At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of October, 2022.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

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JESUS ANTONIO HERNANDEZ AND YISSEL BATISTA,

Plaintiffs,

-against-

Index No.: 514076/17

mot # 7 & 8

HIGH RISE BUILD & DESIGN, INC., and J.J.B. RETAIL CORP. D/B/A SUNRISE AUTO SALES,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	112-120, 121-126
Opposing Affidavits (Affirmations)	
Affidavits/ Affirmations in Reply	127, 128
Other Papers:	

Defendant, J.J.B. Retail Corp. d/b/a Sunrise Auto Sales (J.J.B. Retail) moves in motion (mot.) sequence (seq.) number (no.) 7 for an order: (1) pursuant to CPLR 4404 (a) for judgment notwithstanding the verdict, or alternatively, to set aside the verdict as against the weight of the credible evidence and in the interest of justice; (2) pursuant to CPLR 5015 (a) (3), to relieve J.J.B. Retail from the judgment on the grounds of fraud, misrepresentation or other misconduct of an adverse party; and (3) pursuant to 22

NYCRR 130-1.1, for sanctions against plaintiffs and their counsel. Plaintiffs Jesus Antonio Hernandez and Yessel Batista (collectively, plaintiff) cross-move in mot. seq. no. 8 for an order: (1) denying J.J.B. Retail's motion to set aside the jury's verdict; and (2) imposing sanctions upon J.J.B. Retail and its counsel pursuant to 22 NYCRR 130-1.1 and CPLR 8303.

Background and Procedural History

The underlying action stems from personal injuries sustained by plaintiff as a result of an accident that occurred on May 24, 2017, at a construction site located at 241-02 Linden Boulevard, Elmont, New York (the premises). It is undisputed that the premises were owned by J.J.B. Retail. Plaintiff alleges that sometime before May 24, 2017, he was hired by defendant High Rise Build & Design, Inc., (High Rise)[1] to perform sheetrock work and metal framing at the premises. He further alleges that on May 24, 2017, he fell from a scaffold while performing that work and sustained various injuries. By decision and order, dated November 6, 2019, this court (Honorable Carolyn Wade) denied J.J.B. Retail's motion for summary judgment dismissing plaintiffs' claims. Subsequently J.J.B. Retail moved to reargue said decision which was denied by Judge Wade's decision and order dated April 22, 2020.

The case proceeded to trial before this court solely on the issue of liability. The trial was conducted on April 29, May 2, and May 4, 2022. During the course of the three-day trial, testimony was heard from: Imanayul Suyonov, the owner of J.J.B. Retail,

[1] High Rise failed to answer the complaint and an order of default was issued against it on March 8, 2018.

High Rise supervisor Andre McDonald, and plaintiff. Mr. Suyonov acknowledged that J.J.B. Retail hired a company called SSG Group (SSG) to perform construction work, and that he knew that SSG and High Rise were the same company. He further testified that he visited the premises approximately once a week prior to the date of the accident and that he never saw plaintiff at the site and had only observed African-American people performing work at the premises[2] (NYSCEF Doc No. 115, trial transcript, at 108, lines 12-25). Mr. McDonald testified that he had an independent recollection of every single person who worked on that job site on the date of the accident, and for the 30 days prior, and that he had never seen the plaintiff before seeing him in court (*id.* at 70, lines 23-25; at 71, lines 1-7; at 78, lines 6-12).

Plaintiff testified that he did metal framing and installing sheetrock at the premises for approximately 30 days prior to the accident and that he had heard about the job from Carlos Carmona, who he had worked with at other jobs, and he believed was the boss of the work he was performing at the premises (*id.* at 118, lines 10-14, 18-25; at 119, line 1). He further testified that he was paid in cash by Mr. Carmona, but that he had at one point observed Mr. Suyonov giving Mr. Carmona the cash (*id.* at 120, lines 11-25; at 121, lines 1-6). Plaintiff testified that he received his instructions regarding what work to perform from Mr. Carmona, who informed him that they were working for High Rise (*id.* at 121, lines 8-24). He further testified that the scaffold he was using had no guardrails or safety net and that the accident occurred when one of the wooden pieces of the scaffold rose up causing him to fall off and strike a ladder that had been placed on the floor (*id.* at 124,

[2] The Court notes that the plaintiff is not African-American.

lines 22-25; at 125, lines 1-10, 21-25; at 126, lines 1-2). When plaintiff was shown a text message thread which purported to represent messages plaintiff had exchanged with Mr. Carmona at some point following his accident, he testified that the bulk of the messages related to him asking Mr. Carmona to help him remodel his apartment and that only one of the messages referred to the accident (*id.* at 172, lines 11-23; at 176, lines 23-25; at 177, lines 1-2).

Following the conclusion of the testimony and closing arguments, the case was submitted to the jury. The six-member jury unanimously voted yes to all six questions presented to them, which were as follows:

1. Was plaintiff Jesus Antonio Hernandez injured while working at 241-02 Linden Boulevard, Elmont, New York, on May 24, 2017?
2. Did High Rise Build & Design, Inc. employ plaintiff, Jesus Antonio Hernandez, to perform work on May 24, 2017?
3. Did defendant, J.J.B. Retail Corp. violate New York State Labor Law 240 (1) on May 24, 2017?
4. Was the violation of Labor Law 240 (1) a substantial factor in causing the plaintiff injuries?
5. Did defendant, J.J.B. Retail Corp. violate section 241 (6) of the New York State Labor Law?
6. Was the violation of section 241 (6) of the New York State Labor Law a substantial factor in causing plaintiff's injuries?

Following the jury's unanimous verdict, counsel for J.J.B. Retail orally moved to vacate and set aside this verdict, arguing that it was unsupported by sufficient evidence. In this regard, counsel asserted that there was no valid line of reasoning and permissible inferences which could possibly lead rational jurors to a conclusion that plaintiff was

employed by High Rise or that he was present at the premises at which he claims he was injured. The court reserved decision and the following motion and cross motion ensued.

J.J.B. Retail's Motion and Plaintiffs' Cross Motion

J.J.B. Retail moves for an order: 1) pursuant to CPLR 4404 (a) for judgment notwithstanding the verdict, or alternatively, to set aside the verdict as against the weight of the credible evidence and in the interest of justice; 2) pursuant to CPLR 5015 (a) (3), to relieve it from judgment on the grounds of fraud, misrepresentation, or other misconduct of an adverse party; and 3) pursuant to 22 NYCRR 130-1.1, for sanctions against plaintiffs and their counsel. In response, plaintiff cross-moves for an order: (i) denying J.J.B. Retail's motion to set aside the jury's verdict, and (ii) imposing sanctions upon J.J.B. Retail and its counsel.

In support of its motion, J.J.B. Retail argues that the evidence presented during the trial weighed so heavily in its favor that the jury could not have reached a verdict for plaintiff by any fair interpretation of the evidence. In this regard, J.J.B. Retail contends that the only evidence adduced in support of plaintiff's contention that he was on the site or that he was employed by High Rise was his own testimony. Conversely, J.J.B. Retail asserts that its owner, Mr. Suyonov, testified that he knew who was on the job at all times and never saw plaintiff on the premises. Additionally, J.J.B. Retail points to the testimony of High Rise supervisor Mr. McDonald, who testified that he was the sole person responsible for hiring people to work for High Rise and that plaintiff was not employed on this project. Further, J.J.B. Retail points to the text messages exchanged between plaintiff and Mr. Carmona that were introduced during the trial, which J.J.B. Retail

maintains established a scheme to defraud defendants by way of this action for personal injuries.

Finally, J.J.B. Retail asserts that this Court erred in failing to enter a directed verdict against plaintiff because he pled in his bill of particulars that his employer was Mr. Carmona and never moved to file an amendment, but then proceeded to testify at trial that High Rise was his employer. Thus, J.J.B. Retail contends that it is illogical for the jury to have concluded that plaintiff was employed by High Rise, when plaintiff himself admitted that his employer was Mr. Carmona. It argues that there is no valid line of reasoning or permissible inference that could have led any juror to rule in plaintiff's favor and thus the Court should grant judgment notwithstanding the verdict in favor of J.J.B. Retail and dismiss the lawsuit.

Additionally, J.J.B. Retail argues that the verdict should be set aside in the interest of justice because it was obtained by fraud, misrepresentation, or other misconduct on the part of plaintiff. Specifically, it contends that plaintiff's testimony during the trial regarding the text messages he exchanged with Mr. Carmona conflicts with the affidavit he submitted in opposition to J.J.B. Retail's motion for summary judgment. In this regard, J.J.B. Retail notes that during the trial, plaintiff testified that he did not ask Mr. Carmona to write an affidavit in his favor. However, in his affidavit in opposition to the summary judgment motion, plaintiff attested that he had asked Mr. Carmona to come to his attorney's office to sign an affidavit describing how the accident occurred. Next, J.J.B. Retail contends that plaintiff's testimony that a majority of the text message thread

related to him asking Mr. Carmona to help him remodel his apartment, was untruthful, constitutes perjury and conflicts with his prior affidavit.

J.J.B. Retail further argues that the court should set aside the jury verdict and order a new trial in the interest of justice, as there has been misconduct on the part of plaintiff's counsel that influenced the verdict. Specifically, J.J.B. Retail contends that plaintiff's counsel opened the trial by falsely telling the jury that plaintiff had received Workers' Compensation benefits directly from High Rise, rather than from the State Insurance Fund. Next, it contends that plaintiff's counsel told the jury that he was not required to prove who plaintiff was employed by despite the fact that this exact issue had been discussed during the charging conference, and he knew that the first question to the jury would be whether plaintiff was employed by High Rise. Finally, J.J.B. Retail contends that plaintiff's counsel endorsed plaintiff's perjury regarding the text messages when, during his summation, he stated: "What was the e-mail about, that text message thread? I don't know. I believe my client" (NYSCEF Doc No. 115, trial transcript, at 265, lines 11-13).

Accordingly, J.J.B. Retail maintains that the verdict in plaintiff's favor cannot stand and should be set aside, and that a verdict should be directed in J.J.B. Retail's favor, or that a new trial should be ordered.

In opposition to J.J. B. Retail's motion and in support of the cross motion, plaintiff argues that J.J.B. Retail's motion is without merit in its entirety. He asserts that the branch of the motion seeking to set aside the verdict pursuant to CPLR 4404 (a) should be denied as there was no fraud, and the verdict was amply supported by the weight of

the evidence in the record. Plaintiff further maintains that the branch of the motion seeking that the verdict be vacated pursuant to CPLR 5015 (a) (3) lacks merit as there is no factual or legal basis for the frivolous assertion that, with respect to the issue of the text messages, the verdict in favor of the plaintiffs was obtained by fraud, misrepresentation, or other form of misconduct. In this regard, plaintiff notes that J.J.B. Retail's contention that his testimony regarding the text messages was false rests upon the cross examination of plaintiff concerning whether the text messages had "absolutely nothing" to do with the underlying accident. Plaintiff's affidavit in opposition to the summary judgment motion indicated that the text messages did relate to the accident and plaintiff's trial testimony did not deny that. Moreover, plaintiff points to the following testimony:

> Q. So Mr. Hernandez, I want to get something clear. You are testifying today that these text messages have absolutely nothing to do with this case.
> A. **No**. (*id.* at 152, lines 6-9 [emphasis added]).
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> * * *
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> Q. Thank you, Mr. Hernandez. Now, let's move onto the next line [of the text message]. 'But its' fine, I am not going to get you into trouble. But they themselves will because they say you signed a paper.' What did you mean?
> A. That there does refer to the job, to the accident.
> Q. Mr. Hernandez, before lunch I asked you does this thread have anything to do with this accident and you said no. And now it is your testimony that in the same text message you are referring now to the construction accident?
> A. Here there are six messages. In the first ones they have nothing to do with the job, with the accident. Where it says about the thing that you are asking me about, that does have to do with the accident. (*id.* at 172, lines 11-23).

Plaintiff contends that it was J.J.B. Retail's counsel that actually tried to mislead the jury when, during his summation, he stated that plaintiff was claiming that the text messages "has nothing to do with the accident." (*id.* at 247, line 6), when plaintiff in fact testified that a portion of the text messages related to the accident. Plaintiff argues that if there was any doubt regarding the truthfulness of his testimony, this was for the jury to determine. In this regard, he points out that this Court, in charging the jury, specifically informed them that it was their role to assess the credibility of the witnesses and determine how much weight each witnesses' testimony should be given. Moreover, plaintiff argues that J.J.B. Retail's assertion regarding the fact that plaintiff's affidavit is at odds with his trial testimony, does not demonstrate that his testimony was fraudulent. He notes that counsel for J.J.B. Retail was in possession of said affidavit, as it was submitted in opposition to its summary judgment motion, and thus could have used it during cross examination to try to impeach plaintiff's trial testimony.

Additionally, plaintiff maintains that there is no merit to J.J.B. Retail's contention that because plaintiff pled in his bill of particulars that his employer was Mr. Carmona but then testified that he was employed by High Rise, there was no valid line of reasoning whereby the jury could have found he was employed by High Rise. Plaintiff points to the following testimony at trial:

> Q. Mr. Hernandez, my question is, since you testified two years ago and you said the first time you knew about High Rise employing Carlos Carmona was before this accident, why did you put Carlos Carmona as your employer after this accident?
> A. The truth is that I didn't know until after the accident. I knew after the accident because Carlos told me.

> Q. So, Mr. Hernandez, so when you gave the testimony at your deposition, you were lying?
> A. No, I didn't lie.
> Q. So my question is, why did you testify to that at your deposition?
> A. If it's written there, then I said it. But perhaps it was an error (*id.* at 141, lines 18-25; at 142, lines 1-5).

Thus, plaintiff argues that his error in determining who in fact was his employer was not a fraudulent lie, but rather a lack of understanding regarding the work site hierarchy.

Plaintiff further asserts that there was no error in his counsel's opening statement or summation that would compel setting aside the verdict. In this regard, he notes that when counsel stated that plaintiff received Workers' Compensation from High Rise, this Court in fact sustained the defense's objection, and stated: "[i]t's a matter of law. He received them from the State of New York who administers the Workers' Compensation program. Let's move on" (*id.* at 23, lines 9-11). In addition, plaintiff argues that his counsel's statement in closing regarding what the text messages related to was merely a comment on the evidence that had been presented and was not fraudulent.

Finally, plaintiff argues that the jury verdict should not be set aside as it was supported by credible evidence, and that it was within the jury's province to credit the testimony of plaintiff, and to discredit the testimony of Messrs. Suyonov and McDonald.

Discussion

CPLR 4404 (a) provides in pertinent part that:

> 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 . . .

"A motion pursuant to CPLR 4404 (a) to set aside a jury verdict and for judgment as a matter of law 'will be granted where there is 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'" (*Loretta v Split Dev. Corp.*, 168 AD3d 823, 825-826 [2d Dept 2019], quoting *Frank v Gengler*, 151 AD3d 696, 697 [2d Dept 2017]; *see Century Sur. Co. v All In One Roofing, LLC*, 154 AD3d 803, 807 [2d Dept 2017]). "'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'" (*Khaydarov v AK1 Group, Inc.*, 173 AD3d 721, 722 [2d Dept 2019], quoting *Barril v McClure*, 163 AD3d 752, 753 [2d Dept 2018]; *see Peterson v MTA*, 155 AD3d 795,797 [2d Dept 2017]; *Frank*, 151 AD3d at 697).

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" (*Metz v Peconic Bay Med. Ctr.*, 203 AD3d 1040, 1041 [2d Dept 2022], quoting *Liguori v Yerger*, 197 AD3d 1108, 1109 [2d Dept 2021; *Wallace v City of New York*, 108 AD3d 760, 761 [2d Dept 2013]). "'Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence. Its resolution is entitled to

deference'" (*Aronov v Kanarek*, 166 AD3d 574, 575 [2d Dept 2018], quoting *Cicola v County of Suffolk*, 120 AD3d 1379, 1382 [2014] [internal quotation marks omitted]; *Glynn v Altobelli*, 181 AD3d 567, 569-570 [2d Dept 2020]; *Vasquez v County of Nassau*, 91 AD3d at 857 [holding "[w]e accord deference to the credibility determinations of the factfinders, who had the opportunity to see and hear the witnesses"]).

It is well settled that "the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*Glynn*, 181 AD3d at 569-570, quoting *Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]; *see Desinor v Nassau County*, 206 AD3d 618, 619 [2d Dept 2022]; *Salas v Bellair Laser Ctr., Inc.*, 185 AD3d 746, 747 [2d Dept 2020]).

The Court has considered the parties' submissions and concludes that, contrary to J.J.B. Retail's contention, there was a valid line of reasoning and permissible inferences that justify the jury's liability verdict. Here, the jury heard all issues of fact and made their determination by assessing the evidence, as well as the credibility of witnesses after seeing them and listening to their testimony. Accordingly, it was well within the jury's province to determine that plaintiff's testimony was more credible than that of the witnesses presented on behalf of J.J.B. Retail (*see Cioffi v Target Corp.*, 188 AD3d 788, 791-792 [2d Dept 2020] [holding that the "jury may believe or disbelieve the testimony of a witness, and is free to accept or reject some or all of the parties' testimony and weigh any conflicting inferences"]; *Agostino v L & M Bus Co.*, 162 AD3d 727, 728 [2d Dept 2020]; *Peterson*, 155 AD3d at 798).

Moreover "[u]nder the fair interpretation standard, a jury's resolution of a factual issue is not to be disturbed if there is any way to conclude that the verdict is a fair reflection of the evidence" (*Luna v 4300 Crescent, LLC*, 174 AD3d 881, 884 [2d Dept 2019]; *see Nicastro*, 113 AD2d at 129; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Kirkland v Ranchers Best Wholesale Meats, Inc.*, 152 AD3d 656, 657 [2d Dept 2017]; *Wilson v County of Westchester*, 148 AD3d 1091, 1091 [2d Dept 2017]). Here, it appears that the jury determined that because Mr. Carmona was the person who told plaintiff about the work, supervised him at the job site and handed him his weekly pay, it was reasonable that he initially was under the impression that Mr. Carmona was his employer but later came to learn from Mr. Carmona, that High Rise was the entity for which they were performing work at the site. Accordingly, the Court finds that the jury's verdict was not contrary to the weight of the evidence that was presented.

J.J.B. Retail also seeks to be relieved from the judgment pursuant to CPLR 5015 (a) (3), which provides, in pertinent part, that:"[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . fraud, misrepresentation, or other misconduct of an adverse party." In support of this branch of the motion, J.J.B. Retail alleges that plaintiff was lying about the nature and context of the text messages between Mr. Carmona and himself. Additionally, J.J.B. Retail asserts that the misconduct of plaintiff's counsel during his opening statement and closing summation requires that J.J. B. Retail be relieved of the liability determination.

This branch of J.J.B. Retail's motion is also denied as the Court finds no merit to the allegations of fraud, misrepresentation or misconduct on the part of plaintiff or his counsel (*see Molina v Chladek*, 140 AD3d 523, 524 [1st Dept 2016] [finding that the evidence presented was insufficient to demonstrate fraud that would justify relief under CPLR 5015 (a) (3)]; *Aames Capital Corp. v Davidsohn*, 24 AD3d 474, 475 [2d Dept 2005]; *Clapp v LeBoeuf, Lamb, Leiby & MacRae*, 286 AD2d 643, 644 [1st Dept 2001]; *Arroyo v Hilton*, 281 AD2d 440, 441 [2d Dept 2001]) Moreover, it is well settled that what an attorney states during opening and closing statements is not evidence, and here the jurors were so instructed (*see* PJI 1:3, PJI 1:5; NYSCEF Doc No. 115 at 281, lines 8-11).

The Court, having considered the parties remaining contentions, finds them unavailing. All relief not specifically granted herein has been considered and is denied.

Accordingly, it is hereby

ORDERED that J.J.B. Retail's motion is denied in its entirety; and it is further

ORDERED that branch of plaintiffs' cross motion seeking an order denying J.J.B. Retail's motion is granted and that branch seeking sanctions is denied, and it is further

ORDERED, that this matter shall be reassigned for the damages trial of the case. The Parties shall appear in JCP on October 27, 2022 for a conference.

The foregoing constitutes the decision and order of the Court.

ENTER,

J. S. C.

HON. ELLEN M. SPODEK