

Brown v Concord Nurseries, Inc.

2007 NY Slip Op 34507(U)

June 6, 2007

Supreme Court, Erie County

Docket Number: 2003-8803

Judge: Timothy J. Drury

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

RICHARD BROWN and KELLY BROWN

Plaintiffs,

VS.

**DECISION and
ORDER**

Index No. 2003-8803

CONCORD NURSERIES, INC.

Defendant.

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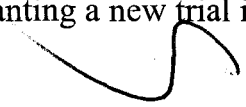
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MEMORANDUM, DECISION AND ORDER

Timothy J. Drury, J.S.C.

Plaintiff was injured when he fell from a ladder while repairing a garage door at defendant's nursery. The matter was tried in this court before a jury which returned a "no cause of action" verdict. Plaintiff has moved pursuant to CPLR section 4404 for an order setting aside the jury's verdict, and directing a verdict in favor of the plaintiff, or, in the alternative, granting a new trial in the interest of



justice. Plaintiff argues that the verdict is against the weight of the evidence which, plaintiff urges, demonstrates that defendant violated NYS Labor Law section 240(1) by failing to provide an appropriate safety device for plaintiff. Defendant responds that the verdict should not be disturbed because the jury properly adopted a reasonable view of the evidence, which, plaintiff asserts, showed that the ladder furnished by defendant did provide proper protection to plaintiff.

Now, upon the evidence adduced at trial, and the Notice of Motion to Set Aside the Verdict and Supporting Affirmation by Michael F. Perley, Esq., dated April 23, 2007, and Defendant's Affirmation in Opposition, and Memorandum of Law in support thereof, by John Wallace, Esq. Dated May 16, 2007, and upon all proceedings heretofore had herein, with due deliberation having been had thereon, this court finds as follows:

At the conclusion of this court's charge to the jury herein, the jurors were given a jury verdict sheet comprised of several questions and instructions designed to assist with, and clarify their verdict. The first instruction required the determination of whether "the plaintiffs have proven by a fair preponderance of the evidence that the defendant failed to provide, or cause to be provided, the Plaintiff, Richard Brown, with a device that provided proper protection." The jury answered "No" to question one, and concluded their deliberations as instructed. This court must limit its analysis, then, to the single issue of whether the verdict is against the weight of evidence that the ladder was an appropriate safety device pursuant to Labor Law

section 240(1).

Labor Law section 240(1) provides, in pertinent part, that all contractors and owners and their agents shall furnish safety devices (including ladders where appropriate) which give proper protection to employees hired to make repairs.

In the instant case, plaintiff's expert, Earnest Gailor testified that the ladder provided by defendant did not provide proper protection to plaintiff. He testified that the ladder was an inappropriate safety device because, among other things, the repair in question would require plaintiff to take both hands off the ladder at the same time. He stated that the ladder offered no fall protection for plaintiff in the event that he lost his balance. However, the defense's expert, John Coniglio, testified that an extension ladder is an appropriate device for performing light duty tasks at an elevated height. Moreover, both Richard Brown and his boss, Jeff Kuhn testified that the ladder in question was in proper working order both before and after plaintiff's fall. Indeed, the evidence shows that the ladder remained upright and intact even after plaintiff fell.

It is axiomatic that a jury verdict should not be set aside as long as "there is at least one fair interpretation of the evidence to support it." (Gaston v. Viclo Realty Co., 215 A.D.2d 174, 626 N.Y.S.2d 131 (1st Dept.1995)). Further, "[a] jury's verdict should not be set aside as against the weight of evidence unless it is palpably wrong and there is no fair interpretation to support the jury's conclusion... or if the verdict is one reasonable persons could have rendered after receiving conflicting evidence".

(Petroski v. Fornes, 125 AD2d 972, 973, *lv denied* 69 NY2d 608). Moreover, it [is] for the jury to weigh the conflicting evidence and credit the opinion of one expert over another. (Howe v. Wilkeson, 275 A.D.2d 876, 877). This court finds that the instant verdict is the product of the jury's decision to favor the opinion of defendant's expert, and discount that of the plaintiff's. This court determines that the verdict herein is neither palpably wrong, nor wholly irrational. Because the verdict is sufficiently supported by the proof at trial, the verdict should not be disturbed on the basis that it is against the weight of evidence.

Plaintiff also argues that the verdict should be set aside in the interest of justice. This court finds, however, that substantial justice was done at trial. Hearing no claim of newly discovered evidence or misconduct on the part of the attorneys or jurors, this court finds that setting aside the verdict would not be in the interest of justice.

For the foregoing reasons, plaintiff's motion is denied in its entirety.

SO ORDERED

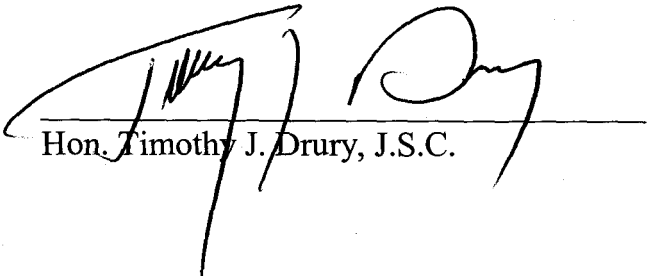
June 6, 2007

Buffalo, New York

GRANTED

JUN 07 2007

BY Carol M. Williams
CAROL M. WILLIAMS
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Hon. Timothy J. Drury, J.S.C.