

Shah v 20 E. 64th St. LLC
2020 NY Slip Op 34535(U)
April 20, 2020
Supreme Court, New York County
Docket Number: Index No. 156305/2015
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

_____X

INDEX NO. 156305/2015

HEMANT SHAH, VARSHA SHAH,

MOTION DATE 09/16/2019

Plaintiffs,

MOTION SEQ. NO. 027

- v -

20 EAST 64TH STREET LLC, TRI STAR CONSTRUCTION
CORP., URBAN FOUNDATION/ENGINEERING,
LLC, ABELOW SHERMAN ARCHITECTS LLC, RA
CONSULTANTS LLC

**DECISION + ORDER ON
MOTION**

Defendants.

_____X

The following e-filed documents, listed by NYSCEF document number (Motion 027) 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1147, 1152, 1153, 1155, 1158

were read on this motion for JUDGMENT NOTWITHSTANDING VERDICT.

This case arises out of a construction project undertaken at the request of Defendant 20 East 64th Street LLC (“20 East”). 20 East retained Defendant Tri-Star Contracting Corp. (“Tri-Star”) to be the construction manager for the project. Tri-Star, in turn, retained Defendant Urban Foundation/Engineering, LLC (“Urban”) to be the excavation contractor. As described in greater detail in an earlier order of the Court (NYSCEF 838), the construction caused substantial damage to Plaintiffs’ adjoining home at 22 East 64th Street. Plaintiffs brought an array of tort claims against all Defendants as well as a breach of contract and contractual indemnification claim against 20 East.

In this post-trial motion, Tri-Star seeks judgment notwithstanding a jury verdict or, in the alternative, a new trial. Tri-Star also seeks judgment in its favor on its cross-claims against Urban. For the reasons that follow, Tri-Star’s motion is granted in part and denied in part.

Procedural Background

Summary Judgment

On September 26, 2017, the Court (Kotler, J.) issued an omnibus summary judgment decision that resolved a number of issues and left others for trial. (NYSCEF 359) (“*SJ Op.*”). Among other things, the Court denied Tri-Star’s motion to dismiss Plaintiffs’ negligence claims. Specifically, the Court found that “there is an issue of fact related to Tri-Star’s involvement with the excavation that precludes summary judgment. *Id.* at 25-27. Based on that finding, the Court also denied Tri-Star’s motion for summary judgment on its cross-claim for summary judgment against Urban for contractual indemnification. *Id.* at 28-29.¹

Trial

In view of the complex web of claims and cross-claims, the parties stipulated to (and the Court ordered) a bifurcated trial.

Phase I

1. The Jury Verdict

After an eight-day trial, on December 19, 2018, the jury determined that Plaintiffs suffered damages proximately caused by the construction in the amount of \$5 million (for repairs) and \$500,000 for alternative living expenses.

2. The Bench Decision

On March 7, 2019, the Court issued a decision finding that 20 East breached both paragraphs 3 and 19 of the parties’ License Agreement and was required to indemnify Plaintiffs as a result of such breaches. (*Id.* at 19-24). The Court found that Plaintiffs were entitled to

¹ For the same reason, the Court also denied Tri-Star’s motion for summary judgment dismissing Urban’s claim against it for common law and contractual indemnification. *Id.* at 28.

\$6,255,007 in damages for the cost of repairing their home; \$1,152,000 for alternative living expenses; reasonable attorneys' fees as provided in the parties' contract (later determined by a JHO to be \$1,850,000); statutory interest from November 21, 2014 to the date of judgment (later determined by the Clerk to be \$3,040,931.50); plus costs and disbursements taxed by the Clerk of \$1,235, for a total of \$12,299,173.50. *See* NYSCEF 838 at 1-2; NYSCEF 934 (judgment).

Phase II

Following a seven-day trial, on July 24, 2019 the jury found that Tri-Star and Urban were negligent and that this negligence caused Plaintiffs' property damage. The jury assigned Tri-Star 60% of the fault and Urban 40% of the fault. No fault was ascribed to Plaintiffs or 20 East (which had been found by Justice Kotler not to have been negligent).

Analysis

Tri-Star Is Not Entitled to Judgment Notwithstanding the Verdict

Pursuant to CPLR § 4404, “[a]fter 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.” Judgment as a matter of law may be granted after a contrary jury verdict if “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.” *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978). A verdict may be set aside where the evidence was “wholly . . . insufficient in point of law to sustain” the claim and the evidence in the case is “insufficient if in truth it is incredible as matter of law.” *Blum v. Fresh Grown Pres. Corp.*, 292 N.Y. 241, 245 (1944). “[T]he question whether a verdict of a jury is ‘unsupported by sufficient evidence’ is always one of law for the Trial Judge.” *Id.* In order

for a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, there must be “a harsher and more basic assessment of the jury verdict.” *Cohen*, 45 N.Y.2d at 499.

Based on a review of the record, as aptly summarized by the briefs in opposition to this motion, the Court finds that sufficient evidence was presented at trial to lead reasonable people to the conclusion reached by the jury that Tri-Star was negligent and that its comparative fault was 60%. There was sufficient admissible evidence (including credible expert evidence that the Court observed firsthand) suggesting that Tri-Star was negligent, *inter alia*, in monitoring the impact of the construction on Plaintiffs’ property and that proper monitoring could have averted some or all of the damage. While the jury did not *have* to reach that conclusion, there was sufficient evidence to permit it reasonably to do so. Accordingly, Tri-Star is not entitled to judgment notwithstanding the verdict.

Tri-Star is Not Entitled to a New Trial

Pursuant to CPLR § 4404, “[a]fter 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 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.” “The criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent, for such a determination results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury.” *Nicastro v. Park*, 113 A.D.2d 129, 132–33 (2d Dep’t 1985). A motion to set aside a verdict as contrary to the weight of the evidence “invokes the court’s discretion, and resolution of such a motion involves an application of that professional judgment gleaned from

the Judge's background and experience as a student, practitioner and judge.” *Id.* at 134–35; *see also Micallef v. Miehle Co., Div. of Miehle-Goss Dexter*, 39 N.Y.2d 376, 381 (1976); *Mann v. Hunt*, 283 A.D. 140, 142 (3d Dep’t 1953). While weight must be given to a jury’s verdict where the facts are disputed and issues of credibility are presented, the court is “not required to give credence to a story so inherently improbable that we are morally certain it is not true.” *Bottalico v. City of New York*, 281 A.D. 339, 341 (1st Dep’t 1953). A jury verdict may be set aside as against the weight of the evidence regardless of whether factual issues still exist. *See McDonald v. Metro. St. Ry. Co.*, 167 N.Y. 66, 69 (1901); *Nicastro*, 113 A.D.2d at 135.

Tri-Star has not established that the jury’s verdict was against the weight of the evidence. Sufficient evidence was presented to permit a reasonable juror to find that Tri-Star was negligent and 60% at fault for the damage. The jury could reasonably conclude, *inter alia*, Tri-Star’s negligence with respect to monitoring was a substantial cause of damages that could have been avoided by prompt cessation of construction.

Tri-Star Was Not Entitled to a Jury Charge on Intervening Cause

The “evidence” upon which Tri-Star relies to suggest that “someone” removed certain optical monitoring points was speculative and not sufficient to present a viable question that there was an intervening cause that absolves Tri-Star of liability (in whole or part). Moreover, the claim against Tri-Star was based on an overall failure to monitor, including a need to adapt if monitors were absent, regardless of the reason for such absence. Accordingly, no instruction to the jury on intervening cause was warranted.

Further, the fact that the jurors asked for a read back of an intervening cause instruction *as to Urban* – based on an argument supported by specific evidence indicating that the damage to property might have been caused by unexpected ground water – does not suggest that Tri-Star

was entitled to an instruction with respect to a different, speculative theory as to its optical monitors.

Tri-Star Is Entitled to Conditional Contractual Indemnification From Urban

Finally, Tri-Star is entitled to contractual indemnification from Urban, but only for the portion of the judgment attributable to *Urban's* negligence. See General Obligations Law § 5-332.1; *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008); *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 795; *Higgins v. TST 375 Hudson, LLC*, 179 A.D.3d 508 (2020). Urban is correct that a monetary award is appropriate only if and when Tri-Star makes a payment to Plaintiffs in excess of its 60% share of Plaintiffs' recovery against Tri-Star and Urban for negligence.

Tri-Star is not entitled to *common law* indemnification because it was found to be partly at fault for Plaintiffs' damages. Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious. *Chatham Towers, Inc. v Castle Restoration & Const., Inc.*, 151 A.D.3d 419 (1st Dep't 2017). A party, such as Tri-Star, who has been found to have participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Trustees of Columbia University v. Mitchell/Giurgola Assocs.*, 109 A.D. 2d 449, 453 (1st Dept 1985).

Therefore, it is:

ORDERED that the branch of Defendant Tri Star's motion seeking judgment notwithstanding the verdict or, in the alternative, a new trial is denied; and it is further

ORDERED that the branch of Tri Star's motion seeking indemnification from Urban is granted to the extent Tri-Star makes a payment to Plaintiffs in excess of its 60% share of Plaintiffs' recovery against Tri-Star and Urban for negligence.

This constitutes the Decision and Order of the Court.

4/20/2020
 DATE


 JOEL M. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	OTHER