At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of May 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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DARIUSZ HRYCHORCZUK,

Plaintiff,

-against-

1677 43RD ST LLC and BBM CONSTRUCTION CORP.,

Defendants.

Index No: 502912/17

DECISION and ORDER

MS #17

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677 43RD ST LLC,

Third-Party Plaintiff,

-against-

BBM CONSTRUCTION CORP.,

Third-Party Defendant.

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BBM CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

GILMAR DESIGN CORPORATION,

Second Third-Party Defendant.

----------X

1677 43RD ST LLC,

Third Third-Party Plaintiff,

-against-

GILMAR DESIGN CORPORATION,

Third Third-Party Defendant.

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[* 1]

The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	632-640,644-646
Cross-motions Affidavits (Affirmations) and Exhibits	
Answering Affidavit (Affirmation)	647-652
Reply Affidavit (Affirmation)	697

Plaintiff moves to set aside the verdict of the jury in this action on the grounds that it is inconsistent and against the weight of the evidence.

Plaintiff, a construction worker, was severely injured when an unsecured wooden staircase he was descending fell over. Plaintiff fell to the ground and sustained injuries that have rendered him a quadriplegic.

Defendant/Third-Party Plaintiff/Third Third-Party Plaintiff 1677 43rd St LLC (1677) is the owner of the premises where the accident occurred.

Third-Party Defendant/Second Third-Party Plaintiff BBM CONSTRUCTION CORP., (BBM) was the General Contractor on the construction job. BBM was also Plaintiff's employer.

Second Third-Party Defendant/Third Third-Party Defendant GILMAR DESIGN CORPORATION (GILMAR) was a masonry subcontractor on the job.

Plaintiff had been granted summary judgment finding 1677 liable pursuant to Labor Law sections 240(1) and 241(6). Plaintiff discontinued his direct claim against his employer BBM. A bifurcated trial was held as to liability on the Third-Party, Second Third-Party, and Third Third-Party claims for indemnification. Specifically, the issues put to the jury in the liability phase were whether BBM, GILMAR or the Plaintiff were negligent and whether their negligence was a proximate cause of the accident.

The jury returned a verdict finding that BBM was negligent, and its negligence was a proximate cause of the accident; that Plaintiff was not negligent; and that GILMAR was negligent but that its negligence was not a proximate cause of the accident. The jury found that BBM was 100% at fault for the accident.

Plaintiff argues that the jury's finding that GILMAR was negligent, but that its negligence was not a substantial factor in causing Plaintiff's accident, was inconsistent and contrary to the weight of the evidence. Plaintiff asks the Court to set aside that portion of the verdict and direct that Judgment be entered finding that GILMAR's negligence was a substantial cause of the accident, or alternatively, order a new trial on the issue of whether GILMAR's negligence was a proximate cause of the accident.

GILMAR counters that the evidence at trial could support a finding that GILMAR was negligent but that such negligence was not a proximate cause of the accident. GILMAR further argues that Plaintiff is not an aggrieved party as he never asserted a claim against GILMAR and thus does not have standing to move to set aside the verdict.

As a preliminary matter, Plaintiff does have standing to make this motion. The cases cited by GILMAR for the proposition that a first party plaintiff who makes no direct claims against third party defendants is not an aggrieved party is misplaced. Those cases, (*Ahrorgulova v. Mann*, 108 AD3d 581 [2d Dept 2013]; *Faicco v. Mr. Lucky's Pub, Inc.*, 131 AD3d 920 [2d Dept 2015]; *Pennini v. Shooting Stars*, 189 AD3d 861 [2d Dept 2020]), involved appeals of dismissals of third-party complaints taken pursuant to CPLR 5511.

However, this motion to set aside the verdict is made pursuant to CPLR 4404(a), which permits any party to the action, not only an aggrieved party, to move to set aside a verdict. GILMAR was properly joined in the action through the third-party complaints

and thus both Plaintiff and GILMAR are parties to the action (*see Pinto v. House,* 79 AD2d 361 [1st Dept 1981]; *Harlem River Consumers Cooperative, Inc., v. Manufacturers Hanover Trust Company,* 68 Misc.2d 608 [Civil Court New York County 1972] (where it was held that a Plaintiff did not need to serve a summons when serving an amended complaint on a third party defendant because a third party defendant was already a party in the action).

While Plaintiff has standing to move to set aside the verdict, he has not demonstrated that the jury's verdict, that GILMAR was negligent but not a substantial factor in causing the accident, was against the weight of the evidence.

In order to reach a determination that there was not sufficient evidence to support a jury verdict, the Court must conclude that based upon the evidence presented at trial there was no valid line of reasoning or permissible inferences by which the jury could have rendered its verdict (*see Verizon NY, Inc. v. Orange & Rockland Util., Inc.*, 100 AD3d 983 [2d Dept 2012]). A verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict on any fair interpretation of the evidence (*see Reitzel v. Hale*, 128 AD3d 1045 [2d Dept 2015]; *Nicastro v. Park*, 113 AD2d 129 [2d Dept 1985]).

The staircase in question was a movable wooden staircase that was set up against a deck-like platform that was attached to the rear of the building and was approximately ten feet off the ground. The staircase was used by the workers to reach the platform. The GILMAR employees were engaged in constructing a brick parapet wall around the perimeter of the platform.

During the trial, there was conflicting evidence as to whether the staircase was moved between the time that Plaintiff last ascended the stairs and the time of his accident.

Plaintiff presented evidence that the staircase was moved and that the GILMAR employees were the only employees working in the vicinity during that time. Plaintiff also introduced evidence that the GILMAR employees added two courses of bricks to the portion of the parapet wall of the platform where the stairs were on the date of the accident.

Plaintiff argued to the jury that GILMAR employees had the motive to move the staircase because it was in the way of their adding the two courses of brick.

Plaintiff and 1677 argued that by adding the two courses of bricks, the GILMAR workers changed the configuration of the staircase so that the stringers of the staircase rested of the side of the parapet wall of the platform instead of the top of the parapet where they had previously rested.

Plaintiff and 1677 further argued that this change in configuration made the stairs less safe.

Plaintiff's expert, Dr. Pugh, made a written report in which he concluded that the staircase was unsafe because it was not secured to the platform but merely leaned against it. He stated that the staircase was not secured but relied on friction of the wooden stringers leaning on the wall and ground to keep it from slipping.

Pugh stated in his report, "Whether or not the temporary wooden stairway was moved laterally while the plaintiff was working the platform should not have been a factor in the accident, because the temporary wooden stairway would require fixing to the building or building extension".

Pugh testified at trial that it did not matter if the staircase was moved or not during the day after it had been put in place. His testimony in essence was that it was the failure to secure or attach the ladder to the platform rather than moving the ladder that made it unsafe.

It is apparent that the jury accepted Pugh's opinion that moving the staircase was not a cause of the failure of the staircase. Pugh's report and testimony were a sufficient evidentiary basis for the jury's to find that GILMAR's employees action were not a proximate cause of the accident. Thus, that finding was not against the weight of the evidence.

Nor was it inconsistent that the jury found that GILMAR was negligent but not a substantial factor in causing the accident.

Pugh also testified at trial that the adding of the two courses of bricks to the parapet wall made it more difficult to get onto the unsecured ladder.

The jury could have found that GILMAR workers were negligent in moving the staircase when it added the additional courses of bricks so that the top of the stringer of the staircase was leaning on the side rather than on top of the platform. They could have also accepted the argument that this made the staircase less stable and more difficult to access. However, it would not have been inconsistent for the jury to conclude, in light of Dr. Pugh's report and testimony, that the sole cause of the accident was the fact that the staircase was not attached or secured to the platform.

Nor would it have been inconsistent for the jury to conclude that, even if the moving of the staircase after adding two courses of bricks made the staircase less stable or more difficult to access, the change did not significantly contribute to causing the

accident and thus was not a substantial factor in causing the accident. There may be more than one cause to an accident, but to be substantial it cannot be slight of trivial (*see* PJI 2:70).

WHEREFORE it is hereby ORDERED that Plaintiff's motion to set aside the verdict is denied.

This constitutes the Decision and Order of this Court.

ENTER:

JSC

HON. WAYNE SAITTA
J.S.C.