And/or Loews Theater Management Corp.)

Defendant.

Glownia, J.

Plaintiff sued Defendant for damages sustained as the result of Plaintiff's fall from a ladder while performing renovations at a property owned by Defendant. This Court granted Summary Judgment to Plaintiff on his claim that Defendant had violated Labor Law §240(1) by failing to provide an adequate safety device for Plaintiff to perform the work. That decision was reversed on appeal, and the case was remanded to this Court for a trial on the issue of liability under Labor Law §240(1). At the close of proof in the ensuing "liability only" trial, Plaintiff moved for a directed verdict pursuant to CPLR §4401. This Court reserved decision on Plaintiff's motion, and submitted the case to the jury. The jury determined that Defendant had not violated Labor Law §240(1), and rendered a "No Cause of Action" verdict. Plaintiff has

now renewed his motion for a directed a verdict pursuant to CPLR §4401, or in the alternative for an order setting aside the jury verdict and ordering a new trial pursuant to CPLR §4404(a).

Now, upon Plaintiff's Notice of Motion dated May 21, 2018, the Affidavit of Richard P. Weisbeck, Jr., dated May 21, 2018, the Affirmation in Opposition to Plaintiff's Post-Trial Motion to Set Aside the Jury Verdict dated June 20, 2018, the affirmation of John H. Kardish, Esq. Dated June 20, 2018, the transcript of the relevant portions of the trial-testimony attached to the aforesaid submissions, the oral argument heard in this Court, and upon all proceedings heretofore had herein, due deliberation having been had thereon, this court finds as follows:

1) Motion for a Directed Verdict:

New York state CPLR §4401 provides in pertinent part that,

> "Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for this motion shall be specified."

A court is required to direct a verdict when there is insufficient evidence to support the jury finding because, "there is simply no valid line of reasoning or permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at the trial." Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499 (1978).

The Plaintiff has argued that the proof at trial showed that the ladder wobbled inexplicably, which wobbling caused the Plaintiff to fall to the ground. The Plaintiff has further argued that the aforementioned proof creates a legal presumption that the ladder was not an adequate safety device as contemplated by Labor Law §240(1) and the progeny of case-law where §240(1) has been interpreted given similar circumstances. (See, Blake v. Neighborhood

Housing Services of New York City, Inc., 1 N.Y.3d 280). The Plaintiff has also claimed that the Defendant's proof at trial was not sufficient to overcome the presumption that the ladder was inadequate. The Plaintiff moved at the close of evidence, and is moving again now for a directed verdict on the basis of his claim that the evidence proves that Defendant has failed to overcome the legal presumption that the ladder provided by Defendant to Plaintiff was not an adequate safety device.

Defendant's theory of the case is that Plaintiff's failure to check, and then re-check the positioning of the ladder each time he climbed and descended the ladder to complete overhead renovations was the sole-proximate cause of the accident. Defendant has asked this Court specifically to consider Plaintiff's admission at trial that he could not recall checking the positioning of the spreader arms/locking mechanism immediately before his final ascent of the ladder in question. Defendant has argued that Plaintiff's failure to make sure the ladder was set-up properly was the sole proximate cause of the accident, therefore the Court should not direct a verdict pursuant to CPLR §4401.

The Plaintiff testified that he went up and down the ladder several times on the day of the accident. He testified that he had checked the positioning of the ladder several times, but that he could not recall having checked the spreader arms/locking mechanism immediately before going up the ladder the time that it wobbled and caused him to fall. The Defendant's expert testified that the Plaintiff's conduct, ie. the Plaintiff's failure to make sure the spreader arms were locked, and failure to maintain three points of contact on the ladder, was the only cause of the accident.

This Court finds based on Plaintiff's trial testimony, and the testimony of Defendant's expert witness, that a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident. Therefore, Plaintiff is not entitled to judgment as a matter of

law pursuant to CPLR 4401. Accordingly, the Plaintiff's motion for a directed verdict is hereby DENIED.

2) Motion to Set Aside the Verdict:

CPLR §4404(a) provides in pertinent part that,

> "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law, or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, or in the interest of justice..."

The Court of Appeals has held that a trial court may set aside a jury verdict and order a new trial if it finds that, "the evidence so preponderated in favor of the [moving party] that the verdict could not have been reached on any fair interpretation of the evidence." Lolik v. Big Supermarkets, Inc., 86 NY2d 744. Moreover, "the question of whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors." Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493 (1978). Additionally, when, as in this case, there is conflicting testimony between witnesses for the Plaintiff and witnesses for the Defendant, "it is soley within the province of the jury to determine the issue of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses. McMillan v. Burden, 136 A.D.3d 1342 (4th Dept. 2016). Also, "A trial judge may not set aside a jury verdict simply because he disagrees with it." Mann v. Hunt, 283 A.D.3d 140, 141.

This Court finds based upon its review of the evidence produced at trial, which is summarized above and will not be rehashed here, that a reasonable jury may have believed the testimony of Defendant's expert and may not have believed the version of events which they

heard as recited by Plaintiff. This Court finds that the verdict is one which "reasonable persons could have rendered after receiving conflicting evidence," and thus, that this Court "should not substitute its judgment for that of the jury." (See, McMillan at 1342). For the foregoing reasons, the Plaintiffs motion to set aside the verdict on the grounds that it is against the weight of the evidence should be and hereby is DENIED.

3)Motion to set Aside in the Interest of Justice:

Finally, Plaintiff has moved this Court to set aside the verdict and order a new trial in the interest of justice pursuant to the final phrase of CPLR 4404(a). Plaintiff has argued that the verdict should be set aside because of the misconduct of the attorney for the Defendant. Plaintiff has set forth numerous instances of the Defense attorneys alleged misconduct and characterized the conduct as "so egregious as to imperil the jury verdict, etc."

It is well settled that attorney misconduct may warrant setting aside a verdict and ordering a new trial. Be that as it may, this Court is also aware of its mandate to give great deference to the trial jury, and only to upset a jury verdict on the basis of attorney misconduct if it actually deprived the Plaintiff of a fair trial. (See, Doody v. Gottshall, 67 A.D.3d 1347).

This Court has reviewed the record including its trial notes and portions of the stenographic record and has duly deliberated on the question of whether the misconduct of defense counsel rose to the level where it wrongly deprived Plaintiff of a fair trial. This Court presided over no less than seven jury trials in the calendar year which encompassed the instant trial, and notes that many of the others have faded from its immediate memory. The instant trial, though, is outstanding among others specifically because of defense counsel's conduct, which

could be construed at times during the trial as strident, disrespectful, disobedient, incorrigible and even alarming (to the Court).

Nevertheless, the determinative question is not whether the court was alarmed, but rather, "Did the defense counsel's conduct cause the jury to render its decision based on passion rather than proof." (See, Johnson v. Lazorowitz, 4 A.D.3d 334). It bears noting that a great deal of defense counsel's objectionable conduct took place outside the earshot of the jury during sidebar conferences, or otherwise outside the presence of the jury. Though counsel's conduct was objectionable on many occasions during the trial, and even at times in the jury's presence, there is no definitive indication that the jury was improperly influenced by counsel's inappropriate conduct. It is important to note that this Court directed the jurors back to the jury room many times during some of the more heated side-bar conferences. A review of the record indicates that this procedural step was an adequate safeguard to the harmful error which might have occurred had the jurors been exposed to defense counsel's dramatic, belligerent conduct. As such, there is no basis for this Court to set aside the verdict. Accordingly, Plaintiff's motion to set aside the verdict in the interest of justice is DENIED.

SO ORDERED

DEC 07 2018

Joseph R. Glownia, J.S.C.