

Bayon v Kutner

2006 NY Slip Op 30825(U)

July 5, 2006

Supreme Court, Nassau County

Docket Number: 1231/04

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 22**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**ROBERT P. BAYON and KARLA G. BAYON,
Plaintiffs,**

**Motion Sequence # 0J2
Submitted April 17, 2006**

-against-

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**HARRY H. KUTNER, JR., ESQ. and THE LAW
FIRM OF HARRY H. KUTNER,
Defendants.**

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation In Opposition.....	2
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Requested Relief

Defendants, HARRY H. KUTNER JR. ESQ. and THE LAW FIRM OF HARRY H. KUTNER, move for an order, pursuant to CPLR §4404(a), setting aside the jury verdict in favor of plaintiffs, ROBERT P. BAYON and KARLA G. BAYON, as against the weight of the evidence or, in the alternative, granting defendants a new trial based upon certain errors made during the course of the trial and because the jury verdict is contrary to the weight of the evidence Plaintiffs oppose the motion, which is determined as follows:

Background

The trial of this legal malpractice action proceeded before the undersigned on January 30 and 31 and February 1, 2006. Prior to trial, the defendant's conceded their fault with respect to the legal malpractice claim and KUTNER acknowledged that he, as plaintiffs attorney, marked the case off the trial calendar and failed to restore it within one (1) year as required by CPLR §3404. Therefore, plaintiffs underlying claims against Sara Nardella, Michael Nardella and Nardella Contracting Co., Inc., were dismissed. Said claims involved §240(1) of the New York State Labor Law wherein plaintiffs alleged that said law was violated when ROBERT P. BAYON fell more than thirteen (13) feet from a plank being used as a scaffold during the renovation of the single-family home owned by Michael and Sara Nardella.

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care. See, *Briggs v Berk*, 284 AD3d 423, 726 NYS2d 690 (2nd Dept. 2002); cf., *Mendoza v Schlossman*, 87 AD2d 606, 448 NYS2d 45 (2nd Dept. 1982). New York generally subscribes to the view that the value of the underlying (usually lost) claim is the measure of damage in a legal malpractice action. *Alva v Hurley, Fox, et al*, 156 Misc 2d 550, 593 NYS 2d 728 (Sup. Rockland, 1993) citing, *inter alia*, *Campagnola v Mulholland*, 76 NY2d 38, 556 NYS2d 239 555 NE2d 611 (C.A. 1990); *Voth v McEachen*, 181 NY 28, 73 NE 488 (C.A. 1905); 76 NY Jur.2nd, Malpractice, § 67. Given

that defendants had conceded fault in the malpractice action, the trial of this case only concerned the merits of the underlying litigation— the case within the case.

New York Labor Law §240, entitled "Scaffolding and other devices for use of employees", provides as follows:

1. All contractors, and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law §240(1) imposes absolute liability on a contractor or owner who is not exempt from the section and liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. An injured's contributory negligence is not a defense to a claim based on Labor Law §240(1) and the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices. See, *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (C.A. 1993); *Blake v Neighborhood Hous. Servs. Of NY City*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (C.A. 2003).

Plaintiffs contended that Michael and Sara Nardella were not entitled to the exemption provided to owners of one and two family homes, who contract for but do not direct or control the work, as set forth in Labor Law §240(1), because they did direct and control the work at their home. Indeed, plaintiffs contended that Nardella Contracting Co., Inc., was the general contractor on the job. In contrast, defendants contended that neither

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Michael nor Sara Nardella directed or controlled the work being performed at the time of plaintiff's accident and that Nardella Contracting Co., Inc., was not the general contractor for the work.

Two questions of fact were presented to the jury which unanimously found that (1) Nardella Contracting Co., Inc. acted as the general contractor on the work performed at the Nardella home, and (2) that Michael Nardella, directed or controlled the work being performed at the job site. Therefore, the defendants in the underlying action were not entitled to the exemption provided under the statute and were absolutely liable for plaintiffs' injuries in the underlying action. Thus, but for the negligent actions of defendants here in, the plaintiffs would have prevailed.

On the motion to overturn the jury verdict, defendants contend that the evidence presented at trial does not support the jury verdict. Defendants argue that, even if Nardella, the homeowner, did much of the work himself and acted as his own general contractor, to be held liable on Labor Law §240(1), it must be demonstrated that Michael Nardella directed or controlled the work of the carpentry contractors involved at the time of plaintiff's accident, which has not been demonstrated in the case at bar. Moreover, defendants argue that insufficient evidence was presented at trial to suggest that Nardella Contracting Co., Inc., hired any of the contractors on the job or ordered or supplied any materials for the job. Defendants contend that Nardella Contracting Co., Inc. was not the general contractor on the job and the jury verdict is not supported by sufficient evidence.

In opposition to the motion to set aside the jury verdict, counsel for plaintiffs points out that the jury rejected the evidence presented by the defendants and favored the plaintiffs' version of events. The transcript of the proceedings supports the jury's finding

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that both Michael Nardella and Sal Nardella, his brother, directed the work on the entire job and that it was their decision to supply only wood for the scaffolding at the job rather than safer metal scaffolding. Moreover, counsel for the plaintiffs points out that the credibility of Michael Nardella left much to be desired. Indeed, he admitted that, although he was experienced in construction and his brother had a home construction company, they never filed a building permit, they never filed plans and they never obtained a Certificate of Completion. Moreover, plaintiffs assert that defendant KUTNER's failure to take the stand, which resulted in a missing witness charge, had significant ramifications. As discussed above, in a legal malpractice case, the plaintiff must show that, but for the negligent conduct of the defendant, he would have prevailed in the underlying matter. It is the Court's belief that the defendants' tactic was to concede liability but refuse to testify, making it extremely difficult to prove the underlying case and which justified the missing witness charge. "Where one party to an action, knowing the truth of a matter in controversy and having the evidence in his possession, omits to speak, every inference against him warranted by the evidence may be considered." *Farrell v Labarbera*, 181 AD2d 715, 581 NYS2d 226 (2nd Dept. 1992). It is well established that a party's failure to produce a material witness who is in his control may be considered by the jury in assessing the strength of evidence offered by the opposite party which could have been controverted by the missing witness. See, *Marine Midland Bank v Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 361, 405 NE2d 205 (C.A. 1980).

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The Law

CPLR §4404(a) provides:

After 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, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

It is axiomatic that a jury verdict is entitled to the benefit of every fair and reasonable inference which can be drawn from the evidence and that it is the function of the jury, not the Court, to make credibility determinations. However, it has often been observed that "whether a jury verdict is against the weight of evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence". *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2nd Dept. 1985). In addition, "[a]lthough these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results". *Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (C.A. 1978).

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible inference which could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence presented at trial". *Cohen v Hallmark Cards*, *supra*; *Nicastro v Park*, *supra*. As stated in *Nicastro*, "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent . . . [and] whether a jury verdict should

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be set aside as against the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors [citations omitted]. The rule has been stated as requiring that a jury verdict be set aside where "the jury could not have reached a verdict on any fair interpretation of the evidence". *Nicastro v Park, supra*; see also, *Burney v Raba*, 266 AD2d 174, 697 NYS2d 329 (2nd Dept. 1999); *Licker v Brangan*, 177 AD2d 547, 576 NYS2d 288 (2nd Dept. 1991).

Discussion

Under the facts of this case, the Court finds that the evidence supports the jury's finding that Nardella Contracting Co., Inc., was the general contractor on the work performed at the Nardella home and that Michael Nardella directed and controlled the work being performed at the job site and, thus were not entitled to the exemption under Labor Law §240(1) and are absolutely liable to plaintiffs for the scaffold accident. When considering whether to overturn a jury verdict "the standard to be applied is whether the evidence preponderates so greatly in the plaintiff's favor that the verdict could not have been reached upon any fair interpretation of the evidence". *Tarantino v Vanguard Leasing Co., Inc.*, 187 AD2d 422, 589 NYS2d 519 (2nd Dept. 1992). Based upon the evidence presented at trial, a rational basis existed for the jury's finding that the Nardella defendants were liable and great deference must be given to the fact-finding function of the jury. *Tarantino v Vanguard Leasing Co., Inc., supra*. Therefore, it was not against the weight of the evidence for the jury to find that the Nardella defendants were liable in the underlying action in the case at bar.

Conclusion

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion for an order setting aside the jury verdict in favor of plaintiffs as against the weight of the evidence or, in the alternative, directing a new trial in that the verdict is contrary to the weight of the evidence, is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 5, 2006


WILLIAM R. LaMARCA, J.S.C.

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ENTERED

JUL 13 2006

NASSAU COUNTY
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