Cioffi v Target Corp.

2019 NY Slip Op 31742(U)

February 19, 2019

Supreme Court, Suffolk County

Docket Number: 000674/2006

Judge: Joseph A. Santorelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER ORIGINAL

INDEX No. 000674/2006
CAL No. 200902749OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11-13-18
SUBMIT DATE 2-14-19
Mot. Seq. # 08 - MD

----------X

PETER CIOFFI and DAWN CIOFFI,

Plaintiffs,

- against -

TARGET CORPORATION, TARGET STORES, INC., WESTBURY HOLDING COMPANY, BAILIWICK DATA SYSTEMS, INC., BAILIWICK ENTERPRISES, LLC., BAILIWICK, LLC., and THE WHITING-TURNER CONTRACTING COMPANY,

Defendants.

----------X

RUBIN & LICATESI, P.C.
Attorneys for Plaintiffs
591 Stewart Avenue, Fourth Floor
Garden City, New York 11530

ZLOTOLOW AND ASSOCIATES
Trial Attorneys for Plaintiffs
270 West Main Street
Sayville, New York 11782

LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendants
One CA Plaza, Suite 225
Islandia, New York 11749

Upon the following papers numbered 1-55; read on this motion to set aside verdict; Order to Show Cause and supporting papers 1 -25; ~~Notice of Cross Motion and supporting papers ___~~; Answering Affidavits and supporting papers 26 - 41; Replying Affidavits and supporting papers 42 - 55; ~~Other ___; (and after hearing counsel in support and opposed to the motion)~~.

By motion dated November 12, 2018, defendants Target Corporation, Target Stores, Inc., Westbury Holding Company, Bailiwick Data Systems, Inc., Bailiwick Enterprises, LLC., and Bailiwick, LLC., move for an order pursuant to CPLR 4404(a):

1. Setting aside the verdict in favor of the plaintiffs and directing that judgment be entered in favor of the defendants as a matter of law; or

2. Setting aside the verdict and ordering a new trial since the verdict was against the weight of the evidence; or

3. Setting aside the verdict and ordering a new trial due to prejudicial comments made by plaintiffs' counsel during the trial.

The plaintiffs oppose this application in all respects.

OVERVIEW

On August 28 and 29, 2018, a jury trial on the issue of liability was conducted before this Court. Plaintiff Peter Cioffi, (hereinafter "plaintiff"), testified on his own behalf. The plaintiffs called Tim Sheehan, an employee of Communication Technology Services, (hereinafter "CTS"), who was the project manager on the job where the plaintiff was injured. The defendants read portions of the examination before trial of Phillip Brooks who was an employee of Whiting-Turner Contracting Co., the general contractor on the project.

On July 11, 2005, the plaintiff was employed as an Installation Foreman at a Target store located in Westbury, New York, that was being remodeled. He was working the 11:00 p.m. to 7:00 a.m. shift finishing the installation of the paging system in the pharmacy stockroom. The plaintiff was using a scissor lift provided by CTS to elevate to the location where the work was to be done. When he finished his work the plaintiff lowered the scissor lift and drove it out of the pharmacy stockroom. Once outside the stockroom, the plaintiff realized that he had left his tool belt on an elevated pipe where he had been working. The plaintiff did not want to move the scissor lift back into the pharmacy stockroom because the "joystick" was a "little worn" and did not have the "exact control" it should have which had caused him on the way into the room and on the way out of the room to "bang" into the door and dent it.

Instead, the plaintiff took a ladder that he had seen in the stockroom, (which did not belong to CTS), raised it and attempted to get his tool belt. While on the ladder it "kicked out" and he fell to the ground.

On direct examination the plaintiff was asked:

> Q. All right. And when you decided to use the ladder, why did you decide to use the ladder?
>
> A. It would be quicker. I wouldn't have to do anymore damage to the door, and it just – I just decided it would be the easiest way to do it. It would be up and down and out the door instead of trying to squeeze it back in and squeeze it back out and do some more damage to the door, and I just didn't want to do anymore damage.

Tim Sheehan testified, *inter alia*, that the decision to use a scissor lift or ladder was up to the worker as long as it was safe. CTS had their own ladders on site that were available to the plaintiff if needed. The plaintiff also acknowledged that his employer provided him with safe equipment on the job site.

The jury returned a verdict concluding that the defendants breached their statutory duty under Labor Law 240 by not furnishing the plaintiff with equipment to give him proper protection in the performance of his work and that the breach of that duty was a substantial factor in causing injuries to him. The jury further concluded that the plaintiff's conduct was not the sole proximate cause of the accident and that he was not a recalcitrant worker.

THE DEFENDANTS' MOTION TO SET ASIDE THE VERDICT

The defendants contend that the plaintiffs have failed to make out a *prima facie* case of a Labor Law 240(1) violation. Moreover, the plaintiff's own actions in failing to utilize the safety equipment issued by his employer was the sole proximate cause of the accident. The defendants note that the trial record is devoid of evidence that the plaintiff was not provided with available safety devices or that he did not know where to find them or that he did not have access to them. In addition, Sheehan testified that CTS company policy directed its workers to only use CTS equipment on job sites and that policy was communicated to its employees at meetings where the plaintiff was present.

Finally, the defendants claim that counsel for the plaintiffs prejudiced the jury by alluding to defense counsel's representation of Sheehan at his pretrial deposition.

In opposition, the plaintiffs argue that the defendants' arguments were rejected by the Appellate Division Second Department in a prior appeal of a decision on a motion for summary judgment. Further, the defendants have not met the standard for setting aside the verdict pursuant to CPLR 4404(a). The plaintiffs contend that the defendants' argument regarding the aforementioned comments made by counsel for plaintiffs during the trial is waived because the defendants did not seek a mistrial prior to the verdict.

> "CPLR 4404(a) provides, in relevant part, that '[a]fter 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' (CPLR 4404[a]). The Court of Appeals has recognized that the setting aside of a jury verdict as a matter of law and the setting aside of a jury verdict as contrary to the weight of the evidence involved two inquiries and two different standards (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498). For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, it must find that there is simply no valid line of reasoning and permissible inferences which could possibly lead . . . to the conclusion reached by the jury on the basis of the evidence presented at trial (*id.* at 499). However, [w]hether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors (*Scalogna v Osipov*, 117 AD3d 934, 935). When a verdict can be

> reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (*Scalogna v Osipov*, 117 AD3d at 935, quoting Handwerker v Dominick L. Cervi, Inc., 57 AD3d 615, 616). 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 on any fair interpretation of the evidence (Costa v Lopez, 120 AD3d 607, 607 see Echeverria v MTA Long Is. Bus. Auth., 100 AD3d 588, 589). Thus, rationality is the touchstone for legal sufficiency, while fair interpretation is the criterion for weight of the evidence (*see Nicasatro v Park*, 113 AD2d 129, 135). Where a court makes a finding that a jury verdict is not supported by sufficient evidence, it leads to a directed verdict terminating the action without resubmission of the case to a jury (*id.* at 132). Where a court finds that a jury verdict is against the weight of the evidence, it grants a new trial (*see id.*)"

(Ramirez v Mezzacappa, 121 AD3d 770, 772; see also, *Loretta v Split Development Corp.*, __AD3d__ [2d Dept. January 16, 2019]).

Here there is simply no valid line of reasoning and permissible inferences which could possibly lead to the conclusions reached by the jury on the basis of the evidence presented at the trial. The evidence adduced at trial clearly established that the plaintiff failed to utilize safety equipment provided at the job site by CTS which was available to him. If for whatever reason the plaintiff did not want to move the scissor lift back into the pharmacy stock room to retrieve his tool belt, (which he left on an elevated pipe), CTS ladders were available, on site and he knew that they were there and could have been used by him to get the tool belt. Instead, the plaintiff chose to use a ladder that was just lying there which he knew did not belong to his employer. As such, the plaintiff's own negligence was the sole proximate cause of his injury (see, Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39-40 [2004]). Contrary to the plaintiffs' contention, the decision of Appellate Division in Cioffi v Target Corp., 114 AD3d 897 does not preclude this finding. The last sentence of the decision of the Court states:

> "We decline the plaintiffs' invitation to search the record and award them summary judgment on their Labor Law § 240 (1) cause of action, as there are triable issues of fact, inter alia, as to whether the injured plaintiff's own conduct was the sole proximate cause of his injuries."

(*Id.* at 899)

Accordingly that branch of the defendants' motion which seeks to set aside the verdict and direct that judgment be entered in favor of the defendants as a matter of law is granted.

The balance of the defendants' motion is denied as moot.

The foregoing shall constitute the decision of the Court.

Submit judgment.

Dated: Suffolk County, New York
February 19, 2019

HON. JOSEPH A. SANTORELLI
J.S.C.