SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

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ANDREW LOMBARDI,

Plaintiff-Petitioner(s),

-against-

STRUCTURE TONE, INC., TRINITY REAL ESTATE, TRINITY CHURCH CORP., THE RECORD CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK d/b/a Trinity Church and COWTAN & TOUT, INC.,

Defendants.

Index #110684/11
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

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STRUCTURE TONE, INC., TRINITY REAL ESTATE, TRINITY CHURCH CORP., THE RECORD CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK d/b/a Trinity Church and COWTAN & TOUT, INC.,

Third-Party Plaintiffs,

-against-

CENTRE STREET SYSTEMS, INC.,

Third-Party Defendant.

TP Index #590270/12

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint, set aside jury verdict, schedule a hearing under CPLR 4545

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	3
Cross-motion & Exhibits Annexed	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff was a carpenter employed by Third-Party Defendant Centre Street Systems, and was working on a project at 205 Hudson Street. On August 3, 2011, the Plaintiff, at about 12:00 noon, went to lunch with two colleagues. Because of the number of people using the elevator, the trio decided to walk downstairs. As the Plaintiff walked along a wall on a lower floor, he turned a corner and, unseen by his fellows, tripped and fell on what he called debris. The specific piece of debris was identified as a piece of electrical conduit. As a result of his call, the Plaintiff fractured the fifth metatarsal of his right foot. After a trial before a jury, the Plaintiff was found 35% responsible for the accident, and was awarded a gross verdict of $400,000.00 for past pain and suffering, $400,000.00 for past lost earnings, $425,000.00, for future lost earnings over 8.5 years and $136,000.00, for future lost earnings, for a total of $1,361,000.00. The award, after deduction for contributory negligence is $884,000.00.

Notwithstanding the defense stressing of the word "debris" [defined in Webster's as 'things (such as broken pieces and old objects) that are lying where they fell or that have been left somewhere because they are not wanted"], the regulation in question also covers scattered tools and materials [Industrial Code 23-1.7(e)(2)]. The unanswered question from the trial is whether what the Plaintiff stepped on was against a wall, left by electrical contractors also going to lunch, or left by someone soon to return for installation. The electricians who were working on the day of the accident were not called as witnesses.

I will not disturb the allocation of fault, and indeed, the Defendant does not challenge that math either. This motion addresses the amount of the damages. The Plaintiff, on the day of the accident, was suffering from diabetes, which in turn complicated and delayed his recovery. He was out of work for several months, tried to return and hen retired. He ha since advertised himself as a freelance carpenter, and even purchased a pick up truck in pursuit of his solo career.

The verdict of the jury as to the allocation of fault is well supported by the evidence. The issue of damages is something else. In the only case that I have found dealing with injuries similar to those suffered by the Plaintiff, the Appellate Division of this Department found that $75,000.00, was sufficient as an award for injuries similar to those incurred by the Plaintiff. [***Crooms v. Sauer Bros. Inc.***, 48 A.D.3d 380, 53 N.Y.S.2d 292008 N.Y. Slip Op. 01823 (1st Dept.- 2008), "The award of $75,000 for a fractured metatarsal and thrombosis does not deviate materially from reasonable compensation."] Taking into consideration that the Plaintiff's diabetes extended the time to heal, the motion to set aside the verdict is granted to the extent of setting aside the verdict and directing a new trial on the issue of damages alone, unless the Defendants agree to pay, and the Plaintiff agrees to accept $125,00.00. The only truly comparable, and binding ruling of the value of the type of injury suffered by the Plaintiff is only seven years old. In addition, I cannot help but intuit that the jury made it award in part based on the tendentious summation of the Plaintiff's counsel, which time and again drew sustained objections to inappropriate comments which had the effect of inviting

the jury to award punitive damages when the issue was not before it. He also began to discuss insurance in front of the jury. Also, Plaintiff's attorney made several comments regarding the alleged insufficient presence of clean up crews [compare ***BUTIGIAN v. PORT AUTHORITY OF NY & NJ***, 293 A.D.2d 251740 N.Y.S.2d 3052002 N.Y. Slip Op. 02670, awarding a new trial "During summation, plaintiffs' counsel opined that: It's about money. It's all about money. Why give him a ladder? Because its cheaper.... Did you see Mr. Savas's [the owner of Computercool] face when I said, what about scaffolds? He said you have to rent scaffolds. You have to lease scaffolds. Let a couple guys fall down. When you accumulate how much it would cost to lease the scaffolds over the years, it's a lot cheaper to, you know, pay the insurance, do what you have to do, than to pay for scaffolds."]. These comments were made in the absence of any evidence as to any standard for the staffing of clean up crews, or how often or when rounds were to be made.

The motion to set aside the verdict is therefore granted. This constitutes the decision and order of the court.

Dated: September 18, 2015

GEOFFREY D. WRIGHT
A.J.S.C.