

Nassar v Macy's, Inc.
2023 NY Slip Op 30212(U)
January 23, 2023
Supreme Court, New York County
Docket Number: Index No. 161207/2014
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. PAUL A. GOETZ</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>NAJI NASSAR,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>MACY'S, INC.,STRUCTURE TONE INC.,</p> <p align="center">Defendants.</p> <p>-----X</p>	<p>PART 47</p> <p>INDEX NO. <u>161207/2014</u></p> <p>MOTION DATE <u>09/19/2022,</u> <u>09/19/2022</u></p> <p>MOTION SEQ. NO. <u>005 006</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 005) 204, 205, 206, 207, 208, 215, 217, 218, 231
 were read on this motion to/for POST JUDGMENT OTHER.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 209, 210, 211, 212, 213, 214, 216, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232, 233
 were read on this motion to/for SET ASIDE VERDICT.

In this personal injury Labor Law case, plaintiff moves to have the jury’s final verdict on past damages disregarded and replaced with the jury’s original award as to those damages (MS # 5). Defendants move pursuant to CPLR § 4404 (a) to dismiss plaintiff’s Labor Law § 200 and common law causes of action arising from his first of two accidents on July 20, 2013 and vacate the jury’s damages awards as to those claims (MS # 6).

After a trial of approximately four weeks the jury determined that defendant Structure Tone, Inc. violated Labor Law § 200 in connection with plaintiff’s first accident on July 20, 2013 by failing to provide and maintain a safe place to work, adequate protection for plaintiff’s safety at the job site and that the violation was a substantial factor in causing plaintiff’s injuries. The jury also found that plaintiff was negligent in connection with his first accident on July 20, 2013 and his negligence was a substantial factor in causing his accident; the jury apportioned fault 70% defendants and 30% plaintiff. The jury awarded plaintiff \$245,000 for past lost earnings

and \$245,000 for past pain and suffering; and \$245,000 for future lost earnings and \$245,000 for future pain and suffering both for a period of 28 years. As to plaintiff's second accident on July 20, 2013 the jury found in favor of defendants on all of plaintiff's Labor Law and common law causes of action.

Evidence at Trial

Plaintiff's testimony

Plaintiff testified that on the date of his accident¹ he was working for Marcello Tile as a helper to the tile setters on the project at the Macy's in Herald Square installing marble slabs for flooring (6/13/22 Tr at 18 - 21). On the date of his accident plaintiff was working with five Marcello Tile employees including his foreman and friend Guiseppe "Joe" Simonetta and his partner Jimmy Gonzalez (*id.* at 25). Also working the evening of plaintiff's accident was a Structure Tone employee (*id.*). Plaintiff was tasked with getting thinset² for the tile setters to lay the marble but there were no Marcello Tile A-frame carts³ available to transport it (*id.* at 25 – 27). Simonetta instructed plaintiff to see if he could borrow someone else's A-frame cart (*id.* at 27). Plaintiff spotted a yellow A-frame cart and the Structure Tone employee standing approximately 30 feet away and he asked the Structure Tone employee if he could borrow it. The Structure Tone employee responded "yeah, sure" and pushed the A-frame cart towards plaintiff and, said "go ahead, use it" (*id.*). Plaintiff did not know the Structure Tone employee's name but testified that he was wearing a white helmet with a Structure Tone sticker on it (*id.*). As to ownership of the cart plaintiff testified that "it did kind of say Structure Tone on it but

¹ Although plaintiff's claims were for two separate accidents on the same date, July 20, 2013, neither party challenges any of the jury's determinations with respect to the second accident. Therefore, only testimony relevant to a determination of parties' motions will be detailed.

² Thinset is the securing material spread on the floor before placing the marble tiles down (*id.* at 21).

³ An A-frame cart is a steel platform with A-shaped metal bars attached for slabs of marble to lean against (*id.* at 23).

scraped. . . . It's not clear it was Structure Tone, but I seen some kind of letters on it say Structure" (6/16/22 Tr at 37).

Plaintiff testified that that night was the first time he used the yellow A-frame cart and that the wheel he claims later malfunctioned was wobbly but he "didn't notice that too much when it was empty because it was a lot easier to push . . ." Plaintiff also testified that the A-frame cart rolled normally without any weight on it when he was rolling it to get the thinset (*id.* at 38 – 41). After rolling the cart to where the thinset was located, plaintiff loaded six or seven bags of thinset onto it (*id.* at 41). Plaintiff estimated that the load of thinset weighed 350 pounds (6/13/22 Tr at 41). Plaintiff testified that after the cart was loaded, Jimmy Gonzalez was at the front of the cart pulling and steering it and he was in rear pushing it (*id.*). Because they had to get the cart up a ramp with a pitch of twenty-four inches, "they had to run with it" (*id.*). When about seventy to eighty percent of the cart was on the ramp (6/16/22 Tr at 42) the rear right wheel stopped swiveling because "it kind of got pressure on it" and it got stuck pointing right, away from the ramp that the front of the cart was already on, snapping plaintiff's "whole back" (6/13/22 Tr at 41 – 42). Nevertheless, with help from two workers standing nearby, plaintiff was able to the cart onto the ramp and up the platform (*id.* at 43). Plaintiff and Gonzalez then navigated the cart through Macy's (*id.*).

Marcello Tile foreman

Marcello Tile's foreman on the project Giuseppe "Joe" Simonetta testified that he is friends with plaintiff and on the night of plaintiff's accident he asked plaintiff to see if he could "find something with wheels . . . [to] bring in some bags of thinset so we can work" (6/10/2022 Tr at 25). He observed plaintiff moving the A-frame cart and did not observe any problems with

him moving it. Simonetta further testified that no one ever complained prior to plaintiff's accident that they were having a problem moving the cart (*id.* at 27).

Structure Tone's job site supervisor

Structure Tone's job site supervisor for the project, Michael Sansone testified that he never received any complaints about Structure Tone carts and he was never informed by anyone of any defect or issue with the wheel on a Structure Tone cart (6/17/22 Tr at 60 – 61).

Nicholas Bellizzi, P.E.

Plaintiff called Nicolas Bellizzi as his engineering expert witness. Bellizzi did not inspect the A-frame cart involved in plaintiff's accident, basing his opinions instead on plaintiff's deposition testimony. Bellizzi recalled that "the right rear wheel turned sideways, kind of stopped, got jammed up in the ramp" and then "hit the ramp and went over the lip on the right side of the ramp" causing "a sudden, unexpected, unanticipated movement" (6/16/22 Tr at 33). Bellizzi opined that if the wheel had been "operating properly, it would have just rolled like the other wheels up the ramp. . . . But because it did not operate properly and got jammed up, it was defective. So the defective wheel . . . was the proximate cause of the accident" (*id.* at 33 – 34). Bellizzi acknowledged that since he did not inspect the wheel, he would not know whether it was actually defective (*id.* at 39).

Bernard Lorenz, P.E.

Defendants called Bernard Lorenz as their engineering expert witness. Lorenz did not inspect the A-frame cart involved in plaintiff's accident, basing his opinions instead upon documents provided to him by defendants' counsel (6/21/22 Tr at 31 & 5 – 6). Lorenz testified that there was no malfunction of the cart when plaintiff first began to use it because plaintiff said during his deposition that when he first started using the cart there was no issue with its

operation (6/16/22 Tr at 16). And that if the wheel of the cart became defective so that it was no longer “free running” it would have remained that way until repaired because it “doesn’t heal itself” and it could not be an intermittent problem (*id.* at 17). Lorenz further testified that if one of the wheels on the cart was not functioning properly, one would not be able to use it if it were loaded with three to four hundred pounds (*id.* at 19).

Discussion

“[U]nder CPLR 4404 (a) the court may set aside a verdict or judgment entered after trial, and direct that judgment be entered in favor of a party entitled to judgment as a matter of law, if the verdict was not supported by legally sufficient evidence, since under those circumstances there is “no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*In re New York City Asbestos Litig.*, 148 A.D.3d 233, 235 [1st Dept 2017], quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

A procedural argument made by plaintiff in opposition to defendants’ motion pursuant to CPLR § 4404 warrants addressing before turning to the merits of the motion. Plaintiff argues that the decision denying defendants’ motion for a directed verdict pursuant to CPLR 4401 “is law of the case,” suggesting that therefore, that denial of that motion requires denial of this motion without addressing the merits. However, a decision after the close of a plaintiff’s case to deny a defendant’s motion for a directed verdict does not preclude a defendant from availing themselves of the post-trial remedy of seeking a judgment in their favor notwithstanding the jury’s verdict. Indeed, defendants were required to move for a directed verdict pursuant to CPLR § 4401 on the issues they now move for a judgment as a matter of law pursuant to CPLR §

4404 in order to preserve those “issue at the close of evidence” (*Wittorf v NYC*, 144 AD3d 493, 494 [2016]). In any event, the law of the case doctrine does not inhibit this court’s ability to revisit a prior determination (*Halloran v Halloran*, 161 AD2d 562, 564 [2nd Dept 1990] [observing “Supreme Court has inherent power to set aside, correct or modify its own orders”]).

Turning to the merits of defendants’ motion, they argue, *inter alia*, that to succeed on his Labor Law § 200 and common law negligence claims, plaintiff must establish that Structure Tone had actual or constructive notice of the defective condition of the A-frame cart and since plaintiff failed to do so this claim must be dismissed and judgment entered in their favor. In opposition plaintiff argues that defendants failed to demonstrate that Structure Tone did not have actual or constructive notice of the defective condition of the cart.

Labor Law § 200, “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]; citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states in pertinent part, as follows:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

(Labor Law § 200 [1]).

“Claims under the statute and common-law fall into two general categories: ‘those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed’” (*Winkler v Halmar Intl., Inc.*, 206 AD3d 458, 459 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144, [1st

Dept 2012]). The statute is governed by the “generally applicable standards of the prudent [person], the foreseeability of harm, and the rule of reason” (*Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 382 [1st Dept 1959]).

There are two distinct standards for liability under Labor Law § 200 and the common law:

Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.

(*Cappabianca*, 99 AD3d at 144). Generally, “[t]hese two categories should be viewed in the disjunctive” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

A defective A-frame cart provided by a general contractor implicates the premises condition standard (*cf Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999] [“As it was reasonably foreseeable that a worker might use the defective ladder and sustain injury, its presence in the building clearly constituted a dangerous condition”]; *Chowdhury v Rodriguez*, 57 AD3d 121, 131–132 [2d Dept 2008] [“when a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition”]).

In order to prevail on his Labor Law § 200 and common law negligence claims plaintiff must establish that defendants had actual or constructive notice of the defective condition of the A-frame cart when it was lent to him (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]; *Lara v Kadir*, 201 AD3d 590, 591 [1st Dept 2022]).

“To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[s’] employees to discover and remedy it”

(*Gordon*, 67 N.Y.2d at 837). Here there was no testimony at trial that anyone saw the A-frame cart malfunction prior to plaintiff using it the night of his accident. Simonetta confirmed that the cart looked and functioned normally when plaintiff began using it. Plaintiff testified that the cart was easy to push before he and Gonzalez loaded it with thinset and attempted to get it up the ramp. Plaintiff’s expert did not suggest that the issue with the cart existed for any length of time prior to the moment plaintiff and Gonzalez encountered the trouble getting the cart loaded with thinset up the ramp. Thus, there is no evidence that that problem with A-frame cart’s rear right wheel was visible and apparent and existed for a sufficient amount of time prior to plaintiff’s accident to allow Structure Tone’s employees an opportunity to discover and remedy the issue. Therefore, the evidence at trial was not sufficient to support plaintiff’s Labor Law § 200 and common law negligence claim (*accord Faricelli v TSS Seedman’s, Inc.*, 94 NY2d 772 [1999] [holding verdict not sufficiently supported because there was no evidence that defendant knew about the dangerous condition or that it had existed long enough prior to the accident so that notice might be inferred]).

Accordingly, plaintiff’s Labor Law § 200 and common law negligence claims must be dismissed and judgment entered in defendants’ favor.⁴

⁴ In light of this determination the parties’ remaining contentions need not be considered.

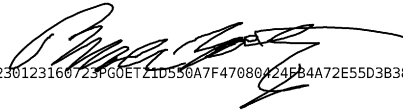
Based on the forgoing, it is

ORDERED that plaintiff's motion (MS # 5) to have the jury's final verdict on past damages disregarded and replaced with the jury's original award as to those damages is denied; and it is further

ORDERED that defendants motion (MS # 6) to dismiss plaintiff's Labor Law § 200 and common law causes of action arising from his first accident on July 20, 2013 and vacate the jury's damages awards as to those claims is granted; and it is further

ORDERED that the jury's damages awards are vacated; and it is further

ORDERED that the clerk is directed to enter judgment in favor of defendants.


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1/23/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: