

<b>Isaac v 135 W. 52nd St. Owner LLC</b>
2022 NY Slip Op 32721(U)
August 11, 2022
Supreme Court, New York County
Docket Number: Index No. 158529/2014
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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BRIAN ISAAC,

Plaintiff,

- v -

135 WEST 52ND STREET OWNER LLC, NEW LINE
CONSTRUCTION CORP., NEW LINE STRUCTURES, INC.

Defendant.

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INDEX NO. 158529/2014

MOTION DATE 07/28/2022

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260

were read on this motion to/for SET ASIDE VERDICT

BACKGROUND

This action was commenced by plaintiff seeking damages for injuries he alleged he sustained when he stepped off a scaffold and hurt his knee. After trial, the jury found that the accident happened in "substantially" the manner that plaintiff testified to, but that the defendants did not breach their statutory duty to furnish a scaffolding which was constructed to give proper protection to plaintiff while performing his work.

PENDING MOTION

Plaintiff moves pursuant to CPLR §4404(a) for an order setting aside the verdict, reinstating the Labor Law §240(1) claim, and granting judgment on liability.

The motion was fully briefed and submitted on July 28, 2022, and the court reserved decision. For the reasons stated below, the motion is denied.

## DISCUSSION

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.

N.Y. C.P.L.R. 4404 (McKinney).

As held by the Appellate Division, First Department:

A jury verdict may not be set aside unless it plainly appears that the evidence so preponderates in favor of the losing side that it could not have been reached on any fair interpretation of the evidence. The evidence before the jury must be viewed in the light most favorable to the successful party and must be sufficient as a matter of law to sustain the verdict as to each specific question submitted to the jury (*see Matter of S. Kornblum Metals Co. v Intsel Corp.*, 38 NY2d 376, 379 [1976]).

*In re Est. of Chi-Chuan Wang*, 162 A.D.3d 447, 448 (2018).

Plaintiff argues that because the jury answered question one that the accident happened in substantially the manner claimed by the plaintiff, he is entitled to a directed verdict or judgment as a matter of law.

The court disagrees. The answer to question one signifies that the jury found the accident happened more or less the way the plaintiff testified to, but not exactly, and as pointed out by defendants, plaintiff testified to multiple versions of the accident. Plaintiff fixates on the fact that the plaintiff testified that the scaffold “jerked.” However, it is possible that the jury found that plaintiff stepped off and fell without finding that the scaffolding “jerked”.

Plaintiff also testified that the lever he was using jerked. Plaintiff testified “I was standing and I am left-handed, so I was standing on the scaffold and was using the lever and it jerked. When it jerked, I went out of reaction, I went to step, step down, I came down and I

fell.” (Tr. P.104, Lines 1-4). Plaintiff further testified “All I remember is falling down and hitting the concrete on my knees because I was sideways...” (Tr. P. 104 lines 6-7).

Plaintiff testified that the scaffold he was using had ladders on the side to climb off (Tr p. 105, lines 8-10). Plaintiff acknowledged that in fact he could not remember if he stepped down or fell down, but he remembered reporting at the time of the accident in 2014 that he had stepped down and not fallen down (Tr. P. 146, L14-17). Plaintiff acknowledged he could not recall what made him fall (Tr. P. 149, L14-16). Plaintiff acknowledged in his testimony that the scaffolding could have been as low as two feet off the ground (Tr. P. 136, line 34).

The court does not know which of the multiple versions of plaintiffs testimony regarding the accident the jury found to be correct, but CPLR §4404(a) mandates that the court assume the jury considered the evidence in the light most favorable to defendants (*In re Est. of Chi-Chuan Wang, supra*).

Labor Law §240(1) provides:

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.

N.Y. Lab. Law § 240 (McKinney).

Pursuant to section 240 of the Labor Law, an owner or contractor has an absolute duty to provide safe scaffolding. The failure to do so renders the owner or contractor liable as a matter of law for any resulting injuries (*Haimes v New York Tel. Co.* 46 NY2d 132).

It is well settled that “what constitutes ‘proper protection within the purview of subdivision 1 of section 240 necessarily turns upon the particular facts and circumstances of each case (*Kalofonos v State* 104 AD2d 75, 79 citing *Weber v Sate of New York* 53 NYS2d 598).”

“Inasmuch as there are no specific statutory requirements with respect to what constitutes a violation of Labor Law § 240 (1), the issue of whether ‘proper protection’ had been provided was an issue of fact for the jury (*Karas v MA Angeliades, Inc.* 304 AD2d 716 citing *Miller v Long Is. Light. Co.*, 166 AD2d 564 [1990]).”

Except in the extreme case where no protective device is furnished (*see, Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524; *Linney v Consistory of Bellevue Ref. Church*, 115 AD2d 209, 210), whether “proper protection” has been provided under Labor Law § 240 (1) is an issue of fact ....

*Blair v. Rosen-Michaels, Inc.*, 146 A.D.2d 863, 865 (1989). The fact that an injured worker falls from a scaffold or other safety device is insufficient to establish that the device did not provide proper protection (*Spenard v Gregware General Contracting* 248 AD2d 868; *Quinlan v Eastern Refractories Co.* 217 AD2d 819, 820).

This is not a case where no safety devices were provided to protect (plaintiff) from an elevation-related risk, which would establish a violation of Labor Law § 240 as a matter of law (*see, Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 493 N.Y.S.2d 102, 482 N.E.2d 898). (Plaintiff) was provided with scaffolding, which is a safety device enumerated in Labor Law § 240(1).

*Beesimer v. Albany Ave./Route 9 Realty, Inc.*, 216 A.D.2d 853, 854 (1995).

The plaintiff’s problem in this trial stemmed from the fact that counsel for plaintiff argued to the jury from opening arguments and through the trial that Labor Law §240(1) mandated that all scaffolds have a safety rail and that the failure of the scaffold to have a safety rail was a violation of the statute. In his opening statement counsel stated “Section 240 of the Labor Law requires all contactors and owner in the altering of a building to furnish scaffolding. When they furnish scaffolding, it must provide proper protection. Specifically, a safety rail

around the scaffold. If an owner and a contractor do not provide safety rails, and as a result a worker is hurt, the owner and the contractor are responsible.” (Ex. A, Trial Transcript, 6/7/22, pp. 15 – 16).

However, plaintiff proffered no evidence at trial, via either plaintiff, an expert, or any of the witnesses called, that under the circumstances of the work plaintiff was performing, in the manner and location it was being performed, that the scaffold required safety railings.

While plaintiff argues defendants confused the jury by referencing legal height requirements, it is clear that the jury followed the courts curative direction to ignore both attorneys’ statements about what the law requires and only rely on the court’s charges. This is evidenced by the fact the second jury note (Court Ex K) which stated:

The jury would like to know if there is any additional information/detail/clarification the court can provide regarding the “statutory duty to furnish a scaffolding which was constructed to give proper protections to plaintiff while performing his work.”

Plaintiff made no request that the court charge anything other than the basic language of PJI 2:217 (see plaintiff’s request to charge Ct Exhibit D).

After the jury note was received, plaintiff argued that the court should just reiterate its charge. There was no request that information be added pertaining to a safety rail (Ex A to the motion pp 736- 743).

In sum it was for the jury to determine whether given the facts and circumstances in this particular case, the scaffold was sufficient even though it lacked a safety rail. The jury concluded that it was. The court does not find a basis to set aside the verdict.<sup>1</sup>

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<sup>1</sup> Assuming *arguendo* the verdict was inconsistent the proper remedy at this juncture would be to order a new trial (*Bellinson Law, LLC v Ianucci* 116 AD3d 401).

Based on the foregoing the motion is denied.



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8/11/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: