

36 A.D.3d 456, 828 N.Y.S.2d 329, 2007 N.Y. Slip Op. 00093

Supreme Court, Appellate Division, First Department, New York.

Frank MIRAGLIA, Plaintiff-Respondent,
v.
H & L HOLDING CORP., Defendant/Third-Party Plaintiff,
v.
Lane & Sons Construction Corp., Third-Party Defendant-Appellant.

Jan. 9, 2007.

Background: Construction worker who was impaled by steel bar when he fell into trench brought suit under scaffolding law to recover for his injuries. The Supreme Court, Bronx County, George D. Salerno, J., entered judgment awarding \$5 million for past pain and suffering, \$10 million for future pain and suffering, and \$8,295,000 for future medical expenses. Construction company appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) evidence precluded recalcitrant worker defense;
- (2) worker was not sole proximate cause of his injuries; and
- (3) award of \$10 million for future pain and suffering was excessive.

Affirmed as modified in part; new trial conditionally ordered.

**330 Mauro Goldberg & Lilling LLP, Great Neck (Barbara DeCrow Goldberg and Matthew W. Naparty of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

TOM, J.P., FRIEDMAN, NARDELLI, CATTERSON, MALONE, JJ.

*456 Judgment, Supreme Court, Bronx County (George D. Salerno, J.), entered May 4, 2005, upon a jury verdict awarding plaintiff, inter alia, \$5 million for past pain and suffering, \$10 million for future pain and suffering over 35 years, and \$8,295,000 for future medical expenses, unanimously modified, on the law, to reduce the award for future medical expenses to \$8,056,222, and, on the facts, to vacate the award for future pain and suffering and order a new

trial solely as to such damages, and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award for future pain and suffering in the amount of \$5,000,000 and to entry of an amended judgment in accordance therewith.

[1] [2] [3] This Court's affirmance of an order denying plaintiff's motion for partial summary judgment did not preclude the trial court from directing a verdict in plaintiff's favor (*see Sorrentino v. Ronbet Co.*, 244 A.D.2d 262, 664 N.Y.S.2d 290 [1997]). Plaintiff's employer's trial testimony that workers were permitted to walk on planks across *457 a trench at the worksite, provided they doubled the planks, negated the defense that plaintiff was a recalcitrant worker for walking on a plank rather than using a ladder to cross the trench (*see Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650, 613 N.E.2d 556 [1993]; *Hagins v. State of New York*, 81 N.Y.2d 921, 922-923, 597 N.Y.S.2d 651, 613 N.E.2d 557 [1993]; *cf. Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74, 823 N.E.2d 439 [2004]). In addition, plaintiff's expert offered unchallenged testimony that even doubled-up planking would not have provided adequate protection because the planks were unsecured and subject to movement. Since the planking was insufficient to protect plaintiff from the elevation-related hazard that caused his harm, liability pursuant to Labor Law § 240(1) was established; plaintiff was not, under any view of the evidence, the sole proximate cause of his injuries (*see Osario v. BRF*, 23 A.D.3d 202, 803 N.Y.S.2d 525 [2005]; *Lajqi v. New York City Tr. Auth.*, 23 A.D.3d 159, 805 N.Y.S.2d 5 [2005]; *cf. Blake v. Neighborhood Hous.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]). At most, plaintiff's failure to double the planks would constitute negligence. However, the doctrine of comparative negligence is not available to diminish a defendant's liability under Labor Law § 240(1) (*see e.g. Morales v. Spring Scaffolding*, 24 A.D.3d 42, 49, 802 N.Y.S.2d 41 [2005]; *Orellano v. 29 E. 37th Realty Corp.*, 292 A.D.2d 289, 291, 740 N.Y.S.2d 16 [2002]).

[4] The 45-year-old plaintiff was impaled by a steel bar from the scrotum to L2 on his spinal cord, resulting in paraplegia and associated complications. However, the seriousness of the injuries notwithstanding, the award for future pain and suffering deviates materially from what is **331 reasonable compensation to the extent indicated (*see Ruby v. Budget Rent A Car Corp.*, 23 A.D.3d 257, 806 N.Y.S.2d 12 [2005], *lv. denied* 6 N.Y.3d 712, 816 N.Y.S.2d 747, 849 N.E.2d 970 [2006]).

[5] The award for future medical expenses improperly included an amount for lost earnings which was the subject of a separate award. Accordingly, the award for future medical expenses is reduced to the maximum amount supported by the evidence.

We have considered appellants' remaining arguments and find them unavailing.