SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Hon. Mary Ann Brigantti-Hughes

X

LEON GRIFFIN,

Second Amended Decision and Order

Plaintiff,

-against- Index No.: 14897/07

CLINTON GREEN SOUTH, LLC., BOVIS LEND LEASE, INC., and BOVIS LEND LEASE LMB, INC.,

Defendants.

X

The following papers numbered 1 to 4 read on the below motions noticed on and duly submitted on the Part IA15 Motion calendar of :

Papers Submitted	Numbered
Defs. Clinton Green South, LLC Bovis Lend Lease, Inc., and Bovis Lend Lease LMB, Inc.'s Affirmation in Support of Motion, Brief in Support, and Exhibits, Trial Transcripts.	1,2
Pl. Leon Griffin's Affirmation in Support of Cross-Motion and Opposition to Defs. Motion, Brief in Support, and Exhibits.	3,4

Defendants, Clinton Green South, LLC., Bovis Lend Lease, Inc., and Bovis Lend Lease LMB, Inc. (hereinafter "Defendants"), move for an Order, pursuant to CPLR 4404, 4401 and 5501(c) , to (1) set aside and vacate the jury's verdict as to damages and dismiss the plaintiff's complaint based on legally insufficient evidence in support of the plaintiff's claims for common law negligence and Labor Law §§200, 240(1) and 241(6); (2) set aside and vacate the jury's verdict and grant a new trial on liability on the plaintiff's Labor Law §240(1) cause of action upon renewal of Defendants' opposition to plaintiff's motion for a directed verdict; (3) set aside and vacate the jury's verdict and grant a new trial on damages based on the plaintiff's improper summation comments and the court's refusal to charge the jury on mitigation of damages; (4) set aside and vacate the jury's awards for past and future lost wages, past and future lost health benefits, past and future lost

employer annuity contributions, future pension benefits and future Social Security benefits as unsupported by record evidence and against the weight of the evidence; (5) set aside and vacate the jury's awards for past and future lost wages, past and future lost health benefits, past and future lost employer annuity contributions, future pension benefits and future Social Security benefits as unsupported by record evidence and against the weight of the evidence, (6) set aside and vacate the jury's award for future pain and suffering as excessive and deviating materially from what would constitute reasonable compensation; (7) grant a stay of entry of judgment and a hearing on collateral source setoffs pursuant to CPLR 4545(c) and the structuring of the judgment pursuant to CPLR 50-B, unless the parties can agree on those issues; and/or (8) granting Defendants such other and different relief as the Court deems just and proper.

Plaintiff, Leon Griffin, (hereinafter "Plaintiff"), opposes Defendants motion in its entirety and cross-moves for an Order setting aside the jury award of $0 for past pain and suffering as inadequate and against the weight of the evidence.

In the interest of judicial economy, the aforementioned motions and cross-motions have been consolidated by the Court and are disposed of in the following Decision and Order.

I. Factual Background and Procedural History

The herein action involves a claim by Plaintiff for personal injuries sustained on June 6, 2006, while plaintiff was working as a concrete worker at a construction project owned by defendant Clinton Green South, LLC. Plaintiff was allegedly working with another to disassemble a piece of scaffolding. Plaintiff's job was to stand on the ground and stack pieces of the scaffolding as it was being disassembled. At one point during his work, Plaintiff heard a "clanking" noise, and was soon thereafter allegedly struck in the back by a fallen piece of scaffolding. Plaintiff testified that no representatives from Defendants told him to set up barricades or safety netting around or under the scaffold to create a "safe drop zone."

Plaintiff was thereafter taken to St. Vincent's hospital where he underwent a CT scan of his back, and was given medication for pain, including an "injection of a painkiller." The CT scan

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revealed a moderate nuclear herniation at L4-L5, with moderate displacement of the dural sac. He was discharged the same day and advised to follow up with his orthopedist. An orthopedist, Dr. Aric Hausknecht, found positive results after administering objective range of motion tests of the back and lower extremities. A July 13, 2006 MRI of the lumbar spine revealed a disc herniation causing nerve root impingement. This condition remained the same two years later, as revealed in a 2008 MRI. Plaintiff was referred to a Dr. Paul Brisson, who recommended a microdiscectomy decompression surgery, performed a year later after approval from the Workers' Compensation Board. Dr. Brisson opined that Plaintiff's "nerve damage" was"permanent", and Dr. Hausknecht opined that Plaintiff's injuries were substantially caused by the June 6, 2006 accident. Plaintiff thereafter commenced this action asserting common law negligence and Labor Law §§200, 240(1), and 241(6).

The action proceeded to a jury trial against Defendants on March 8 through 24, 2010. At trial, Plaintiff produced no other witnesses to corroborate his account of this accident. Plaintiff testified that he continued to suffer from pain in the lower back and legs which render him unable to sit or stand for prolonged periods of time. A vocational rehabilitation counselor, Allan Provder, opined that Plaintiff was now barred from any sort of future employment as a result of his injuries. Plaintiff also presented expert testimony from an economist, Dr. Alan Leiken, who testified as to past and future economic losses.

At the close of Plaintiff's proof, the Court directed a liability verdict in Plaintiff's favor on the Labor Law §240(1) claim, and did not rule on Defendants' motion for a directed verdict dismissing the common law negligence and Labor Law §§200 and 241(6) claims. The jury returned a verdict in favor of Plaintiff in the total amount of $12,562,772, which was broken down as follows:

Past	
Lost earnings:	$131,243
Lost health insurance:	$22,748

Lost annuity funding:	$20,414
Pain and suffering:	$0
Future	
Lost earnings:	$3,127,091 over 39 years
Lost health insurance:	$1,835,711 over 39 years
Lost annuity funding:	$494,935 over 39 years
Lost pension funding:	$1,230,630 over 39 years
Lost social security:	$700,000 over 39 years
Pain and suffering:	$5,000,000 over 39 years.

Defendants now move, post-trial, for (1) an Order setting aside the verdict and dismissing Plaintiff's case as to the proximate cause issue based on legally insufficient evidence, or (2) an Order vacating the directed verdict on liability to the Plaintiff, which deprived the Defendants of an opportunity to contest the claim against them, (3) an Order vacating the jury's damages verdict and ordering a new trial on damages due to inadequate jury instructions and Plaintiff's improper and prejudicial summation, or (4) an Order vacating the jury's past and future economic loss, and future pain and suffering damages awards as excessive, unreasonable, and based on speculation, and (5) a hearing to determine payments made from collateral sources pursuant to CPLR 4545 and the structuring of the judgment under CPLR 50-B.

Plaintiff has opposed this motion, and cross-moved for an Order vacating the jury's award of $0 for past pain and suffering as inadequate and against the weight of the evidence.

II. Legal Standard of Review for Vacating Jury Verdict

Under CPLR 4404(a),

> The court may set aside a jury 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.

For a court to decide that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial *see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 (1978); *Nicastro v. Park*, 113 A.D.2d 129, 132 (2nd Dept. 1985). Any defect in the plaintiff's case can be cured by the evidence presented on the defendants case in chief. *Id.* In determining whether a plaintiff's initial burden has been established, the Supreme Court is obliged to consider all of the evidence, including the proof adduced by the defendants which cures any defects in the plaintiff's case. *See Bopp v. New York Elec. Veh. Transp. Co.*, 177 N.Y. 33, 35 (1903). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 (1997).

III. Defendants' Motions as to Liability

1. Defendants' Motion to Vacate Directed Verdict Entered In Favor of Plaintiff on his Labor Law §240(1) Claim

Defendants argue that the court should not have directed a verdict in favor of Plaintiff because factual issues existed as to his claims, and Defendants were deprived of an opportunity to contest the labor law 240(1) claims against them. Doing so violated CPLR 4401 as the directed

verdict was entered at the close of Plaintiff's case, and before Defendants had an opportunity to present its case in full. Defendants argue that Plaintiff only had an uncorroborated, self-serving account of this accident, which presented a "classic" credibility determination for a jury to decide. *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 256 A.D.2d 106, 109 (1st Dept. 1998) (where plaintiff is the sole witness to the accident, summary judgment is inappropriate where the defendant has presented evidence of a triable issue of fact relating to plaintiff's credibility.). In this case, Defendants argue that there is a credibility issue with Plaintiff that should have precluded entry of a directed verdict in his favor.

Plaintiff opposes this motion, and argues that he has a "perfect" Labor Law 240(1) case based on the facts presented at trial. Further, Defendants were not prepared to present any witnesses to contradict the testimony on liability presented in Plaintiff's case in chief.

On this issue, the Court will grant Defendants' motion, and order a new trial on liability solely on the issue of Plaintiff's Labor Law 240(1) claims.

CPLR 4401 states:

> Any party may move for judgment with respect to a case of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence where it is made by all parties.

A motion pursuant to CPLR 4401 for judgment as a matter of law is properly granted only "where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Walden v Otis El. Co.*, 178 AD2d 878, 878-879). Prior to directing a verdict in favor of one party to an action, a court must determine "whether there [is] any rational basis on which a jury could [find] for [the opposing party], the [opposing party] being entitled to every favorable inference which

could reasonably be drawn from the evidence submitted by [it]" (*Rhabb v New York City Hous. Auth.*, 41 NY2d 200, 202; See *Pollack v Klein*, 39 A.D.3d 730, 730). In making this determination, a court must not "engage in a weighing of the evidence," nor may it direct a verdict where "the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question" (*Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366, 366). Most importantly, it is well-established that the grant of a judgment prior to the close of the opposing party's case will be reversed as premature, even if the ultimate success of the opposing party in the action is improbable. *Cass v. Broome County Co-Operative Ins. Co*, 94 A.D.2d 822, 823 (3d Dept. 1983)(citing *Page v. City of New York*, 79 A.D.2d 573 (1st Dept. 1980) and *Cetta v. City of New York*, 46 A.D.2d 762 (1st Dept. 1974)).

In this matter, the Court directed a verdict in Plaintiff's favor at the close of his case, and prior to Defendants' case in chief. Pursuant to the above and solely on these grounds, this Court will vacate this judgment and order a new liability trial solely on this issue of Plaintiff's Labor Law §240(1) claim.

2. Defendants' Motion to Dismiss Complaint as Plaintiff Failed to Adduce Legally Sufficient Evidence in Support of his Claims

Defendants argue that Plaintiff failed to bear his burden of proving that this alleged incident was the proximate cause of Plaintiff's injuries. Defendants assert that Plaintiff brought forth no other witnesses to corroborate the happening of the accident itself. Only Plaintiff's treating physician, Dr. Aric Hausknecht, testified as to proximate cause. Defendants claim that the doctor conceded that Plaintiff had a pre-existing condition at the site of his alleged injury. However, Dr. Hausknecht only gave conclusory opinions without factual explanation that the injury was caused by the accident rather than this condition.

Defendants add that Plaintiff failed to adduce sufficient proof to support his commmon law negligence and labor law §§ 200 and 241(6) claims. Under Labor Law §200, general supervision of the worksite, the right to stop a contractor's work upon observing a safety violation, and the right

to ensure compliance with safety protocols and contract specifications are insufficient to constitute direct supervisory control necessary to impose liabilty under Labor Law §200 or common law. *DeSimone v. Structure Tone, Inc.*, 306 A.D.2d 90, 90-91 (1st Dept. 2003). In this case, Defendants argue that Plaintiff only relied on Bovis Lend Leasing's exercise of general supervisory authority over the work done at the construction site that day. Plaintiff cited the testimony of Bovis' general superintendent Ralph DiDonato, who stated that under the contract, Bovis was required to implement a worker safety program. Section 9.8 of the contract further gave Bovis the authority to stop work and enforce compliance with safety protocols. Still, Defendants argue that this is insufficient to impose liability under Labor Law §200. As to Plaintiff's claims under Labor Law §241(6), Defendants claim the sections of the Industrial Code cited in the complaint are too general to constitute concrete safety standards upon which liability may be premised, or were inapplicable to this fact pattern.

In opposition, Plaintiff argues that the issue of proximate causation was based on legally sufficient evidence. Dr. Hausknecht explained that Plaintiff's hypertrophic condition was merely "wear and tear" and would not have contributed in any way to his injuries.

CPLR 4404(a) states as follows:

> After a trial of a cause of action or issue triable by a jury, upon the motion of any party 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.

Accordingly, the Court may set aside a verdict or judgment entered as a matter of law when it is convinced that the jury could not find for the other party by any rational process; when, in

support of the party against whom it proposes to order judgment, the court can find "no evidence and no substantial inferences", "when reasonable minds reacting to the evidence could not differ and would have to conclude just one way.". *Prince v. City of New York*, 21 A.D.2d 668 (1st Dept. 1964); *African Metals Corp. v. Bullowa*, 288 *N.Y.* 78, 81 (1942). *Cesario v. Chiapparine*, 21 A.D.2d 272 (2d Dept. 1964). The Court must accept as true all of the evidence offered by the party against whom the motion for judgment aims, and must even resolve in that party's favor all questions relating to the credibility of witnesses. *Hurder v. Samuel Kosoff & Sons, Inc.*, 23 A.D.2d 804 (4th Dept. 1965).

We initially look to Defendants' first argument, that no rational jury could conclude that Plaintiff's injury more probably resulted from the alleged accident than from his pre-existing condition. The Court disagrees. Dr. Hausknect testified that it was his opinion that Plaintiff's L4-L5 injuries and nerve damage were consistent with his report that a piece of scaffolding fell and landed on his lower back. The doctor testified that the accident and subsequent trauma that Plaintiff sustained was what caused the disk herniation, pinched nerve, and other problems he had been experiencing. (See Trial Transcript at 206:11-16.)

With regard to the"pre-existing condition," Dr. Hausknecht opined that the hypertrophy found at Plaintiff's L4-L5 had developed months before the accident, as a result of Plaintiff's athletic activities. However, Dr. Hausknecht opined that the hypertrophy was not contributory in any way to Plaintif's injury. He described it as a "common finding" and 'wear and tear," and Plaintiff's radiologist deemed it "slight." (*Id.* at 244:13-17). Accordingly, Dr. Hausknecht believed the condition was not contributory to Plaintiff's injuries. This opinion was not conclusory in nature, rather it was based on his review of the CAT scan which revealed the hypertrophy, the remarks of the radiologist, and the nature and extent of Plaintiff's L4-L5 disc herniation. Defendants' motion for directed verdict is therefore denied with respect to its proximate cause arguments.

Defendants also renew their motion to dismiss originally made at trial, which asserts that Plaintiff failed to adduce sufficient proof to support his Common Law Negligence and Labor Law Secs. 200 and 241(6) claims. This Court did not rule on this motion at the time it was made, as it

was considered moot . Since the Court has reversed the directed verdict and ordered a new trial on the Plaintiff's Labor Law 240(1) claim, it will now address Defendants' argument on these additional claims.

Labor Law Sec. 200 is a codification of common-law negligence principles concerning duty imposed upon an owner or general contractor to provide workers with a safe environment. See *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 (1993); *Ross v. Curtis-Palmer Hydro-Electric Company et al.*, 81 N.Y.2d 494 (1993). It is well settled that an implicit precondition to this duty is that the party charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. *Rizzuto v. LA Wegner Contracting Co., Inc.*, 91 NY 2d 343, 352 (1998). Thus, the statute is applicable only to those owners and contractors who exercise control or supervision over the work being performed, or who have either created a dangerous situation or had actual or constructive notice of such condition. *Lombardi v. Stout*, 80 NY 2d 290 (1992); *Monterroza v. State University College Fund*, 56 A.D.3d 629 (2d Dept. 2008). The bottom line for purposes of liability under Labor Law Sec. 200 is that the party against whom liability is sought must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Rizzuto v. Wenger Constracting Co.*, 91 NY 2d. 343 (1998). A construction manager whose duties are limited to observing the work and reporting safety violations does not thereby become liable when the contractor's employee is injured by a dangerous condition arising from the contractor's negligent methods. The construction manager's authority to stop the contractor's work, if the manger notices a safety violation, does not give the manager a duty to protect the contractor's employees. *Buccini v. 1568 Broadway Associates*, 250 A.D.2d 466 (1st Dept. 1998).

In this matter, at trial, Plaintiff withdrew common law negligence and Labor Law §200 claims against defendant Clinton Green, LLC, the owner of the construction site. He preserved his claims against defendant Bovis, on the grounds that Bovis (1) was responsible for ensuring workers had proper protection, (2) was required under contract to implement a worksite safety program, and (3) had authority under contract to stop work if it became aware of a subcontractor's noncompliance with safety protocols. (See Trial Transcript at 79:17-82.) Even while making all inferences in favor

of Plaintiff, these facts would not impute liability on Bovis under Common Law or Labor Law Sec. 200. More than general control over the work giving rise to the injury must be established for liability to lie, for instance, the retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200. *Dennis v. City of New York*, 304 A.D.2d 611 (2nd Dept. 2003); *Brown v. City of New York City Economic Development Corp.*, 234 A.D.2d 33 (1st Dept. 1996). Plaintiff in this matter offers no evidence that Bovis had more than general supervisory control over his worksite, and the record does not reflect the level of control necessary to impose liability under the common law or Labor Law. Accordingly, Plaintiff's Common Law and Labor Law Sec. 200 claims as to Bovis must be dismissed.

Defendants also move to dismiss Plaintiff's Labor Law 241(6) claims against Bovis. At trial, Plaintiff voluntarily dismissed his 241(6) claims as to co-defendant Clinton Green LLC., but maintained his claims as to Bovis. To the extent that a plaintiff asserts a viable claim under this section, the plaintiff need not show that the defendant exercised supervision or control over the worksite. Rather, a plaintiff must demonstrate that his injuries were proximately caused by a violation of an appliciable Industrial Code regulation. *Penta v. Related Cos., L.P.*, 286 A.D.2d 674 (2nd Dept. 2001). The regulations relied on must be "concrete specifications" as opposed to general safety standards. *Ross v. Curtis-Palmer Hydro-Electric, et al.*, 81 N.Y.2d 494 (1993).

In this matter, Plantiff alleged violations of Industrial Code Secs. 23-1.5 ("General resonsibility of employers"); 23-1.7(a) ("Overhead hazards"); 23-1.7(b) ("Hazardous openings"); 23-1.18 ("Sidewalks and barricades"); and 23-1.19 ("Catch platforms"); as well as Industrial Code subparts 23-5 ("Scaffolding", generally), and 23-6 ("Material Hoisting"). Primarily, as argued by Defendants, Plaintiff's allegations of subpart 23-5 and 23-6 violations, without citing provisions within the subparts, as procedurally defective as they are overly broad. The only specific provision seemingly applicable to this matter is 23-1.7(a), "overhead hazards." To establish prima facie that there was a violation of this subsection, a plaintiff must show that the area in which the plaintiff was injured was one where workers are normally exposed to falling objects. See *Mercado v TPT*

Brooklyn Assoc., LLC, 38 A.D.3d 732, 733-34 (2d Dept 2007). Plaintiff in this case has not effectively shown that he was injured as a result of a specific violation of a concrete specification within the Industrial Code. Accordingly, Plaintiff's claims pursuant to Labor Law §241(6) shall be dismissed.

IV. Defendants' Motion for a New Trial on Damages

1. Defendants' Motion for a New Trial on Damages as the Jury was not properly instructed on Plaintiff's Duty to Mitigate his Damages

Defendants argue that the Court erred in failing to instruct the jury on Plaintiff's duty to mitigate his damages. It is well-settled that New York courts adhere to the universally accepted principle that a harmed plaintiff must mitigate damages. *Wilmot v. State*, 32 *N.Y.2d* 164, 168-69 (1973). Plaintiffs generally are obligated to take whatever reasonable actions they can to minimize their damages. *Courtland v. Walston & Co.*, 340 F/Supp. 1076, 1079-80 (S.D.N.Y. 1972)(applying New York's mitigation doctrine to the sale of securities). However, it is also true that a defendant bears the burden of introducing evidence to prove that a plaintiff could have lessened her damages. *Jenkins v. Etlinger*, 55 N.Y.2d 35, 39 (1982). In other words, a defendant must establish an evidentiary foundation for a charge on mitigation of damages. *Reed v. City of New York*, 304 A.D.2d 1 (1st Dept. 2003).

In this matter, Defendants argue that Plaintiff did not contest his potential to return to work following the alleged accident. Specifically, Defendants cite the testimony of Plaintiff's treating physician, Dr. Aric Hausknecht, who opined that epidural injections have a "reasonable likelihood" of helping his pain. (Trial Transcript, at 200:12-201, 208:17-210, 5). Dr. Hausknecht testfieid that Plaintiff may be able to return to a sedentary position at some point, but stated that he was not ready to do it yet. The doctor stated:

> I think it would be overall bad for his condition for him to try and work, but it's still possible at some point in the future that he may be able to re-enter the job market, if his condition improves. (*Id.*)

Defendants offered no other evidence or testimony from the record to demonstrate that Plaintiff indeed could have returned to work, or more likely than not had the ability to return to some sort of employment in the future. This was not a matter where it was conclusively established that the plaintiff was employable and he simply did not contest his ability to return to work. In this matter, Plaintiff's treating physician stated that there may be a chance, at some point in the future, that he could return to a sedentary position, despite his training being in construction and cement. Accordingly, Defendants did not bear its burden of proof in demonstrating Plaintiff could have lessened his damages, and Defendants therefore were not entitled to a mitigation jury charge.

2. Defendants' Motion for a New Trial on Damages as Plaintiff's Counsel made inappropriate and Prejudicial Remarks at Summation.

Defendants seek a new damages trial on the basis that Plaintiff counsel's summation comments deprived Defendants of a fair trial. As argued by Defendants, it is fundamental that the jury must decide the issues on the evidence presented at trial, and therefore counsel, in summing up, must stay within "the four corners of the evidence" and avoid irrelevant comments which have no bearing on any legitimate issues in the case. *People v. Nevedo*, 202 A.D.2d 183, 185 (1st Dept. 1994)(internal citations omitted). Defendants cite that Plaintiff's summation to the jury referred to his likely future of "drug addiction" to pain medication, despite no evidentiary support. Further, counsel's summation allegedly attacked the credibility of defense counsel, as he accused counsel of selectively reading deposition testimony to the jury and attempting to confuse the jury while cross-examining Dr. Hausknecht on Plaintiff's pre-existing back condition.

In order to warrant reversal, the conduct of an attorney must unfairly and prejudicially interject extraneous and irrelevant issues *(see, Giuamara v O'Donnell*, 96 A.D.2d 1049 (2nd Dept. 1983); *Laughing v Utica Steam Engine & Boiler Works*, 16 A.D.2d 294 (4th Dept. 1962). When the conduct of counsel has "permeated the trial and created a climate of hostility that effectively destroyed the defendant's ability to obtain a fair trial", reversal is the appropriate remedy. *Rohring v. Niagra Falls*, 192 A.D.2d 228 (4th Dept. 1993).

In this matter, Plaintiff's alleged misconduct at summation did not create such a hostile climate so as to cloud the jury's ability to focus on relevant issues. Any objections made during summation were addressed at the time they were made, and when viewed in the totality of the trial, the remarks did not deprive Defendants of their day in court. Defendants' motion is therefore denied on this issue.

3. Defendants' Motion for a New Trial on Damages as the Jury's Award for Past and Future Economic Losses was not Supported by the Record.

Defendants argue that Plaintiff's expert testimony as to his past and future lost earnings was based on assumptions and unsupported by the record, thus the jury verdicts of $131,243 for past lost earnings, $22,748 for past lost health insurance, $20,414 for past lost annuity funding, $3,127,091 for future lost earnings, $1,835,711 for future lost health insurance, $494,935 for future lost annuity funding, $1,230,630 for future lost pension, and $700,000 for future lost social security should be vacated. As cited by Defendants, economic damages, including lost earnings, must be proven with "reasonable certainty" and therefore cannot be speculative in character. *See Behrens v. Metropolitan Opera Assoc., Inc.* 18 A.D.3d 47 (1st Dept. 2005). An expert witness may not guess or speculate, and further, an expert's opinion must be based upon facts personally known and testified to by the witness or disclosed by the evidence in the record." *Espinosa v. A&S Welding & Boiler Repair*, 120 A.D.2d 435 (1st Dept. 1986).

On a post-trial motion submitted pursuant to CPLR 4404(a), a court may grant a new trial where the verdict is contrary to the "weight of the evidence" and "in the interest of justice." Here, the court is dissatisfied with the verdict, enough to reject but not enough to direct judgment notwiststhstanding it. The key is the judge's common sense reaction to the evidence. *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376 (1976). The court finds a verdict against the weight of the evidence when there is something about the case that arouses its suspicious or otherwise makes it uncomfortable, and it may be the result of incredible or improbable testimony. *See., e.g., Bottalico v. City of New York*, 281 A.D.339 (1st Dept. 1953). The power to set aside a verdict and grant a new trial is an inherent one, and CPLR 4404(a) is merely a codification of it.

McCarthy v. Port of New York Authority, 21 A.D.2d 125 (1st Dept. 1964).

With respect to expert testimony, an expert witness may not reach a conclusion by assuming material facts not supported by the evidence and may not guess or speculate in drawing a conclusion. *Quinn v. Artcraft Const., Inc.*, 203 A.D.2d 444 (2nd Dept. 1994); see also *Wright v. New York City Housing Authority*, 208 A.D.2d 328 (1st Dept. 1995)(expert may not create facts upon which conclusion is based). The general rule has been that an expert opinion must be based on facts disclosed by the evidence or known by the witness personally. *People v. Miller*, 91 N.Y.2d 372 (1998). Expert testimony should generally be excluded where the opinion is based upon facts not fairly inferrable from the evidence, *Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410 (1971); *Lopato v. Kinney Rent-A-Car, Inc.*, 73 A.D.2d 565 (if cross-examination reveals that opinion is based on facts not in evidence, the jury must be instructed to disregard the opinion). However, an expert may base an opinion on circumstantial evidence, with the lack of direct evidence simply affecting the weight of the opinion, *Soulier v. Hughes*, 119 A.D.2d 951 (3rd Dept 1986). An expert may testify to an opinion based on material not in evidence if the material "is of a kind accepted in the profession as reliable in forming a professional opinion" *Hambsh v. New York City Transit Authority*, 63 N.Y.2d 723 (1984).

In regards to lost earnings, an award may be set aside where the evidence as to loss of earnings is too speculative; *Galaz v. Sobel & Kraus, Inc.*, 280 A.D.2d 427 (1st Dept. 2001); *see also Toscarelli v. Purdy*, 217 A.D.2d 815 (3rd Dept. 1995). Loss of earnings must be established with reasonable certainty focusing on the plaintiff's earning capacity before an after the accident. *Behrens v. Met Opera Assoc., Inc.*, 18 A.D.3d 47 (1st Dept. 2005); *Calo v. Perez*, 211 A.D.2d 607 (2nd Dept. 1995); *Whalen v. New York*, 270 A.D.2d 340 (2nd Dept. 2000)(plaintiff met burden of proof with respect to lost earnings by submitted evidence that included documentation of wages rec'd by union workers at plaintiff's pay scale and documentation of his employment during period immediately preceding accident.) An award for loss of future earnings may not be based upon speculation, *Davis v. New York*, 264 A.D.2d 379 (2nd Dept. 1999), but must be established with reasonable certainty. *Rohring v. Niagara Falls*, 192 A.D.2d 228, where plaintiff was not a union member, it was too speculative to permit consideration of hypothetical union benefits that plaintiff would have received

had he joined. *Hackworth v. WDW Dev.*, 224 A.D.2d 265.

Plaintiff's expert, Dr. Allan Leiken, testified that he would have worked an increasing numbers of hours per year, starting at 1200, following the date of this accident. This number of hours, 1200, is higher than the 975 Plaintiff worked at the height of his career in 2005. Dr. Leiken offered no evidentiary basis for starting at 1200 hours worked for the year 2007. Thereafter, Dr. Leiken increased the number of hours worked to 1300 in 2008, and 1400 for the remainder of Plaintiff's career. The question is what was the basis for this starting hour total, and what was the basis for increasing it each year, eventually capping the yearly hours at 1400. The economists' explanation is simply as follows:

> Then I used twelve hundred, thirteen hundred, until I got to fourteen hundred. When people start out working, the employers don't know them, yet. They haven't proven themselves. But once you gain experience and once you have relationships, you're going to get more work and, typically, once you earn and how much you work would then be related to the field that you are in and the experience you had.
>
> He's just starting out. He's at the beginning of his career when this happened. So I don't expect him to work fourteen hundred or two thousand hours when he's just started out and gaining experience. This is not like, again, a fulltime job where you work for one employer the rest of your life. It's typical that these workers go from job to job, employer to employer, and so looking at any tax returns or having the prior records of how many hours he worked is not enough information when we're projecting, over thirty years, how much he's going to work and how much he's going to earn. (Trial Transcript, at 467:12- 468:17).

Dr. Leiken's testimony concerning his annual hourly calculations demonstrated that he had absolutely no actual evidentiary basis for these figures. At no point did Dr. Leiken cite statistics concerning hours of construction workers, or any other analytical data to support his assumptions. Dr. Leiken never analyzed Plaintiff's tax forms, explaining that doing so would be useless in this

industry. However, the expert did not offer any other empirical evidence to back his statements that these kinds of workers "go from job to job, employer to employer" or to show that Plaintiff himself would follow a similar path. This Court would be constrained to label the testimony of Dr. Leiken as to Plaintiff's lost past and future earnings as within "reasonable certainty." Further, the expert calculated that Plaintiff's wages would increase 3.3% each year based on generic, non construction-specific government statistics.

Dr. Leiken's testimony and assumptions as to Plaintiff's future lost earnings carried over into his analysis of Plaintiff's future lost health benefits, social security benefits, annuity contributions, and pension benefits. Specifically with respect to lost health benefits, it was never even established that Plaintiff was eligible or receiving health benefits at the time of the accident. Dr. Leiken merely testified that Union members received health benefits after working a certain number of hours, but did not state if Plaintiff had achieved that target or what the hourly target was. (See Trial Transcript at 447:1-9). The remainder of Plaintiff's future economic losses, as stated earlier, are based off of Dr. Leiken's unsupported assumptions seemingly concerning not only the nature of the construction industry but Plaintiff's eligibility and collection of benefits prior to the accident.

Accordingly, the jury verdict for Plaintiff's past lost earnings will be upheld. The jury verdict for Plaintiff's future lost earnings, health benefits, annuity contributions, and social security must be set aside and a new trial must be ordered regarding the above damages.

V. Defendant and Plaintiff's Post-Trial Motions Regarding the Jury Awards for Past and Future Pain and Suffering.

Plaintiff has filed a cross-motion setting aside the Jury verdict of $0 for Plaintiff's past pain and suffering as against the weight of the evidence. Defendant's motion seeks to set aside the Jury verdict of $5,000,000 for future pain and suffering as excessive and deviating materially from reasonable compensation. In his cross-motion, Plaintiff has offered to accept a reduction in Plaintiff's future pain and suffering to $3,500,000, in exchange for additur to past pain and suffering in the amount of $1,500,000.

Pursuant to CPLR 5501(c),

> In reviewing a money judgment in an action in which an itemized verdict is requried by rule forty one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered into a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasoanble compensation.

Compensation has been deemed reasonable when it falls within boundaries of other awards that have been previously approved on appellate review. *Donlon v. City of New York*, 284 A.D.2d 13, 18, 727 N.Y.S.2d 94, 98 (1st Dept. 2001). In *Donlon*, the Court held that an "analysis of appealed verdicts using CPLR 5501(c) is not optional but a legislative mandate." 284 A.D.2d at 16, 727 N.Y.S.2d at 97. Moreover, "[c]ase comparison cannot be expected to depend upon perfect factual identity. More often, analogous cases will be useful as benchmarks." *Id.*

With respect to Plaintiff's cross-motion, it is undisputed that Plaintiff did have several visits with phyisicans, physical therapy, and some surgical intervention to treat his condition allegedly caused by the accident. Further, there was evidence presented on the record that Plaintiff had recurring pain since the date of the accident, and medical experts opined that Plaintiff would have residual pain for the rest of his life. For a jury to award $0 for past pain and suffering, especially considering the substantial award for future pain and suffering, is unfathomable and deviates materially from what would be considered reasonable compensation.

Likewise, the Jury's award of $5,000,000 is excessive in this matter. The record shows that Plaintiff suffered from a large disc herniation at L4-L5, with protrusion and nerve impingement. He underwent a microdiscectomy and laminotomy. Similar injuries resulted in significantly smaller jury awards. In *Vargas v. ML 1188 Grand Concourse*, the 54 year-old plaintiff suffered radiculopathy at L5-S1 with nerve root compression, a herniated disc at L2-L3, and soft tissue injuries to the neck and back. She was treated by an orthopedist and physical therapist for eight months after the accident and had lumbar surgery four years after the accident.

but at the time of trial, more than five years after the accident, still had pain in the lower back for which she takes medicine, and otherwise continued to suffer a loss of enjoyment of life. 24 A.D.3d 104 (1st Dept. 2005). The plaintiff received a $500,000 award for future pain and sufffering, which was reduced to $300,000. *Id.* In *Sanango v. 200 E. 16th St. Housing Corp.*, a jury awarded $1.452,000 for future pain and suffering to a plaintiff who suffered from fractured vertebrae, which required spinal fusion surgery. 15 A.D.3d 36 (1st Dept. 2004). The plaintiff also suffered from nerve root damage, an abnormal spinal fusion, rotator cuff tear, and vision loss. *Id.* Considering these matters, it is clear that the award of $5,000,000 for future pain and suffering was excessive.

Absent a stipulation amongst the parties, this court shall order a new trial on the issue of past and future pain and suffering.

VI. Defendants' Motion for a Hearing Pursuant to CPLR 4545 and Article 50-B

This Court will Reserve decision on this branch on Defendants' post-trial motion pending the outcome of the new trials on liability and damages as outlined above.

VII. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants, Clinton Green South, LLC, Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc.'s, motion for an Order, pursuant to CPLR 4401, vacating the directed verdict on liability under Labor Law 240(1) is GRANTED, and it is further

ORDERED, that a new trial be heard on the issue of Defendants Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc.'s liabilty under Labor Law Sec. 240(1), and it is further,

ORDERED, that Defendants, Clinton Green South, LLC, Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc.'s, motion to dismiss Plaintiff's Common-Law Negligence, Labor Law Sec 200, and Labor Law Sec. 241(6) claims is hereby GRANTED, and it is further

ORDERED, that Defendants, Clinton Green South, LLC, Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc.'s motion, as well as Plaintiff Leon Griffin's cross-motion for an Order, pursuant to CPLR 4404 and 5501(c) are hereby GRANTED IN PART, and the jury verdict as to Plaintiff's future lost earnings, future lost health benefits, lost annuity contributions and pension benefits, lost social security benefits, and past and future pain and suffering are hereby vacated, while the jury verdict as to Plaintiff's past lost earnings remain, and it is further

ORDERED, that a new trial be heard on the issue of Plaintiff's future lost earnings, future lost health benefits, lost annuity contributions and pension benefits, lost social security benefits, and past and future pain and suffering, and it is further

ORDERED, that the judgment entered against Defendants, entered on May 24, 2010, is hereby vacated.

The above constitutes the Decision and Order of this Court.

Dated: March 31, 2011

Hon. Mary Ann Brigantti-Hughes, J.S.C.