Bergstrom v Plaza Construction
2003 NY Slip Op 30157(U)
October 3, 2003
Supreme Court, New York County
Docket Number: 0104920/2001
Judge: Ralph A. Boniello
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RALPH BODIELLO III, Justice   PART 42

Andrew Bergstrom & Cathleen Bergstrom
Plaintiffs

- v -

Plaza Construction, 56th Street Associates, DCM Erectors and Smith Equipment
Defendants

INDEX NO. 104920/01

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED
OCT 23 2003

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

SEE ATTACHED DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______

Dated: 10/3/03

HON. RALPH BODIELLO III J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 2]

STATE OF NEW YORK - SUPREME COURT
COUNTY OF NEW YORK

ANDREW BERGSTROM and
CATHLEEN BERGSTROM

Plaintiffs,

-against-

Index No. 104920

PLAZA CONSTRUCTION, 56''' STREET
ASSOCIATES, DCM ERECTORS, and
SMITH EQUIPMENT

Defendants.

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DECISION & ORDER

Boniello, III., J.

The Plaintiffs, Andrew Bergstrom and Cathleen Bergstrom, move to set aside the jury verdict in the above matter pursuant to CPLR § 4404 (a) and directing that judgment be entered in favor of the Plaintiffs as a matter of law, or in the alternative, ordering a new trial on the grounds that the jury verdict was contrary to the weight of the evidence and in the interest of justice.

Plaintiff, Andrew Bergtrom, brought suit against Defendants for injuries he sustained as a result of a "flashback" explosion that occurred while he was attempting to light a cutting torch. Following a jury trial, a verdict of no cause of action was returned against the Plaintiff. The jury determined, as a threshold matter, that Defendant Smith Equipment's cutting torch was not defective and that neither Defendants Smith Equipment, Plaza Construction nor 56th Street Associates were negligent. Plaintiffs assert that the jury's verdict was inconsistent and against the weight of the evidence and was the result of errors or confusion with certain portions of the jury charge.

A Motion to Set Aside a Jury Verdict should not be granted unless the jury could not have reached the verdict based upon any fair interpretation of the evidence (*Lolick* v *Big V Supermarkets, Inc.*, 86 NY2d 744 [1995]; *Root* v *Di Raddo*, 302 AD2d 987 [4th Dept 20031). Further, a court should be guided by the rule that if a verdict is one which reasonable persons could have rendered after receiving conflicting evidence, a court should not substitute its judgment in place of the jury's *(Wilsonv Mary Imogene Bnssett Hosp.*, 2003 NY AppDiv LEXIS 7899 [4th Dept 20031; *Hizam* v *Mossn, 265* AD2d 873 [4th Dept 19991; *Harris v Armstrong*, 97

AD2d 947 [4th Dept 19831). While great discretion and caution are entrusted with the trial court in malting decisions surrounding a motion to set aside a jury's verdict, a court must exercise due caution and restraint when exercising its power to disrupt the sphere that the jury plays in the adjudication of civil matters (*Rudddock* v *Happell*, 2003 NY AppDiv LEXIS 7871 [4th Dept 20031; *Diglio* v *Gray Dorchester Assocs.*, 255 AD2d 911 [4th Dept 19981).

Plaintiffs assert that there was uncontroverted evidence establishing that the cutting torch was defectively designed because it was manufactured without an integrated flashback arrestor and that a properly designed cutting torch with an integrated flashback arrestor would eliminate or substantially reduce the hazard posed by a flashback. Plaintiffs provided expert testimony from Dr. Jeffrey Ketchman who opined that a cutting torch which is manufactured without an integrated flashback arrestor is defective and John Nelson who testified that flashback arrrestors could have easily been integrated into the cutting torch and would eliminate or at least substantially reduce the hazard posed by a flashback. Under cross-examination, Dr. Ketchinan testified that there were approximately twelve manufacturers of cutting torches without flashback arrestors. Further, Mr. Nelson conceded on cross-examination that flashback arrestors can be the cause of flashbacks. Defendant Smith's Director of Engineering, Duane Overvaag, also testified that there were dangers in integrating a flashback arrestor into a cutting torch. The conflicting testimony on the issue as to whether the failure to integrate flashback arrestors constituted a defective design was properly placed before the jury to resolve.

Additionally, it was undisputed that the Plaintiff, Andrew Bergstrom ,did not "purge" the lines prior to lighting the cutting torch. Defendant Smith Equipment asserts that the failure to purge the lines led to a mixed gas situation which caused the explosion. Plaintiff, Andrew

Bergstrom, testified on direct examination that he had no training regarding purging, however, under cross examination, he conceded that he was taught about purging while learning the trade at BOCES. He also testified that he was aware of the potential for mixed gas and that the availability of reverse flow check valves for the cutting torch could prevent a mixed gas explosion. Nonetheless, he stated that he continued, even after the accident, to use Defendant Sinith Equipment's cutting torch without purging the lines prior to lighting and without using reverse flow check valves.

The Plaintiffs also complain that portions of the Court's jury charge were in error and/or confusing to members of the jury. Specifically, Plaintiffs assert that the charge pertaining to section 241 (6) of the Labor Law did not properly designate subcontractors, their agents and employees as a basis for vicarious liability against either the owner and/or general contractor. Although the sub-contractors were not mentioned by name in the charge, the charge clearly set forth the applicable sections of 23-1.25 of NYCRR and stated that the owner is liable for the failure of a general contractor or subcontractors to use reasonable care. The charge then went on to detail the applicability of section 23-1.25 to this case. The jury was not precluded from considering the negligence of subcontractors in determining whether the owner and/or general contractor were negligent. In addition, the Plaintiffs also claim that there was no mention of a design defect in the jury charge. The Court finds that assertion to be without merit. Further, the Plaintiffs claim that the charge was confusing since the subject matter of the questions presented in the jury verdict sheet did not follow that of the jury charge. The Court read each question to the jury and explained the procedure as to how to answer and how to proceed from each question after the answer. The questions were clear, straightforward and self explanatory.

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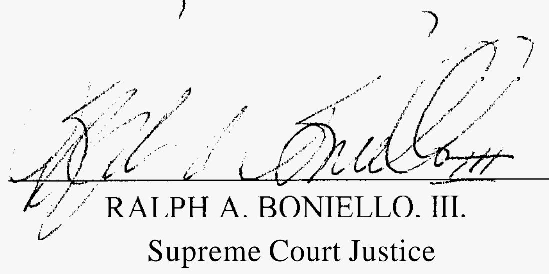
The Court finds that the Plaintiffs have failed to meet their burden that the preponderance of evidence in support of Plaintiffs' position was so great that the jury verdict could not have been reached upon a fair interpretation of the evidence or the result of errors or confusion with certain portions of the jury charge. Nor do the facts herein warrant setting aside the jury verdict in the interests of justice.

Accordingly, the Plaintiffs' motion seeking to set aside the jury verdict in the above matter is denied in its entirety.

This Decision shall constitute the Order of the Court.



RALPH A. BONIELLO, III.
Supreme Court Justice

Dated: October 3, 2003
New York, New York