

<b>Loretta v Split Dev. Corp.</b>
2016 NY Slip Op 32991(U)
May 6, 2016
Supreme Court, Westchester County
Docket Number: 62670/2013
Judge: Lester B. Adler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order with notice of entry upon all parties.

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
**VINCENT LORETTA and JOHANNA LORETTA,**

Plaintiffs,

-against-

**DECISION & ORDER**

**SPLIT DEVELOPMENT CORP.,**

Index No.:62670/2013  
Motion # 6

Defendant.

-----X

**ADLER, J.**

In this post-judgment motion, plaintiff moves under CPLR 4404(a) for an order setting aside the jury verdict as “contrary to the weight of the evidence and contrary to law.” For the reasons set forth below, the motion is denied. This Court reviewed the following papers in connection with this motion:

- Notice of Motion
- Affirmation in Support of Ronald K. Friedman, Esq., with Exhibits
- Supplemental Affirmation in Support of Ronald K. Friedman, Esq., with Exhibits
- Memorandum of Law in Support
- Affirmation in Opposition of Matthew J. McMahon, Esq., with Exhibits
- Reply Affirmation of Ronald K. Friedman, Esq.

*Background* – Plaintiffs brought this personal injury action to recover for personal injuries that Vincent Loretta suffered in May 2012, when he fell from a ladder while working at a construction project in Irvington, New York. Loretta was employed by Armstrong Plumbing & Heating, Inc. (Armstrong), a sub-contractor that was performing plumbing work in a single-family house. Armstrong had been hired by defendant Split

Development Corp. (Split), the general contractor for the project.

When the accident occurred, Loretta was standing on a ten-foot-high, A-frame ladder which Armstrong had provided him. He fell to the concrete floor of the garage when the ladder toppled over.

In August 2013, plaintiffs brought this action. They alleged, among other things, a cause of action against Split for violation of Labor Law § 240(1) (the Scaffold Act.)

After discovery, plaintiffs moved and Split cross moved for summary judgment as to Split's liability under the Scaffold Act. Plaintiffs contended that the ladder that Armstrong provided to Loretta was inadequate under the Scaffold Act as a matter of law because it was not secured or braced. In opposition, Split argued that a triable issue of fact had been raised whether the ladder was adequate for the work Loretta was performing, and further contended that factual disputes existed as to (1) whether the ladder's movement caused Loretta to fall from it, or vice versa and (2) what caused Loretta to fall from the ladder.

In a Decision & Order dated December 1, 2014, the Court (Sam D. Walker, J.) denied the motion and cross motion. The Court held, among other things, that the question whether the ladder that Armstrong provided Loretta constituted adequate protection was a triable issue of fact:

[T]he determination to use [a] ladder . . . requires . . . a factual assessment . . . to determine whether there has been a violation of the [Scaffold Act]. The determination of the type of protective safety device required for a particular job depends on the foreseeable risks of harm presented by the nature of the work.

*Trial* – This Court presided over the jury trial in this action in July 2015. The jury heard testimony from, among others, Loretta and Ernest Gailor, plaintiffs' witness.

Loretta, the only witness to his accident, testified that, before the incident, he had used the ladder about six times that day, without any problems. He stated that the ladder's legs were capped with rubber cleats which sat on a level and dry concrete floor.

Loretta further testified that, when the ladder toppled and fell, he was attaching a vertical pipe section to the end of a pipe elbow located in the garage ceiling. Loretta stated that, to seat the pipe section, he was using considerable force to push and twist the section two inches into the elbow. On cross examination, however, defendant confronted Loretta with inconsistent testimony from his pre-trial deposition. At the deposition, Loretta, when describing the force he used to connect the pipe section to the elbow, stated that a pipe section "go[es] in pretty easy. . . . You just got to twist it as you go in."

Moreover, at the deposition Loretta acknowledged that he did not remember whether he was twisting the section when he fell, and on cross examination stated that he merely assumed that he had been twisting it.

During direct examination, Loretta testified that he did not feel the ladder move before it toppled, and during his deposition, he stated "I didn't feel [the ladder] move and then I fell . . . ." On cross examination, Loretta further admitted that he could not tell whether he fell before or after the ladder toppled.

Mr. Gailor, on direct examination, opined that the ladder constituted an inadequate safety device to protect Loretta from the work he was performing. However, plaintiffs' counsel asked Gailor to base his opinion on the factual assumptions that (1) while Loretta was pushing the pipe up and twisting it, the ladder toppled and (2) the toppling ladder caused Loretta to fall. On cross examination, Gailor acknowledged that,

if some of the factual presumptions were inaccurate, his conclusion would be clearly different.

Gailor further opined that the ladder fell over because Loretta “pushed the center of gravity to the outside of the ladder” by “twisting the pipe and creating a torque.” On cross examination, Gailor acknowledged that he lacked sufficient information to calculate how much force Loretta had applied when attaching the pipe section.

At the conclusion of the trial, the following special verdict questions were submitted to the jury:

(1) WAS THE LADDER FURNISHED TO THE PLAINTIFF ADEQUATE TO PROTECT HIM FROM THE HAZARDS IN THE PERFORMANCE OF THE PLUMBING WORK HE WAS PERFORMING?

...

IF YOUR ANSWER IS “NO” TO QUESTION ONE PROCEED TO QUESTION TWO.

IF YOUR ANSWER IS “YES” TO QUESTION ONE PROCEED NO FURTHER AND REPORT TO THE COURT.

(2) WAS THE FAILURE TO PROVIDE ADEQUATE PROTECTION TO THE PLAINTIFF A SUBSTANTIAL FACTOR IN CAUSING THE ACCIDENT?

On July 27, 2015, the jury unanimously answered question # 1 “No,” resulting in a verdict in defendant’s favor.

*Motion* – Seeking to have the verdict set aside, plaintiffs first argue that, under the Scaffold Act, the ladder was inadequate as a matter of law. This argument was already raised and rejected before the motion Court, which ruled that the ladder’s adequacy for the work to be performed was an issue of fact. Interestingly, plaintiffs did not appeal the motion Court’s ruling, which thus became the law of the case. Moreover,

at the jury charge conference before this Court, plaintiffs did not object to the composition of the verdict sheet, which calls for a determination of fact.

Plaintiffs' argument that the verdict was against the weight of the evidence also fails. "A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" (*DiDonna v Houck*, 111 AD3d 662, 663 [2d Dept 2013]). In this case, there was sufficient evidence to support the jury verdict. Based on Loretta's testimony at his deposition and at trial, the jury could rationally conclude that, (1) when Loretta fell, he was not installing the pipe section by twisting the pipe and exerting force and (2) his fall was not caused by the ladder's movement, and instead his fall caused the ladder to topple over (*see Antunes v 950 Park Ave. Corp.*, 149 AD2d 332 [1st Dept 1989]).

Moreover, the jury had a rational basis to reject Gailor's expert testimony, since his opinion that the ladder was inadequate was premised on disputed issues of fact.

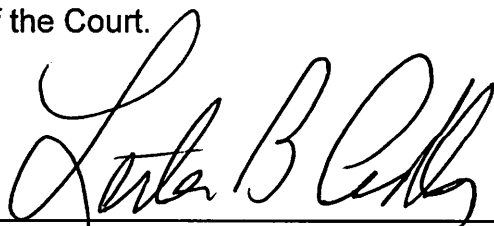
Accordingly, it is hereby

ORDERED, that plaintiff's motion to set aside the verdict pursuant to CPLR 4404(a) is denied.

The foregoing constitutes the Order of the Court.

Dated: White Plains, New York

May 6, 2016



HON. LESTER B. ADLER  
SUPREME COURT JUSTICE