

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC
Justice

PART 47

Index Number : 150281/2011
TOWER INSURANCE COMPANY OF
vs
LMW ENGINEERING GROUP LLC
Sequence Number : 003
OTHER RELIEFS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

DECIDED AS PER ATTACHED DECISION AND ORDER
OF JUSTICE EDWARDS DATED 3/22/18

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/22/18

Paul A. Goetz, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

TOWER INSURANCE COMPANY OF NEW YORK a/s/o 532 39 REALTY, LLC,

Plaintiff,

-against-

LMW ENGINEERING GROUP, LLC, JIEMING WANG SHINE REALTY, INC., ZHI KUANG YU, PANE STONE CONSTRUCTION, INC., SHIMING THAM, SHIMING TAM ARCHITECT, P.C., HENG YONG CONSTRUCTION, INC., and JOHN HSU,

Defendants.

Index No.: 150281/2011

DECISION/ORDER

Motion Sequences: 002 and 003

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1, 2
Opposition Affidavits/Affirmations and Memo of Law annexed	3, 4
Reply Affidavits/Affirmations/Memos of Law annexed	5, 6

*ERIKA M. EDWARDS, J.S.C.:*

Plaintiff Tower Insurance Company of New York a/s/o 532 39 Realty, LLC (“Tower”) brought this subrogation action against Defendants Pane Stone Construction (“Pane Stone”), Metal Stone Construction, Inc. (“Metal Stone”) (“collectively “Defendants”), and others to recover money for its insured’s property damage in 2008 caused by negligent underpinning construction work conducted on the adjacent building. Tower’s claims against Pane Stone and Metal Stone were tried before a jury on various days from September 15, 2017, to October 4, 2017. The jury rendered a verdict in Tower’s favor against Defendants in the total amount of \$449,627.15 with Pane Stone being 75% responsible and Metal Stone being 25% responsible for Tower’s loss.

Both Defendants now move for an order setting aside the verdict, pursuant to CPLR 4404(a). Under motion sequence 002, Pane Stone moves to set aside the jury’s award of damages<sup>1</sup> because it was against the weight of the evidence, excessive and speculative. Under

<sup>1</sup> Pane Stone listed the damages award at \$452,127.15, but it was actually 449,627.15.

motion sequence 003, Metal Stone moves to set aside the jury's liability verdict as against the weight of the evidence, for an order finding that Metal Stone was not negligent as a matter of law, or in the alternative, for an order granting a new trial as to negligence. Metal Stone also moves to set aside the jury's damages award of \$449,627.15 to Tower, or to reduce the award to \$200,000 to \$238,000, or in the alternative, for a new trial on damages. Tower opposes both motions and Pane Stone partially opposed Metal Stone's motion as it pertained to setting aside the jury's liability verdict finding that Metal Stone was 25% liable for Tower's damages.

For the reasons set forth herein, the court denies Defendants' motions in their entirety.

Pane Stone does not dispute the jury's apportionment of liability against it, but argues in substance that the jury's damages award was against the weight of the evidence, excessive and speculative since it was solely based on estimates and opinion. Pane Stone further argues that the true measure of damages should have been based on the evidence demonstrating that the insured's actual cost of repair was \$200,000 to \$204,000 and that the diminution of value was \$200,000.

Metal Stone disputes the jury's verdict on liability and damages. Metal Stone argues in substance that it had no liability because it only filed the PW2, which was the work permit for the New York City Department of Buildings. It did not perform any work at the site, it was not present at the site, it had no supervisory authority over the underpinning work or subcontractor and it owed no duty to Tower or its insured. Shine Realty was the owner of the property where the underpinning work was being performed. Shine Realty hired Pane Stone as its general contractor and Pane Stone hired Heng Yong Construction to perform the underpinning work.

Metal also argues that the damages award should be set aside or reduced because the jury failed to use the proper measure of damages which was the lesser of the diminution in value or the reasonable cost of repair. Metal Stone and Pane Stone both argue in substance that the evidence demonstrated that Tower's insured paid \$200,000 for the repairs, there was additional work needed to repair the roof at \$20,000 and \$500 each for seven windows for a total of \$23,500. The defense experts estimated the repairs costs to be \$204,000 and \$238,000 and the diminution in value to be \$200,000. Metal Stone claims that Tower's expert's estimate was inflated because it included some items which were not damaged. Therefore, the jury's damages verdict should be set aside as against the weight of the evidence and because it was excessive or the court should reduce the award to \$200,000 to \$238,000, or in the alternative, order a new trial on damages.

CPLR 4404(a) permits a trial court to set aside a jury 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 can order a new trial 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 a reasonable time as determined by the court (CPLR 4404[a]).

The court is permitted to set aside a verdict and order a new trial where the jury's verdict is against the weight of the evidence and it "involves what is in large part a discretionary balancing of many factors" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978] [internal

citations omitted]). For a court to determine that as a matter of law a jury verdict is not supported by sufficient evidence, the court must find that based on the evidence presented at trial, “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury” (*id.*). If there is a question of fact and “it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence” (*id.* [internal quotation and citation omitted]).

It requires the court to view the evidence in the light most favorable to the prevailing party, for the movant to assume the facts testified to by the prevailing party’s witnesses to be true and to grant all favorable inferences flowing from the evidence to the prevailing party (*see S. Kornblum Metals Co. v Intsel Corp.*, 38 NY2d 376 [1976]). Judgment notwithstanding the verdict is not appropriate where issues of credibility are involved as matters of credibility and the weight to be accorded the testimony are within the province of the jury (*Bodlovich v Carucci*, 38 AD2d 699, 700 [1<sup>st</sup> Dept 1972]).

When applying these legal principles to the evidence presented at trial, the court determines that the jury’s verdict on liability and damages was not against the weight of the evidence and the court denies the motions to set aside the verdict, for a new trial, for an order that Metal Stone was not negligent as a matter of law, or to reduce the jury’s damages award.

Here, Defendants failed to demonstrate that the jury’s verdict was against the weight of the evidence by showing that the evidence preponderated so greatly in their favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. Here, there was ample evidence to support the jury’s verdict in favor of Tower based on 75% liability to Pane Stone and 25% liability to Metal Stone and the jury’s damages award in the amount of \$449,627.15. After considering the credibility of the witnesses and the reasonable inferences drawn from the evidence in favor of Tower, it is easy to understand why the jury appeared to credit the testimony and documentary evidence submitted by Tower to substantiate liability and damages.

As noted by both Tower and Pane Stone, the jury found Metal Stone to be 25% liable based on the evidence which revealed that Metal Stone filed the application for the work permit, it was signed by a Metal Stone employee who listed Metal Stone as the construction superintendent. As the construction superintendent, Metal Stone was required to conduct daily site visits to supervise the work, including underpinning.

Metal Stone was also listed as the client on the engineer’s support of excavation plans. The engineer testified in substance that he had a long-term relationship with Metal Stone, that he was hired by Metal Stone, paid by Metal Stone and whenever he saw that the sub-contractor was not performing the underpinning work properly, he called Metal Stone to send a supervisor to the site and a representative came each time. He believed Metal Stone was the general contractor for the foundation work and that Metal Stone was required to contact him prior to the start of the underpinning work.

Additionally, the evidence demonstrated that Metal Stone and Pane Stone are significantly interrelated as they are owned by the same person, they share the same office, have the same address and have the same employees.

Damages experts from all parties testified at trial. Based on the evidence, Tower demonstrated that it paid its insured \$449,627.15 to settle the damages claim. Tower presented documentary and testimonial evidence that this amount was based on their expert's detailed inspection of the premises and an itemized estimate of the cost to repair the damaged property. It was a compromise reached after negotiating with the insured's expert and attorney and after deducting depreciation. The evidence revealed that the insured did not use all the money to repair the property, but paid off the building's outstanding mortgage to avoid additional problems he was having with his mortgage company. He used some of the money to pay off his legal fees and then spent approximately \$200,000 on repairs that primarily dealt with safety concerns. The insured testified in substance that he had not yet completed all necessary repairs, that he still needed to repair the roof, windows, capstones and a staircase. He said that the building is still not level and there are problems with the doors and windows. He stated in substance that even after all repairs are made, the building will still not be restored to its pre-accident condition because the façade and corniches can never be replaced to their original condition. Additionally, Tower's structural engineer testified in substance that the repair costs increased from the date of the initial incident because the building is in continuing structural decline and erosion which caused the cracks to grow and the building to shift over time.

As Tower argues, Defendants' experts did not conduct a detailed inspection of the premises, nor did they provide an itemized list of estimated repairs needed to restore the premises to its pre-accident condition. They largely based their conclusions on reports prepared by others. Tower claims that the jury credited its experts over the defense experts because the defense experts were not structural engineers or expert builders. Based on the evidence, it was reasonable for the jurors to credit Tower's testimonial and documentary evidence over the evidence presented by Defendants.

As mentioned above, issues of credibility and the weight to be given to testimony are within the province of the jury and cannot be a basis to set aside a verdict. Therefore, based on the evidence, Defendants failed to demonstrate that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational jurors to conclude that Defendants were not liable for Tower's claims in the total amount of \$449,627.15, with Pane Stone held to be 75% liable and Metal Stone 25% held to be liable for such damages.

Therefore, the court denies Defendants' motions in their entirety with prejudice.

As such, it is hereby

**ORDERED** that the court denies Defendant Pane Stone Construction's motion to set aside the verdict as to damages under motion sequence 002 in its entirety with prejudice and without costs; and it is further

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