SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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ROBERT MCCULLOUGH,

Plaintiff,

- v -

ONE BRYANT PARK, DURST DEVELOPMENT, LLC., TISHMAN CONSTRUCTION CORP., COMPONENT ASSEMBLY SYSTEMS, INC.,

Defendant.

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INDEX NO. 113802/2009

MOTION DATE

MOTION SEQ. NO. 008 009

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 008) 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 269, 271, 272, 273, 338, 339, 355

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 336, 337, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 353, 354, 356, 357, 358, 359

were read on this motion to/for SET ASIDE VERDICT.

Plaintiff was an ironworker who sustained ankle injuries on April 14, 2009, when he tripped and fell in a drain hole while working at the worksite at One Bryant Park, in the county, city, and state of New York. After the defendants' respective motions for summary judgment were denied and unsuccessfully appealed, a nine-day jury trial was held on October 2, 2017. The jury awarded plaintiff a total sum of $3,927,046 for the ankle injuries that included a diagnosis of reflex sympathetic dystrophy and apportioned liability as follows: 90% to defendant One Bryant Park LLC (Owner)/Tishman Construction Corp. [1], (the Bryant defendants); 5% to Component Assembly Systems, Inc. (Component), and 5% to plaintiff. The Bryant defendants in motion sequence (MS) 8, move to set aside the verdict requesting a collateral source hearing pursuant to CPLR § 4545, and arguing that the verdict did not distinguish between the liabilities of each individual defendant, among other claims. Defendant Component partially opposes the motion, and in MS 009, moves to set aside the verdict as against it as legally insufficient, against the weight of the evidence, or internally inconsistent, which the co-defendants partially object. Plaintiff opposes both motions in one submission that appears in MS 009 in the court's NYSCEF system.

[1] Defendants One Bryant Park LLC and Tishman Construction Corp. are represented by the same counsel.

Liability Issues

Defendants One Bryant Park, Durst Development Corp (Durst), and Tishman Construction were represented by the same law firm from the inception of the case through motion practice, the trial, and now in this post-trial motion. Throughout this case, these three defendants were referred to as the Bryant Defendants (*McCullough v One Bryant Park*, 132 AD3d 491[1st Dept 2015] [denying the Bryant defendants' and Component's respective motion for summary judgment]). Durst's motion for a directed verdict, which would have been granted when the motion was made, was reserved until the end of the trial to accommodate plaintiff. The motion was granted then; Durst was dismissed from the case and the caption was amended accordingly (NYSCEF doc. no. 251 - tr. 2/17-18/17, pp 518-520, 560-561, 678-680, 704).

Owner and GC (the Bryant defendants) argue that Owner should also have been dismissed from the case when Durst was dismissed from the case, because, like Durst, Owner was not liable, either under common law negligence or Labor Law § 200. As stated during the trial, Owner and GC were referred to interchangeably by all including its own counsel. Indeed, their counsel suggested using a slash to connect the two names as follows: One Bryant Park/Tishman (*id.*, p 689). The jury saw one attorney represent both Owner's and GC's interest. Neither plaintiff nor co-defendant Component had notice that the Bryant defendants would be separated as it was mentioned for the first time during the charge conference (*id.*, pp 561-562). Despite knowing the applicable law, Owner and GC chose to be so intertwined throughout the case that it is incumbent on them to undo the intertwining between themselves for the apportionment of liability.

In any event, in denying the Bryant defendants' motion for summary judgment on Labor Law § 200 and common negligence claims, the First Department stated:

> It is immaterial that [the Bryant] defendants lacked supervisory control over plaintiff's work, since his injuries arose "from the condition of the workplace ..., rather than the method used in performing the work (internal citation omitted). Further, these defendants failed to make a prima facie showing that they lacked constructive notice of the uncovered drain hole (internal citation omitted).

(*McCullough*, 132 AD3d at 491).

Contrary to the Bryant defendants' contention that Owner had no liability, the jury found as the First Department did. The jury saw and heard evidence of the condition of the mechanical room on the 7th floor where the plaintiff fell to compel a

view that the hole, filled with debris, and the discoloration of the flooring surrounding the hole, had existed for some time.

The next issue raised by the Bryant defendants, outside the intertwinement subject, is their (joint) crossclaims against Component. They claim that Component's representation that "the drain hole [that caused plaintiff to trip] is not a hole that Component was obligated to cover under the terms of its contract is especially frivolous" because Component had admitted otherwise in its brief to the First Department (NYSEC doc. no. 242 – Leiter aff, p 36). They add that the testimony of Component's foreman, John Pearson, was also frivolous because Pearson never read Component's full contract for the job (*id.* referring to NYSCEF doc. no. 250 – tr. 10/16/17, p 440). The Bryant defendants also deem as frivolous Component's arguments to the jury as to Component's work outside the contract or extra work (NYSCEF doc. no. 242, p 41).

Component's appellate brief was not an issue before this court. No mention of Component's alleged admission was raised and will not be addressed here. As to Pearson's testimony being frivolous, it is noted that the Bryant defendants had subpoenaed Pearson, as did plaintiff, to be a witness. The Bryant defendants had or should have had an idea of what Pearson's testimony would be because Pearson was deposed prior to testifying at trial (NYSCEF doc. no. 250 – tr. 10/16/17, pp 409-411). As to Component's extra work argument, the Bryant defendants had their opportunity to counter that in their cross-examination of Pearson. Thus, if the whole issue with the type of holes Component was charged to cover is frivolous and Pearson's testimony was frivolous, the Bryant defendants had a major hand in this frivolous exercise.

The Bryant defendants next argue that "[i]t was also error to instruct the jury that Component could only be liable if its maintenance obligation was so comprehensive that it displaced One Bryant Park from all maintenance . . .." The Bryant defendants do not refer to the part of the charge that form their allegation or where in the transcript this appears. A review of the charges pertaining to Component shows no verbiage that could lead one to so conclude.

The Bryant defendants argue that the jury's apportionment of just 5% of fault to plaintiff is against the weight of the evidence. It is not. The jury heard evidence of plaintiff's role in stepping over the raised threshold without looking on the floor as he stepped down; the location of the hole; and the visibility of the hole as one looked in the room. The jury heard the cross-examination of plaintiff by defendants' attorneys. Even with plaintiff's agreement with the Bryant defendants' attorney that plaintiff has "a personal responsibility to keep an eye out for [his] own safety" (NYSCEF doc. no. 242, p 43), there was sufficient evidence that the hole was not so visible as it was by the underside of a raised threshold, for plaintiff, who was looking for a coworker the room, as he stepped down to cross the doorway.

The next issue raised by the Bryant defendants is plaintiff's failure to present the photographs taken by Ralph Lamo, a worker who was with plaintiff when he fell. Plaintiff represented to the jury that Lamo had photographs of the condition of the defect and surrounding area, and that Lamo would testify. Lamo did not testify (*id.*, pp 44-45).

These objections and arguments are raised for the first time in this post-trial motion. If the absence on Lamo's photographs or using the photographs that were not Lamo's were error, these errors were not so prejudicial as the photographs used by all the parties were admitted into evidence by stipulation. Questions on the depiction of the condition of the area of plaintiff's trip and fall were asked of witnesses who were familiar with the jobsite. And the jury heard testimony from these witnesses as to whether the condition depicted in the photos were accurate.

The Bryant defendants claim that plaintiff's counsel made remarks that vilified and prejudiced them (NYSCEF doc. no. 242, pp 54-55). The claimed offensive remarks are plaintiff's counsel's "[portrayal of] plaintiff's case as a matter of life and death for plaintiff, but a mere game for Tishman" and insinuating that Tishman deprived plaintiff of his right to bring a legal claim in court against Tishman and that Tishman "threw plaintiff off the job site" after his ankle injury (*id.*, p 55). They further claim that plaintiff's counsel attacked the credibility of the Bryant defendants' counsel in front of jury and that prejudiced the Bryant defendants (*id.*, pp 56-57).

None of these isolated remarks were so prejudicial as to sway the jury from reaching the verdict based on the evidence. The jury heard plaintiff's testimony to about his employer, who was not Tishman, and why he worked at a different job site after the accident. Hence, the jury had evidence to consider rather than the isolated remark by plaintiff's attorney. Further, the jury was instructed to consider only the evidence and not the attorneys' remarks in their opening and closing statements in rendering a verdict. Considering that the jury went through nine days of trial, to say that defendants deprived or wanted to deprive plaintiff of a fair trial is a non-issue. And whether this is a life or death for plaintiff is hyperbole, which the jury can weigh. Hence these comments did not deprive defendants of a fair trial (*see Nieves v Riverbay Corp.*, 95 AD3d 458 [1st Dept 2012]).

Finally, the "attack" by plaintiff's counsel against the Bryant defendants' counsel toward the end of the trial was a singular and short exchange over whether there was a transcript to show if plaintiff had said he was "embarrassed" for his part in the accident (NYSCEF doc. no. 251, pp 229-230). This was a rare instance in the entire trial where the attorneys were in "attack" mode. The "attack" here, as represented by the appellate attorney, is an exception to the manner this trial proceeded. What the jury saw in this nine-day trial was zealous representation of

their respective clients by professional trial attorneys who were respectful and courteous toward each other, and who cooperated with each other and the court in streamlining the trial. This singular exception does not cast a negative shadow over the Bryant defendants' trial counsel.

Both Component and the Bryant defendants separately take issue with the jury's apportioning 5% of liability to Component. Component contends that there can be no support for the jury's finding of negligence on Component's part for not covering the drain, and that the finding of negligence must have come from the Bryant defendants' new theory. The Bryant defendants' attorney, at summation, told the jury that Component could be negligent since it constructed the sill that is the threshold (MS 009: NYSCEF 256 – Brody aff at ¶¶ 78-79, 81-84). Adding to this line of the alleged improper conduct by plaintiff's counsel was the hypothetical question raised as to whether a warning of the presence of a hole was necessary even though there was no evidence that the drain was installed when the threshold was built (*id.* at ¶¶ 50-51).

Component's contention makes a good point but misses facts that the jury may construe as negligence in response to the jury charge under PJI 2:10 on negligence and question 5 in the verdict sheet as related to Component's negligence. While the jury found that Component did not breach its contractual obligation to furnish and maintain temporary protection, the jury's finding of 5% fault on Component's part may be supported by some evidence not related to the threshold issue. To wit, Pearson, its foreman, testified that Component has a two-man roving team whose job it was to continually, for a twelve-month period, to contact the site safety manager by radio, to make repairs to temporary protection, which work was outside the contract (NYSCEF doc. no. 250 – tr p 443:7-19). And one photograph showed a piece of wood sticking out of the drain hole; Component's function at the job site was carpentry work.

The Bryant defendants marshal the evidence to show that Component should be more than 5% liable. The evidence they present are the testimony of John Pearson, Component's foreman, stating that Component would not cover a drain pipe and have left drains without covers; that he directed protection details and checked on the work done by his workers but did not check on the threshold Component built; and that he was not aware of any warnings about the plaintiff's accident location given by Component (NYSCEF doc. no. 242, pp 50-52).

The Bryant defendants' argument that Component's percentage of liability should be higher cannot find support as the jury found that Component did not breach its contractual obligation. And the threshold construction is a new theory thrown in toward the end of the trial. The focus of the trial was the drain hole, not the threshold, and the jury heard testimony regarding Component's duty as to covering drain holes when the drain is installed.

Damages Issues

The defendants argue that the award was excessive and against the weight of the evidence. The breakdown of the total award of $3,960,455.52 is as follows:

- future medical expenses $ 99,000
- lost earnings up to verdict date $ 705,370
- future lost earnings to age 62 (now 53) $1,000,000
- pain and suffering up to verdict date $1,000,000
- future pain and suffering $ 750,000

Component reserves the right to challenge on appeal, "the adequacy of the medical evidence on the diagnosis of reflex sympathetic dystrophy" (NYSCEF doc. no. 256 at ¶ 88). Component also takes issue with the projections for lost wages as an ironworker as conflicting with plaintiff's education and ability to do sedentary work. This argument dispenses with much of plaintiff's complaint about being debilitated by the nerve pains consistent with the diagnosis of reflex sympathetic dystrophy (RSD) also known as complex regional pain syndrome (CRPS).

Both the One Bryant Park defendants and Component argue that the causal connection between the alleged RSD suffered by plaintiff as being caused by the work-related accident is speculative. This leaves plaintiff's injury to just two ankle ligament tears and progressive arthritis. Thus, defendants conclude that the award is excessive for plaintiff's minor ankle injury.

Defendants' arguments do not take into account the testimony by plaintiff and his treating doctors, Dr. John Zboinski, a podiatrist, and Dr. Touliopolous, an orthopedist. Defendants point to specific statements by the doctors and argue the speculative connection between the injury sustained and the RSD diagnosis. However, these arguments do not divest the objective medical evidence and the subjective complaints in plaintiff's case.

The jury heard that plaintiff downplayed his injury at first, even returning to work the next day. The jury heard and saw evidence of the two surgeries and multiple medical tests plaintiff underwent; the cortisone injections and lumbar sympathetic nerve injection he had; the prescription pain medication he was given; the objective and subjective restrictions in his movement; the treating doctors' opinion that the RSD symptoms were related to the ankle injury plaintiff sustained from his fall on the seventh floor of One Bryant Park while he was working; Dr. Touliopoulos' opinion that plaintiff will experience pain from his ankle injury for the rest of his life; plaintiff's testimony on how the RSD symptoms is debilitating stopping him from working as an ironworker and from actively job hunting in other industries, including sedentary work; the doctors' prognosis that the painful syndrome would persist indefinitely; and a prognosis of an ankle fusion surgery.

In contrast, Component put before the jury that plaintiff's claimed injury and pain is unrelated to the injury sustain in this accident. Component's expert witness, a radiologist, Dr. David Fisher, testified, in sum and substance, that there is no evidence of RSD (NYSCEF doc. no. 248 – Davis tr, p155-156). Defendants claim that plaintiff's cross-examination unfairly mocked Dr. Fisher because the questions suggested that Dr. Fisher had motive to testify favorably for defendants since they hired him as an expert witness (NYSCEF doc. no. 242, pp 59-60).

The questions were proper for a cross-examination of defendants' expert. Further the jury saw Dr. Fisher's demonstration of the x-ray films, heard his explanations, and observed him as he testified. It was within the jury's provenance to assess Dr. Fisher's testimony and accept or reject such parts as the jury deems fit. The jury can choose to find Dr. Fisher's description of the X-ray to conflict with what was shown, and if fact, under the principal of *falsus in uno*, the jury rejected Fisher's testimony outright as evidenced by jury note number VIII: "We would like to strike Dr. Fischer's (Fisher?) testimony" (NYSCEF doc. no. 239).

The award of $1,000,000 for past pain and suffering for the past eight years and the $750,000 for future pain and suffering as a result of RSD symptoms, that was causally related to the injury plaintiff sustained while working at One Bryant Park on October 14, 2009, which are permanent and significantly limits plaintiff's ability to function due to the pain, does not materially deviate from reasonable compensation (*see e.g., Kutza v Bovis Lend Lease LMB, Inc.*, 131 AD3d 838 [1st Dept 2015][award for deceased plaintiff who suffered RSD increased from $100,000 to $400,000 for pain and suffering, and wife's loss of consortium claim was increased from $0 to $50,000]; *Hernandez v Ten Ten Co., 102 AD3d 431* [1st Dept, 2013] [$1,000,000 for past pain and suffering for over 8 years; $2,166,666.67 for future pain and suffering over 25.8 years for plaintiff suffering from RSD]; *Serrano v 432 Park South Realty Co.*, 59 AD3d 242 [1st Dept 2009][plaintiff suffering from RSD was $600,000 for past pain and suffering and the future pain and suffering award of $4,240,000 reduced to $2,500,000]).

Dr. Missun's estimate on the future medical expenses was for $104,392 for 27.3 years (NYSCEF doc. no. 351). The jury found plaintiff to have a life expectancy of 24.8 years (NYSCEF doc. no. 251, p775:7-9). The jury's award of $99,000 for future medical expenses reflects a reduction based on the difference in the life expectancy years. Hence, the jury's award for future medical expenses is supported by the evidence. The jury's award of $99,000 also did not stray far from Dr. Touliopoulos' estimate of $90,000 for plaintiff's life-care plan that included future visits for orthopedic care two to four times a year at $120 per visit, pain management visits, medication, and x-rays (NYSCEF doc. no. 249, pp 261-262).

The Bryant defendants argue that a collateral source hearing is required to determine what medical expenses are covered by plaintiff's insurance. The goal of a collateral source hearing pursuant to CPLR 4545 is to eliminate duplicative recovery by a plaintiff (*Andino v Mills* 2018 WL 2899137 [Ct of App June 12, 2018]). Plaintiff does not oppose a collateral source hearing as to the medical expenses. Defendants' request for a collateral source hearing for this limited purpose is granted.

Dr. Missun, who, after testifying about his methodology, concluded that plaintiff's future lost earnings are $1,058,000 for 27.3 years (NYSCEF doc. no. 250, pp 338, 365). The Bryant defendants claim that Dr. Missun's calculations was based on a flawed assumption of the number of hours plaintiff worked as an ironworker. Dr. Missun based his projection of an average of 1,787 work hours per year. The Bryant defendants claim that the accurate number of hours is 1,311 hours per year based on plaintiff's record (NYSCEF doc. no. 242, p78; NYSCEF doc. no. 250 – Missun tr – p346:4-6).

The Bryant defendants' claim here misses Dr. Missun's explanation that immediately followed his calculation of 1,311 hours per year. That 1,311 hours per year calculation was from 1986 through 1990. Adding the time frame that plaintiff returned to ironwork in 2008 to 2009, that number was stepped up to an average of 1,752 hours per year (NYSCEF doc. no. 250 – Missun tr – p346:7-12). "A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" (*Angel R. ex rel. Virginia D. v New York City Transit Authority*, 139 AD3d 590, 590 [1st Dept 2016] [internal citation omitted]; see *Foley v City of New York*, 151 AD3d 431, 431 [1st Dept 2017]). However, because the jury found plaintiff to have a life expectancy of 24.8 years, in contrast to Dr. Missun's projection of future lost earnings for 27.3 years, the award for future lost earnings shall be reduced to reflect the jury's finding of 24.8 years.

Component's argument that plaintiff could be other than an ironworker does not sway the jury's award. Had Dr. Missun based his calculations on plaintiff's prior employment in the stock market where plaintiff's earnings surpassed an ironworker's hourly wage of about $44, the estimate for future loss earnings would be much higher.

Accordingly, it is

ORDERED that defendants One Bryant Park and Tishman Construction Corp. (MS 8) and co-defendant Component Assembly Systems' (MS 9) respective motions to set aside the verdict is granted to the extent that the jury award for future lost earnings of $1,058,000 for 27.3 years shall be reduced to the amount for 24.8 years; and it is further

ORDERED that the parties furnish the court with the recalculated amount of the future lost earnings for a period of 24.8 years on October 3, 2018 at 2:30 PM; it is further

ORDERED that the branch of defendants One Bryant Park and Tishman Construction Corp.'s motion for a collateral source hearing (MS 008) is granted insofar as the matter shall be calendared for a CPLR § hearing for plaintiff's future medical expenses. The parties shall appear for a collateral source hearing on this issue on October 3, 2018 at 2:30 PM, in Part 33, located at 71 Thomas Street, New York, NY; and it is further,

ORDERED, that One Bryant Park and Tishman Construction Corp. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry,

This constitutes the decision and order of the court.

8/10/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE