Lenardo v RealTerm US, Inc.
2024 NY Slip Op 35081(U)
September 10, 2024
Supreme Court, Westchester County
Docket Number: Index No. 60083/2020
Judge: Janet C. Malone
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MICHAEL LENARDO, Index No.: 60083/2020

Plaintiff,

-against- DECISION AND ORDER

Motion Seq. No. 9

REALTERM US, INC. d/b/a REAL TERM LOGISTICS, and RLIF EAST 2, LLC,

Defendants.

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MALONE, J.

Overview

Plaintiff Michael Lenardo's ("Plaintiff") post-jury trial motion for an order 1) pursuant to CPLR R. 4404 setting aside the verdict and granting a new trial due to alleged trial errors regarding the verdict sheet, jury charges and the Court granting Defendants Real Term US, Inc. d/b/a Real Term Logistics and RLIF East 2, LLC's ("Real Term") motion in limine (CLPR R. 4404); and 2) pursuant to CPLR R. 4401setting aside the verdict and granting a directed verdict in his favor on the issues of negligence and proximate cause pursuant to (NYSCEF Doc. Nos. 238-253; 261-264).

Real Term contends that Plaintiff 's motion should be denied because Plaintiff agreed to the verdict sheet and waived any right to object; failed to object to the jury charge; the Court has discretion in deciding jury charges and motions in limine; and it is against the weight of evidence to direct a verdict in Plaintiff 's favor (NYSCEF Doc. Nos. 254 -257).

In reply, Plaintiff only argues that Real Term failed to distinguish *Lippel v. City of New York*, 281 A.D.2d 327 (1st Dept. 2001) in regard to the preclusion of Pasquale Vicino's testimony.

Plaintiff's motion is denied in its entirety as set forth herein.

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Relevant Background

Real Term are the owners/lessors of 6 Warehouse Lane, Elmsford, New York (the "Premises"); and Plaintiff is employed by XPO Logistics Freight, Inc. ("XPO"),[1] one of the tenant of the Premises.

In this action commenced on September 15, 2020, Plaintiff claimed that he sustained serious injuries on August 11, 2020 when, as he was walking up the wooden exterior staircase to the Premises, the handrail gave away, causing Plaintiff to fall (NYSCEF Doc. No. 1).

The jury trial on Plaintiff's claims commenced on September 18, 2023 and concluded on September 26, 2023.[2] The jury returned a unanimous verdict in favor of Real Term on September 27, 2023 finding that Real Term did not "exercise control over the premises to the degree that Real Term had a duty to maintain and repair the staircase at the dock door 10 staircase at [the] premises" (Trial Transcript [NYSCEF Doc. No. 242] 503:17-505:8).

Legal Analysis

"A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the [jury] charge, misconduct, newly discovered evidence, and surprise" *Allen v. Uh*, 82 AD3d 1025, 1025 (2d Dept. 2011). "In considering such a motion, the Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his or her own common sense, experience and sense of fairness rather than to precedents in arriving at a decision" *Schuster v. Sourour*, 207 AD3d 491, 494 (2d Dept. 2022)(internal citations and quotations omitted).

Verdict Sheet

Plaintiff contends that question number one of the verdict sheet was poorly worded which confused the jury; however, upon review of the record, Plaintiff consented to "question number one on the verdict sheet" and thus, waived any objection (Trial Transcript [NYSCEF Doc. No. 242] at 371:3-4); *Rabito v. Deer Park Mgt. Servs.*, LLC, 106 AD3d 798, 799 (2d Dept

[1] Real Term commenced a third-party action against XPO Logistics Freight, Inc. ("XPO"), the tenant of the premises and the Court (Quinn Koba, J.) granted RealTerm's motion for summary judgment for contractual indemnification against XPO (Decision and Order, NYSCEF Doc. No. 127).
[2] Testimony was taken on September 18, 19, 20, 21, 22, and 26.

2013)("plaintiffs' failure to object to the verdict sheet constitutes a waiver of their claim"); *see also Jing Xue Jiang v. Dollar Rent a Car, Inc.*, 91 AD3d 603, 604 ("The challenges made by the defendants … are unpreserved for appellate review. The defendants consented to the …verdict sheet as given").

Plaintiff's contention that the Court failed to furnish the final verdict sheet prior to summations as required by CPLR § 4110-b must also fail as it mischaracterizes the record as Counsel for both parties were provided with the verdict sheet prior to summations (Trial Transcript [NYSCEF Doc. No. 242] at 401:1-11). Plaintiff even admits receipt of the verdict sheet before summations and the proposed charges (Reply Memorandum [NYSCEF Doc. No. 263] at pg. 4).

The next argument by Plaintiff is that the Court should have reinstructed the jury due to the jury's confusion similarly mischaracterizes the record and is unavailing. The jury's note stated, "The jury would like question number one reworded and it is unclear what is being asked." (Court Exhibit 3, NYSCEF Doc. No. 229). The record reveals that when the foreperson of the jury was questioned about what was unclear about Question Number One, the foreperson was unable to explain; and the jury was instructed to confer and advise the Court what clarification was needed. (Trial Transcript [NYSCEF Doc. No. 242] at 499:20- 501:11). In the interim, the Court and both Counsel discussed what further instructions should the Court provide. During this time period, the jury advised that they had reached a verdict.

Plaintiff never objected to the Court's direction to the jury; nor did Plaintiff request that the Court reinstruct the jury on PJI 2:105 and 2:106 or grant Plaintiff's request for Supplemental Charge on PJI 2:10, prior to the jury being sent back to determine what clarification was needed, (Trial Transcript [NYSCEF Doc. No. 242] at 499:20-500:15). Further review of the record reveals that the jury was able to understand question number one of the verdict sheet and no confusion was apparent as the foreperson advised that all the jurors now understood question number one (Trial Transcript [NYSCEF Doc. No. 242] at 503:22- 504:25); *Dirende v. Cipollaro*, 234 AD2d 78, 78 (1st Dept. 1996)("The denial of a supplemental charge was not error, inasmuch as there was no manifestation of continued juror confusion after the court …respon[ded] to a jury inquiry, the jury rendered its verdict only minutes after").

Finally, Plaintiff avers that the jury charge on plaintiff's burden to proof was too onerous; that "unbeknownst to the undersigned, the verdict sheet that was actually given to the jury had three less questions than its predecessor." Not only does this accusation and the others made herein

cast aspersions on the Court, but it is also disingenuous and potentially sanctionable (22 NYCRR 130-1(a)-(c)(3) as the two charges in question were removed at Plaintiff's request (Trial Transcript [NYSCEF Doc. No. 242] at 376:23-403:2) and is irrelevant to question number one (*see* Verdict Sheet at NYSCEF Doc. No. 247). Plaintiff also argues that "plaintiff's burden to show that the handrail or staircase of the dock door 10 staircase was defective, that it gave way, and that the defective handrail was the proximate cause of the occurrence on August 11, 2020" was too onerous. This argument is without merit since Plaintiff's did not object to this language (Trial Transcript [NYSCEF Doc. No. 242] at 388:11-393:13) and it precisely follows the language of PJI 2:106 ("In order for plaintiff to recover, plaintiff must show that he or she was injured, that the injury occurred in a portion of the premises that was in a defective condition; that the defective condition of the premises was a substantial factor in causing the injury").

Motion in Limine

Plaintiff contends that the Court erred in granting Defendant's motion in limine to preclude expert testimony from Pasquale Vicino ("Vicino"), the District Safety Manager for XPO, "on how the subject stairs should have been constructed including, but not limited to, testimony that the handrail should have been secured by lag bolts rather than nails" (Transcript of Rulings on the Motions in Limine [NYSCEF Doc. No. 245] at 5:12-6:5)[3] while allowing Defendant to cross-examine Vicino based on his personal observations of Plaintiff during the accident. Upon review of the record, this argument is without merit.

Trial courts have broad discretion in ruling on the admission of evidence. *Chichuahua v. Birchwood Estates*, LLC, 203 AD 3d 1015, 1018 (2d Dept. 2022). Moreover, trial courts are accorded "wide discretion in making evidentiary rulings[ ] and those rulings should not be disturbed on appeal absent an improvident exercise of discretion" *People v. Williams*, 49 AD3d 672, 672 (2009). The Court has discretion to "determine whether a particular witness is qualified to testify as an expert, and its determination will not be disturbed in the absence of serious mistake, an error of law, or an improvident exercise of discretion" *Lieberman-Massoni v. Massoni*, 215 AD3d 663 (2d Dept. 2023). Here, Plaintiff failed to establish that it was an improvident exercise of discretion for the Court to preclude expert testimony from Vicino. Plaintiff failed to provide a

[3] The pages of the Transcript of the proceedings held on September 19, 2023, are unnumbered. The Court arrived at page 5 by omitting the Exhibit page and the cover page.

curriculum vitae or any documentation that Vicino had the "requisite skill, training, education, knowledge, or experience to render a reliable [expert] opinion" *Formica v. Formica* , 101 Ad3d 805, 806 (2d Dept 2012). Additionally, the Court allowed Vicino, safety manager of XPO, to testify about his duties and responsibilities, whether or not he made reports, the substance of what he is mandated to report and the source of information that he accumulated for the reports besides his own observations and as a layman testify as to his knowledge of broken safety measures. (NYSCEF Doc. No. 245 at 6:17-7:11; 8:24 -9:5); *Barreto v. MTA*, 25 NY3d 426 (2015).

Plaintiff 's reliance on *Lippel v. City of New York*, 281 A.D.2d 327 (1st Dept. 2001) is misplaced as the facts are inapposite to those here. In *Lippel*, the Court found that " Plaintiff was entitled to have [Defendant's witness] testify as an expert on pothole repairs " because Defendant offered the employee witness as an expert "having knowledge of the procedures that are followed with respect to potholes and their repair." *Id.* at 328.

Here, Vicino testified at his deposition that he did not have any professional engineering degrees, had never built a staircase, had never made repairs to the warehouse or any other facilities, and that he relied on the service center manager, Plaintiff , to advise "if there is anything wrong with the steps" (NYSCEF Doc. No. 178 at 77:13-78:18); *Sikorjak v. City of New York,* 168 AD3d 778, 782 (2d Dept. 2019)("It was a provident exercise of discretion for the court to limit the testimony of the plaintiff's expert to issues calling for professional or technical knowledge"). Accordingly, Plaintiff's request is denied.

Judgment as a Matter of Law

"A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party" *Hiotidis v. Ramuni*, 161 AD3d 955, 956 (2d Dept. 2018); *Suzanne P. v. Joint Bd of Directors of Erie-Wyoming Soil Conservation Dist.*, 41 NY3d 391 (2024)("there is no rational process by which the fact trier could base a finding in favor of the nonmoving party").

"In considering such a motion, the facts must be considered in a light most favorable to the nonmovant" *Sikorjak v. City of New York,* 168 AD3d 778, 780-781 (2d Dept. 2019). "The

determination that a verdict is contrary to the weight of the evidence is itself a factual determination based on the reviewing court's conclusion that the original trier of fact has incorrectly assessed the evidence" *Yac v. County of Suffolk*, 205 AD3d 764, 766 (2d Dept. 2022).

Here, the jury's determination that Real Term did not exercise control over the premises to the degree that it had a duty to maintain and repair the staircase at the premises was not against the weight of the evidence. *Cali Dev. Corp. v Church Side Realty, LLC*, 208 AD3d 451, 451 (2d Dept 2022) ("An out-of-possession landlord is not liable for injuries that occur on leased premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct to perform the relevant maintenance or repairs").

Tamara Viechweg's, Real Term's property manager, uncontroverted testimony was that XPO (Plaintiff 's employer) was Real Term's sole commercial tenant for the entire premises; pursuant to the lease, XPO was responsible for repairs and maintenance, insurance and real estate taxes (Trial Transcript [NYSCEF Doc. No. 240] 150:22-158:8); that the maintenance firm that Real Term employs was only hired to handle sprinkler system for the exterior of the premises (*Id.* at 84:14-88:8; 96:1-97:1) and that repairs to the staircase were the obligation of the tenant pursuant to the lease (*Id. at* 115:19-118-12). Thus, Plaintiff's motion for judgment as a matter of law is denied.

To the extent relief requested is not addressed, it is deemed denied.

Accordingly, it is hereby

ORDERED, that Plaintiff Michael Lenardo's motion is denied in its entirety; and it is further

ORDERED, that Plaintiff Michael Lenardo shall serve all parties with a copy of this Decision and Order with notice of entry within ten (10) days and proof of same filed via NYSCEF;

This constitutes the Decision and Order of the Court.

Dated: September 10, 2024
White Plains, New York

ENTER:

Janet C. Malone

HON. JANET C. MALONE, J.S.C.