

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

D36167
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_____AD3d_____

Argued - September 10, 2012

PETER B. SKELOS, J.P.
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2011-05683

DECISION & ORDER

Stephen J. Danseglio, et al., appellants, v Jemval Corp., et al., respondents, et al., defendant.

(Index No. 14291/06)

Favata & Wallace LLP (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn], of counsel), for appellants.

Ptashnik & Associates, LLC, New York, N.Y. (Richard M. Fedrow and Robert E. Fein of counsel), for respondent Jemval Corp.

Cheryl Kitton, Bellmore, N.Y., for respondent Vincent Contracting and Dismantling Service, Inc.

In an action, inter alia, to recover damages for injury to property, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (K. Murphy, J.), entered April 20, 2011, as granted those branches of the separate motions of the defendants Jemval Corp. and Vincent Contracting and Dismantling Service, Inc., which were pursuant to CPLR 4404(a) to set aside, as contrary to the weight of the evidence, a jury verdict on the issue of liability finding the defendant Jemval Corp. 75% at fault and the defendant Vincent Contracting and Dismantling Service, Inc., 20% at fault in the happening of the occurrence, and on the issue of damages finding that the plaintiffs sustained damages in the principal sum of \$1.2 million, and directed the dismissal of the complaint insofar as asserted against those defendants.

ORDERED that the order is modified, on the facts, (1) by deleting the provision thereof granting those branches of the separate motions of the defendants Jemval Corp. and Vincent Contracting and Dismantling Service, Inc., which were pursuant to CPLR 4404(a) to set aside the

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verdict on the issue of liability as contrary to the weight of the evidence, and substituting therefor a provision denying those branches of the motions, and (2) by deleting the provision thereof directing the dismissal of the complaint insofar as asserted against the defendants Jemval Corp. and Vincent Contracting and Dismantling Service, Inc., and substituting therefor a provision granting a new trial on the issue of damages; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the plaintiffs.

Contrary to the Supreme Court's determination, it cannot be said that the jury's verdict on the issue of liability could not have been reached on any fair interpretation of the evidence. Thus, the court should have denied those branches of the separate motions of the defendants Jemval Corp. and Vincent Contracting and Dismantling Service, Inc. (hereinafter together the moving defendants), which were pursuant to CPLR 4404(a) to set aside the verdict on the issue of liability as contrary to the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Nicastro v Park*, 113 AD2d 129, 132-134). "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Jean-Louis v City of New York*, 86 AD3d 628, 629 [internal quotation marks omitted]).

However, the Supreme Court properly granted those branches of the moving defendants' separate motions which were pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages as contrary to the weight of the evidence. Nonetheless, when a determination is made that a factual conclusion is contrary to the weight of the evidence, the result is "merely a new trial," and not a final judgment (*Cohen v Hallmark Cards*, 45 NY2d 493, 498; *see* CPLR 4404[a]). Accordingly, instead of directing the dismissal of the complaint insofar as asserted against the moving defendants, the Supreme Court should have granted a new trial on the issue of damages.

SKELOS, J.P., LEVENTHAL, CHAMBERS and LOTT, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court