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

PRESENT: ALICE SCHLESINGER PART IA Part 16

0124269/2000

MASSIE, ROBERT J. DR.
VS
CARNEGIE HALL

INDEX NO. _____

MOTION DATE _____

SEQ 3

MOTION SEQ. NO. _____

VACATE OR MODIFY AWARD

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAY 02 2005 MAY 04 2005

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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ROBERT J. MASSIE, JR.

Plaintiff,

-against-

Index No. 124269/00
Motion Seq. No. 003

CARNEGIE HALL CORP. and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

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CARNEGIE HALL CORP. and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third-Party Plaintiffs,

-against-

STOKES INDUSTRIES, INC.,

Third-Party Defendant.

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SCHLESINGER, J.:

Between December 6 and December 17, 2004, this Court with a jury, heard the case of *Robert J. Massie, Jr. against Carnegie Hall Corp. and Tishman Construction Corporation*, together with the third-party action of *Carnegie Hall and Tishman against Stokes Industries, Inc.* Earlier in the proceedings partial summary judgment, pursuant to §240(1) of the Labor Law had been awarded to Mr. Massie. Therefore, the jury hearing the case was to decide two issues, damages for the injuries the plaintiff sustained to his face and back and liability vis-a-vis the third party.

Mr. Massie was a union employee of Schiavone Construction, who was hired by defendant Tishman, the construction manager on a Carnegie Hall expansion job. He

operated a forklift at the site. The work he was doing, at the time of the accident, was excavation work about 60 feet below the basement level.

The accident occurred on August 22, 2000 around one o'clock in the afternoon. Massie was operating the forklift when it left the platform it was partially on and crashed down, to a distance of about 25 feet. His face crashed into the steering wheel and his body banged into other structures. He was immediately taken by ambulance to Cornell Medical Center where he had extensive surgery performed on his face that evening. Soon after his release from the hospital, he began experiencing pain in his lower back.

The jury awarded him $500,000 for past pain and suffering, $1.5 million dollars for future pain and suffering for 42.7 years, (his date of birth is February 17, 1971), and $500,000 for future medical expenses. There was no claim made for lost earnings.

Stokes Industries was the entity that contracted with Schiavone to design and build the material hoist, the hoist that failed. The parties stipulated that the failure was caused by a separation at the point of attachment of the piston rod and cross tube.

Tishman's counsel argued two theories of liability against Stokes. They were product defect and common law negligence. They called an expert, Irving Ojalvo, a licensed professional engineer, who opined that the collapse was due to an over load of an under designed system.

They also heard from Van Stokes, the principal of Stokes and designer of the hoist. He testified as both a fact witness and an expert witness. It was his position that the hoist, as designed by him, was safe as it included among other features safety latches. However, he also testified that Schiavone, who installed the hoist opted not to include the latches, as they believed it would slow down the work. Further, he stated that two weeks

before the accident, Schiavone workers had removed the piston from the hoist improperly, by banging out the pins connected to the rod.

As to the negligence claim against Stokes, counsel for Tishman argued that Stokes knew that the hoist was dangerous without the safety latches, but failed to warn those in charge. Stokes' counsel countered that Tishman, the people who were in charge had a presence at the job site in the person of Roy Barnaby, who acknowledged the absence of the latches at the site. Further, Tishman's contract with Schiavone put them in charge of inspecting the job site and keeping it safe.

I charged the jury on "superseding cause," to the effect that if the jury found that Schiavone purposely did not install the latches, that could absolve Stokes of any liability. That is what the jury found, that Stokes was neither negligent, nor had they defectively designed the hoist.

Before the Court now is a motion by third-party plaintiffs pursuant to CPLR §4404(a) and 5501© to reduce the awards for pain and suffering and for medical expenses, to vacate the jury's determination that Stokes was free of any negligence, pursuant to CPLR §5041, to order a 50-B hearing, pursuant to CPLR §4545© to order a collateral source hearing regarding future medical expenses, and finally to order a new trial for allegedly erroneous rulings made by the Court. Each part of the motion is denied, with the exception of directing a new trial on damages, unless plaintiff accedes to a reduction in future medical expenses to the amount his counsel requested based on the evidence presented or $237,000.

As to pain and suffering, I do not find that the $500,000 for past and $1.5 million for future, deviates from what is considered reasonable compensation. As referred to earlier,

Mr. Massie suffered serious injuries to two parts of his body, his face and his lower back. Beside calling experts in the fields of orthopedics and radiology, he also called his treating physicians. First, Dr. Noel Fleischer, an internist and neurologist testified to his patient's permanent back injuries, which included a herniated disc at L5-S1, and other disc bulges at L2-L3, L3-L4, and L4-L5. This caused Massie numbness, chronic pain and stiffness. His prognosis according to Dr. Fleischer and Dr. Thomas Kolb, a Board Certified radiologist who also testified, was poor and they opined his symptoms would get worse with age.

Mr. Massie, who impressed the Court with his candor and honesty, testified that he could no longer participate in the various sports activities he had engaged in before the accident. He was 29 when it happened. He was out of work for six months. Since returning to work, he has been assigned to only light work. Because of his inactivity, he has gained 50 pounds.

As to his facial injuries, his treating plastic surgeon testified. Dr. John Sherman described the massive injuries Massie suffered. This included tripod fracture of the left orbit, left vertical fracture through the maxilla, depressed left zygomatic arch fracture and depressed left tolerol arbitral wall fracture. The extensive surgery included the placement of three permanent titanium plates, held in place with screws, in his face.

Thus, even though Dr. Sherman opined that he thought his surgery had achieved excellent results, Mr. Massie was left with permanent numbness to his left eye and cheek resulting in increased sensitivity to cold which causes headaches and difficulty sleeping. He also has permanent facial scars and permanent facial deformity.

Therefore, despite to some extent, Mr. Massie disparaging his own suffering, it was clear that he is not the same man he was before the accident and that he will continue to

experience the serious effects of the accident throughout the rest of his anticipated long life.

As for the insufficiency of evidence claimed by moving counsel, I completely disagree. Stokes' testimony was credible and made sense. Beyond that, it was essentially corroborated in its major details by many witnesses called to testify, witnesses in a position to know from working at the job site. These included Michael D. Buono, the individual who ran the air compressor, Stanley Lucas, the super on the job, and Anthony Del Viscovo, the project manager and a trained engineer. These were all employees of Schiavone. The latter two, with the most knowledge of the hoist and the issue of the safety latches, were called to the stand by third-party defendant Stokes, with virtually no questioning by counsel for Tishman.

It is clear that these men from Schiavone, albeit reluctantly, acknowledged that the safety latches were in the design by Stokes but were not installed by their employer Schiavone until after the accident. They all testified that they believed the installed hydraulic system was all that was needed for safety on the site. But they also confirmed what Stokes testified to, that pressure to get the job done, resulted in bringing extra pumps to the site and working harder and faster.[1] The jury obviously believed it was Schiavone, with the implicit knowledge of Tishman, that was responsible for the collapse of the hoist. If that belief was not irresistible, it was certainly understandable.

Further, as to my allegedly erroneous evidentiary decisions, moving counsel disingenuously suggests, without submitting the record, that it was my admission of

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[1]Despite the absence of any significant portion of the record in the moving papers, I secured and reviewed the trial record.

hearsay testimony from Stokes on the issue of safety latches that was determinative to the verdict. As alluded to above, this acknowledgment by employees of Schiavone that they were aware of the safety latches and the decision not to install them was repeatedly brought out throughout the trial. First, it was elicited via the examination of Stokes by moving counsel for Tishman, as well as reading from Stokes' deposition. Then it was brought out by Stokes' counsel when he called Lucas and Del Viscovo to the stand. Therefore, even if it was error to have Stokes, when he was recalled, go into further explicit details of these conversations with these men, which I do not believe it was, it was old news by then. The jury had already heard it implicitly, if not explicitly from the men themselves.

Finally, I also find no necessity for either a 50-B hearing or a collateral source one. As to the former, I will entertain proposed judgments and counter judgments. As to the latter, collateral source is not an issue here with respect to future medical expenses. Since Mr. Massie's medical bills were all paid by Worker's Compensation which represents a repayable lien, no interrogatory was presented to the jury, and no jury award was made, with respect to medical expenses incurred through the date of the trial.

This decision constitutes the order of the Court. The parties are to submit proposed judgments consistent with it.

Dated: May 2, 2005
MAY 02 2005

Alice Schlesinger

J.S.C.
ALICE SCHLESINGER