

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D14506
C/hu

_____AD3d_____

Argued - October 27, 2006

ROBERT W. SCHMIDT, J.P.
WILLIAM F. MASTRO
STEVEN W. FISHER
MARK C. DILLON, JJ.

2005-01675
2005-01913

DECISION & ORDER

Kisnet Brooks, respondent-appellant, v Maintenance Service Resources, Inc., defendant third-party plaintiff-appellant-respondent; Allied Exterminating, third-party defendant-appellant-respondent.

(Index No. 49128/97)

Rayo and Fontanelli, P.C., Brooklyn, N.Y. (Mark J. Rayo, Louis A. Badolato, and Brian Isaac of counsel), for respondent-appellant.

Charles J. Siegel, New York, N.Y. (Peter E. Vairo of counsel), for defendant third-party plaintiff-appellant-respondent.

Leahey & Johnson, P.C., New York, N.Y. (Peter James Johnson, Peter James Johnson, Jr., James P. Tenney, Kimberly Schirripa, and Joanne Filiberti of counsel), for third-party defendant-appellant-respondent.

In an action to recover damages for personal injuries, (1) the third-party defendant appeals, and the defendant third-party plaintiff separately appeals, as limited by their respective briefs, from so much of an amended order of the Supreme Court, Kings County (Bunyan, J.), dated January 24, 2005, as, after a jury verdict, inter alia, awarding the plaintiff damages in the sums of \$450,000 for past pain and suffering, \$740,000 for future pain and suffering, \$287,000 for past lost earnings, and \$1,000,000 for future lost earnings, denied, in part, those branches of their separate motions

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which were pursuant to CPLR 4404(a) to set aside the jury verdict and for judgment as a matter of law, or, alternatively, to set aside the jury verdict as against the weight of the evidence and for a new trial on the issue of damages, or to reduce the damages for past pain and suffering and future pain and suffering, and the plaintiff cross-appeals, as limited by her brief, from so much of the same amended order as granted the motions of the third-party defendant and the defendant third-party plaintiff to the extent of reducing the damages for past lost earnings to the sum of \$197,753.54, and granting a new trial on the issues of damages for past pain and suffering, future pain and suffering, and future lost earnings unless the parties stipulated to reduce the damages for past pain and suffering from the sum of \$450,000 to the sum of \$175,000, the damages for future pain and suffering from the sum of \$740,000 to the sum of \$300,000, and the damages for future lost earnings from the sum of \$1,000,000 to the sum of \$395,506.80, and (2) the plaintiff also appeals from an order of the same court dated December 23, 2004.

ORDERED that the appeal from the order dated December 23, 2004, is dismissed, without costs or disbursements, as that order was superseded by the amended order dated January 24, 2005; and it is further,

ORDERED that the appeals and cross appeal from the amended order dated January 24, 2005, are dismissed as academic, without costs or disbursements, in light of our determination of an appeal and cross appeal from an interlocutory judgment of the Supreme Court, Kings County, dated June 28, 2005 (*see Brooks v Maintenance Serv. Resources, Inc.*, _____AD3d_____ [Appellate Division Docket No. 2005-06455, decided herewith]).

SCHMIDT, J.P., MASTRO and DILLON, JJ., concur.

FISHER, J., concurs to dismiss the appeal from the order dated December 23, 2004, on the ground that that order was superseded by the amended order dated January 24, 2005, and to dismiss the appeals and cross appeal from the amended order dated January 24, 2005, as academic, with the following memorandum:

In light of my dissent from this court's determination of an appeal and cross appeals from an order of the Supreme Court, Kings County, dated February 10, 2006 (*see Brooks v Maintenance Serv. Resources, Inc.*, _____AD3d_____ [Appellate Division Docket No. 2006-02155, decided herewith]), I concur to dismiss the appeal from the order dated December 23, 2004, on the ground that that order was superseded by the amended order dated January 24, 2005, and to dismiss the appeals and cross appeal from the amended order dated January 24, 2005, as academic, as there should be a new trial on damages.

ENTER:



James Edward Pelzer
Clerk of the Court