Lupo v Pro Foods, LLC
2011 NY Slip Op 30558(U)
March 9, 2011
Supreme Court, New York County
Docket Number: 107565/06
Judge: Judith J. Gische
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[* 1] SCANNED ON 3/11/2011

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

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 107565/2006

LUPO, GIULIO

vs.

PRO FOODS, LLC.

SEQUENCE NUMBER : 004

OTHER RELIEFS

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. 004

MOTION CAL. NO. ______

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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED MAR 1 1 2011 NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 3/09/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

---X

GIULIO LUPO,

Plaintiff,

-against-

PRO FOODS, LLC, PRO FOODS RESTAURANT SUPPLY, LLC. SCHIMENTI CONSTRUCTION COMPANY OF NEW YORK, INC., SCHIMENTI CONSTRUCTION COMPANY, LLC., and COPPOLA PAVING & LANDSCAPING CORP.,

Defendants.

---X

SCHIMENTI CONSTRUCTION COMPANY OF NEW YORK, INC., and SCHIMENTI CONSTRUCTION COMPANY, LLC,

Third-party Plaintiffs,

-against-

JAK CONSTRUCTION SERVICES,

Third-Party Defendants.

---X

Decision/Order

Index # 107565/06
Mot. Seq. #s 004, 005

FILED
MAR 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Gische, J.:

Pursuant to CPLR §2219(A) the following numbered papers were considered by the court in connection with these motions:

PAPERS	NUMBERED
Mot. Seq. # 004	
Notice of Motion, RPM affirm., exhibits	1
PDT affirm., exhibits	2
SAJ affirm. In Opp., exhibits	3
RPM affirm in Reply	4
Mot. Seq. # 005	
Notice of Motion, PDR affirm., exhibits	1
RPM Affirm. In Opp	2
PDR affirm in Reply, exhibits	3

Upon the foregoing papers the decision and order of the court is as follows:

This case was tried before the court and a jury on July 19, 20, 21, 26, 27, 28, 30 and August 2, 2010. Defendants Pro Foods, LLC, and Pro Foods Restaurant Supply, LLC, had been previously granted summary judgment, releasing them from the case. In addition, as a consequence of the summary adjudication, the only claim of liability before the court at the time of trial was ordinary negligence. Summary judgment was upheld by the Appellate Division. (Lupo v. Pro Foods, 68 AD3d 607 [1st dept. 2009]). At the close of evidence, the court granted Schimenti Construction Company of New York, Inc., and Schimenti Construction Company, LLC.'s (collectively "Schimenti") motion for a directed verdict, releasing them from the case. Accordingly, at the close of evidence the jury was left to consider the liability of the sole remaining defendant, Coppola Paving and Landscape Corp. ("Coppola") and the comparative liability of plaintiff, Giulio Lupo ("Lupo").

After due deliberation, the jury returned a jury verdict sheet finding that: [1] Coppola was negligent and that its negligence was a substantial factor in causing Lupo's injuries; but that [2] Lupo was not comparatively negligent. The jury awarded Lupo $240,000 for past pain and suffering, $500,000 for future pain and suffering, $185,978.22 for past loss of earnings and $1,441,318.90 for future loss of earnings. The total award was, therefore, $2,367,283.90.

Coppola now moves to set aside the verdict for various reasons and to remit on the issue of damages (Mot. Seq. #004). Coppola's motion is opposed by Lupo and Schimenti. Lupo has separately moved for a new trial on the amount of damages for

pain and suffering (Mot. Seq. #005). Coppola opposes Lupo's motion.

This case arose out of an accident that occurred on November 17, 2004, while plaintiff was working at an active construction site, located at 53-01 11th Street, Long Island City, New York ("premises"). Shimenti was the general contractor that hired Coppola to pour new concrete flooring at the premises. The pouring of concrete was scheduled to be done in three separate sections, with each section pour beginning on different dates. The pourings were each to take place, in the evenings, after the other trade workers had left the site.

The first third of the floor was poured, as scheduled, on the evening of November 16, 2004. Once the pouring was complete, Coppola covered the wet concrete with a poly plastic sheeting material. The covering extended not only over the newly poured concrete, but also over most of the wood bracing, which extended from the point at which the flooring ended, over a depression, to the back wall.[1] The depression was previously the location of a concrete ramp, which led to a means of ingress to and egress from the premises. Although at the time of the accident, the concrete that had covered the ramp had been removed, and there was a dirt surface instead, the area that had once been the ramp still remained at 3 to 4 feet below floor level. No barriers, barricades or warnings were posted directing people to stay off the newly poured concrete, either on the entire poured area or at or around the point of the depression. Coppola claims that in meetings before it began its work, it instructed

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[1]While there was conflicting testimony on the extent to which the plastic covering obfuscated what lay beneath, in deciding this motion the evidence supporting the verdict is entitled to every favorable inference. Broadie v. St. Francis Hosp., 25 AD3d 745 (2nd dept. 2006)

Shimienti to keep the other trades people off the concrete. Notwithstanding this testimony, workers on the site the morning of the accident, including Lupo, testified that they had never been told not to walk on the newly poured concrete.

The day after the concrete was poured (November 17, 2004), Lupo came to work at or about 7:00 a.m. and was instructed by his foreman to do a task related to the lighting at the premises. Although an alternate route to attend to his task existed, Lupo chose instead to walk over the poly plastic covering toward the back of building. Once he reached the depression, he fell in, which the jury found was a substantial factor in causing his injuries.

Lupo claimed that the depression was hidden from his view by the plastic covering. Although the exact configuration of the depression may have been altered over time, the deposition testimony from Lupo himself (read into the trial record), revealed that he was aware of the configuration of the building, including that at the exact location of his accident there had been a ramp, which created a hole or depression in the floor. He had walked in this same area no more than a week before the accident, stepping into the depression more than three times.

Law applicable to these motions

Coppola seeks that the court set aside the verdict and direct a verdict in its favor, or alternatively to set aside the verdict as against the weight of the evidence. CPLR §4404. It alternatively moves to set aside the damages award as excessive pursuant to CPLR §5501. Lupo also moves pursuant to CPLR §§ 4404 and 5501 to set aside the jury awards on both past and future pain and suffering as being inadequate.

CPLR § 4404 (a) provides that a court may set aside a jury verdict and direct a

verdict as a matter of law or set aside a verdict and direct a new trial "where the verdict is contrary to the weight of the evidence."

A motion for a directed verdict should not be granted unless there is simply no valid line of reasoning and permissible inferences from the evidence that could support the decision reached by the jury (Cohen v. Hallmark Cards, Inc., 45 NY2d 493 [1978]; Stephenson v. Hotel Employees and Restaurant Uniion Local 100, 14 AD3d 325 [1st dept. 2005]l; 1/5th LP v. HL One, LLC, 23 AD3d 170 [1st dept. 2005]). In contrast, a motion for a new trial on ground that the jury's verdict was against the weight of the evidence, requires a finding that the jury could not have reached its verdict on any fair interpretation of the evidence. (Delgado v. Board of Education. 65 AD2d 547 [2nd dept. 1978] *aff'd no opn* 48 NY2d 643 [1979]; McDermott v. Coffee Beanery, Ltd., 9 AD3d 195 [1st dept 2004]).

The inherent discretion of the trial judge to set aside a verdict may only be exercised after the court has cautiously balanced the great deference to be accorded a jury's conclusion against the court's own obligation to assure that the verdict is fair. The court may not employ its discretion simply because it disagrees with the verdict. (McDermott v. Coffee Beanery, Ltd., *supra*). The court's reconsideration of a jury verdict must be "exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict" (Cholewinski v. Wisnicki, 21 AD3d 791 [1st Dept 2005]; Brown v. Taylor, 221 AD2d 208, 209 [1st Dept 1995]).

Pursuant to the standard for appellate review set forth in CPLR §5501(c), it is recognized that an award of damages may be set aside by a trial court as excessive or

inadequate only when the award deviates materially from what is reasonable compensation. In determining whether an award deviates materially from what is reasonable, the courts look to awards approved in similar cases. (Donlon v. City of New York, 284 AD2d 12 [1st dept. 2001]). Even so, the courts are aware that each case needs to be evaluated on its own merits and that considerable deference should be accorded to the jury's award, because precise comparisons of injuries in different cases is virtually impossible. (So v. Wing Tat Realty, Inc., 259 AD2d 373 [1st dept. 1999]).

Discussion

Preliminarily, the court addresses Shimenti's opposition to the motion. Shimenti was released from liability, based upon the a directed verdict by the court that it was a special employer of Lupo. Thus, the jury never considered any issue with respect to Shimenti. Shimenti put in opposition to the motion because it was unclear if Coppola's broad ranging motion was intended to specifically reach the court's ruling on the directed verdict. Having reviewed the motion and the reply, it is clear that Coppola makes no express arguments challenging the court's ruling on the directed verdict in favor of Shimenti. Even if it did, the motion would be procedurally defective because the ruling on such issue is neither part of this motion, nor part of any of the truncated transcripts that have been filed with the court on this trial. Nakyeoung Seoung v. Vicuna, 38 AD3d 734 (2nd dept. 2007)(see decision, *infra*).

Likewise, to the extent that Coppola's motion to set aside the jury verdict is based upon arguments that the court committed reversible legal errors in connection with its rulings, including those on law of the case, spoliation, evidence, expert evidence

and/or assumption of the risk, it is denied outright. The motion is defective because it fails to include the transcripts any of the court's decisions being challenged, the context in which those rulings were made and whether the present were preserved for any review. All of this information is contained within the transcribed record, including but not limited to, the charge conference which was fully held on the record. Most, if not all, of the rulings were accompanied by explanations by the court of the basis for its rulings. Coppola's motion on these points is based entirely upon its attorney's recollection of the court's rulings. This is not an acceptable substitute for the official court transcript of the proceedings. Failure to include the court's rulings which are being challenged on this motion, including the underlying decisions which articulated the basis for the rulings, renders the motion inadequate for the court to make an informed decision on the merits of Coppola's present arguments. Nakyeoung Seoung v. Vicuna, 38 AD3d 734 (2nd dept. 2007); McCarthy v. 390 Tower Associates, LLC, 9 Misc3d 219 (Sup. Ct. NY Co. 2005). Coppola is admonished that to the extent it intends to raise such arguments on appeal, it is duty bound to present a full record to the Appellate Court for review.

Coppola argues that it had no legal duty to Lupo because it did not own, occupy or control the ramp where Lupo fell. This argument is rejected because the area where Lupo fell was covered with the milky colored poly plastic material put there by Coppola. There was evidence that the plastic covered the depression to a point where you could not readily see the hole below it. Coppola did not put up any warning tapes, cones, barriers or other devices to keep people off the poly plastic and/or wet concrete and/or warn them about the hole which it had covered up with additional poly plastic. Because Coppola, in part, created and/or exacerbated a dangerous condition, it cannot avoid

liability or deny that it owed Lupo a duty. (Espinal. v. Melville Snow Contractor, Inc., 98 NY2d 136 [2002]; Bodenmiller v. Thermo Tech Combustion, Inc., 80 AD3d 719 [2nd dept. 2011)] Cornell v. 360 West 51st Street Realty, LLC, 51 AD3d 469 [1st dept. 2008]).

In this same regard, Coppola's argument that Lupo was the sole proximate cause of his accident fails. Having created a dangerous condition, Coppola is not excluded form liability. The court also rejects Coppola's argument that it had no duty to warn because the danger in this case was open and obvious. The testimony supports a conclusion that the dangerous condition, the void at the end of the concrete pour, was, as a result of Coppola's actions, covered with plastic that obfuscated direct observation of the condition at the time of the accident. Thus, at the time of the accident, the condition was not open and obvious.

Nonetheless, the court does agree with Coppola's arguments that it was against the weight of the evidence for the jury not to have found that Lupo was also negligent. The evidence is unrefuted that no more than a week before the accident, Lupo knew there was a depression in the area in which he later fell. While Lupo speculates that in the week that passed the configuration of the ramp might have changed because it was an active construction site, even if you believe that testimony, he still had a duty to look and see if there actually were any changes that would have made the unsafe condition now safe. In fact any changes made since he had last observed the area, did not make it any more safe. The fact that the area was covered with plastic that obstructed his view, did not absolve him of investigating further to determine if there was still a four foot depression in the area, before walking right into it, falling and injuring himself. (See: Williams v. Hooper, __AD3d __ [1st dept. 2011]; Perez v. Audobon at 186th

Street, LLC, 1 AD3d 492 [2nd dept. 2003]). The court, therefore, sets aside the jury verdict on the issue issues of comparative negligence, and orders that there be a retrial, unless the plaintiff agrees to accept a finding of comparative negligence at 25% and to reduce the award of damages accordingly. (McCollin v. New York City Housing Authority, 307 Ad2d 875 [1st dept. 2003]; Streich v. New York City Transit Authority, 305 AD2d 221 [1st dept. 2003]).

On the issue of damages for pain and suffering, Coppola argues that the amount awarded was excessive. Lupo, on the other hand, argues that the award was inadequate.

The evidence established that Lupo sustained multiple injuries to his head, neck and back, as a result of his fall. The extent of his injuries, were not immediately apparent, but manifested themselves over time. Lupo's cervical and lumbar spine deteriorated to the extent that Lupo required two separate spinal fusion surgeries. During the first surgery two herniated cervical discs were removed and three bones were fused together with titanium plates and screws. Less than a year later, Lupo underwent a lumbar fusion surgery, requiring the spine be exposed from both the front and back, while surgeons fused together three levels of the lumbar spine with rods, screws and cages. It was also conceded by Lupo's own doctor, and further established by other evidence in the record, that Lupo suffered from pre-existing cervical spondylosis and degenerative disc disease. The evidence also supported a conclusion that Lupo,, although requiring extensive and serious surgeries, had a good recovery,

Notwithstanding that the analysis of the adequacy of the award requires that the

look at other awards for similar injuries, Coppola has not cited any cases in either its motion in chief or in opposition to Lupo's motion, for the court to compare with the instant award. Consequently, there is no basis to set aside the award as excessive. Plaintiff, in its motion, has cited cases where the particular plaintiffs required less medical intervention for neck and spine injuries, and the awards were only minimally lower or higher for past pain and suffering and minimally lower or higher for future pain and suffering. (See e.g. Valentin v. City of New York, 293 AD2d 313 [1st dept. 2002]; Amonbea v. Perry Beverage, 294 AD2d 285 [1st dept. 2002]). The distinguishing characteristic in this case, however, which would justify a lower award than those cited by Lupo, is that he had pre- existing degenerative disc disease. Thus, his damages reflect, as they should, compensation for aggravation to his pre-existing condition. (Kinney Rent-A-Car, Inc., 73 AD2d 565 [1st dept. 1979]). Under such circumstances, the award would, as expected, be lower that the cases relied upon by Lupo.

Thus, the court denies the both Coppola and Lupo's motions and declines to find that pain and suffering award, as found by the jury, for both the past and the future, was either excessive or inadequate.

Coppola also argues that the lost earnings component of the jury award is against the weight of the evidence because it is based upon Lupo's life expectancy rather than his work life expectancy. To the extent Coppola offers on this motion the expert, "affidavit" of Michael Feinberg, it is rejected out of hand. In the first place the affidavit provided to the court is nether signed nor notarized. But even if it had been, the court still would not have considered it, because the affidavit was never part of the trial record, nor was Mr. Feinberg ever called as a witness at trial. The "affidavit" cannot

now be considered by the court on this motion.

The argument otherwise fails. According the work life tables contained in Pattern Jury Instructions ("PJI"), Lupo could statistically have been expected to work 21.25 years at the time of trial. The jury, however, calculated his future lost earnings on the basis of 34 years, which is Lupo's statistical life expectancy in the PJI statistical tables. It is apparent, however, that in making their calculation, included as part of lost earnings not only salary, but lost pension benefits that plaintiff would have been entitled to after he retired. Plaintiff's expert testified that if Lupo were to have worked in the normal course, he would have retired in 2031, and then he would have continued to receive pension benefits for an additional 13 years. The award, which was intended to cover 34 years, is consistent with the testimony. The amount of the award, which included lost earnings and pension benefits, was supported by the evidence presented. (Caban v. City of New York, 46 AD3d 319 [1st dept. 2007]). The motion to set aside the jury verdict on the amount of future lost earnings is denied.

Conclusion

In accordance herewith it is hereby:

ORDERED that Coppola Paving and Landscape Corp.'s motion (seq. # 004) is granted only to the extent that the verdict is set aside on the issues of plaintiff's comparative negligence and apportionment and remitted for a new trial on such issues unless the plaintiff stipulates to a finding of 25% negligence and a reduction to such extent of the damages awarded in this case and it is further

ORDERED that except as otherwise expressly granted herein, Coppola Paving and Landscape Corp.'s motion (seq. # 004) is denied, and it is further

ORDERED that plaintiff's motion (seq. # 005) is denied in its entirely, and it is further

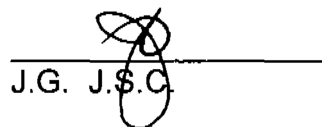
ORDERED that each side shall pick up their respective trial exhibits from the clerk in Part 10, Room 232, no later than Ten (10) Days after date of entry of this decision and order; the parties shall contact the clerk at (646) 386-3723 to make arrangements in advance; failure to retrieve these exhibits shall result in the court sending them to be filed with the County Clerk; and it is further

ORDERED that any relief not expressly granted herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 9, 2011

SO ORDERED:



J.G. J.S.C.

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