SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. RONALD D. HOLLIE IAS TERM PART K-3

SHI PEI FANG, Plaintiff,	X	Index No.: 19255/96
- against -	:	Motion To Set Aside The Verdict
HENG SANG REALTY CORPORATION, Defendant.	:	
	X	
HENG SANG REALTY CORPORATION, Third-Party Plaintiff,	:	
- against -	:	
LIPENARD ENTERPRISES, INC. AND CHINA APPAREL RESOURCES, INC., Third-Party Defendant.	:	
	X	

The following papers numbered 1 to 8 read on this motion which seeks to set aside the verdict pursuant to CPLR § 4404(a).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	... 1 - 4 ....
Affirmation in Opposition-Exhibits-Service.....	... 5 - 7 ....
Reply.....	... 8 .....

This personal injury action was brought to recover damages as a result of injuries the

plaintiff sustained when his left forearm was cut by broken and falling glass from a window. The injury from the falling window glass caused nerve, tendon, and muscle damage that further caused a permanent "clawing" deformity to the left hand (clawed hand) and substantially diminished the strength and flexibility of the left hand. The injury is alleged to have further caused substantial loss of the use of plaintiff's left hand and substantial pain and suffering to plaintiff.

The injury occurred while plaintiff was present at his place of employment, in a building owned by the defendant, HENG SANG REALTY CORPORATION ("HENG SANG"). It is defendant's position that it is an "out of possession" owner.

The plaintiff commenced his action against the defendant, who in turn brought a third party action against the plaintiff's employer (the lessee of the premises) LIPENARD ENTERPRISES, INC. That third party action was discontinued without prejudice on April 25, 2002. A bifurcated trial, in the action brought by the plaintiff, SHI PEI FANG against defendant, HENG SANG REALTY CORPORATION, was commenced on April 25, 2002 before a jury. A verdict was rendered on May 2, 2002, in favor of the plaintiff, on the issue of liability. On May 9, 2002, after a trial on the issue of damages, damages were awarded in the amount of $60,000.00 for past medical expenses, $122,640.00 for past loss of earnings and $750,000.00 for pain and suffering totalling $932,640.00 in damages from June 9, 1995 to May 9, 2002. The jury also awarded, for future damages, medical expenses in the amount of $30,000.00; pain and suffering in the amount of $1,250,000.00 for a period of 30 years; and loss of future earnings in the amount of $220,000.00 for a period of 12 years.

The defendant now, by this motion, seeks to set aside the verdict on liability and damages, to dismiss the complaint, or in the alternative to reduce the damages awarded to the plaintiff by the jury.

In support of the branch of the defendant's motion to set aside the verdict on liability, the

defendant argues that the plaintiff failed to establish a prima facie case with respect to the liability of the defendant, an out of possession landlord, and that the verdict was against the weight of the evidence. The movant also states, in support of the motion to set aside the verdict, that the testimony of the plaintiff's expert witness, Alvin Ubell, should have been precluded. In opposition, the plaintiff argues that the verdict on the issue of liability was legally sufficient and that it was supported by the evidence.

The branch of the defendant's motion which seeks to set aside the verdict on the grounds that it is against the weight of the evidence is denied. The movant's arguments, that a prima facie case was not established with respect to the liability of the out of possession landlord, and that the charge to the jury with respect to the out of possession landlords' liability was erroneous, are without merit. At trial it was established that the defendant HENG SANG REALTY CORPORATION, the owner, though out of possession, retained the right to re-enter and inspect the leased commercial premises. This fact is not disputed by the defendant. It is well established that the reservation of the right to re-enter, inspect and make repairs, may subject a landlord to liability where a commercial building is regulated under the Administrative Code of the City of New York, and there are significant structural or design defects. (See, Guzman v. Haven Plaza Housing Development Fund Company, Inc., 69 N.Y.2d 559). The testimony at trial, which was not refuted, established that the wooden frame window at issue was rotting with peeling paint, and that the condition of said window would have been visible to the defendant upon inspection. Additionally, the testimony further established that for at least two weeks preceding the accident the window had been held open by a piece of wood which was not present immediately prior to the accident. The jury was charged with New York City Administrative Code Sections 127-27, and 127-28, which states the owner's obligation to maintain a safe building; Section 127-29, which states the requirement that the building walls and appurtenances, including window frames, be examined under the supervision of a licensed engineer or architect, and a report of that examination be issued documenting the inspection and noting any significant deterioration; Labor Law §200, which states that the building owner shall provide employees with a safe place to work.

The cases cited in support of the movant's argument that a violation of the statute has not been established are distinguishable from the case at bar in that a clearly visible structural defect or unsafe condition was not evident in those cases and such a defect or unsafe condition was clearly visible in the instant matter. In Manning v. New York Telephone Company, 157 A.D. 2d 264, as cited by the movant, the court found that the defect complained of related to the interior floor maintenance which was the general responsibility of the tenant, and as a result rejected the plaintiff's argument that the slip and fall on a highly polished floor was the result of the out of possession landlords' failure to comply with the provisions of the Administrative Code, which set forth responsibility of the landlord for safe maintenance. Similarly distinguishable from the case at bar is Plung v. Cohen, 250 A.D.2d 430, also cited by the defendant. In that case, the court found that the owner's responsibility to provide a safe condition did not extend to injuries to an employee who tripped and fell on debris left by a carpeting contractor where the plaintiff had alleged that the defendant, an out of possession landlord, was responsible for the alleged dangerous condition. Although the out of possession landlord's right of re-entry does not by itself, result in liability, a violation of a statute, rules or regulations, such as those contained in the Administrative Code of the City of New York, in addition to having a right to re-entry, will subject the landlord to liability (see, Guzman v. Haven Plaza Housing Development Fund Company, Inc., 69 N.Y.2d 559). The evidence presented at trial clearly established that the landlord breached a specific duty in failing to inspect the windows and failing to maintain the safety of the building as required by law. The court also rejects the movant's argument that the testimony of expert witness Alvin Udell should have been precluded. The defendant was given notice of the witness and his testimony by the plaintiff, in that the plaintiff provided disclosure pursuant to CPLR §3101(d). Therefore the branch of the defendant's motion which seeks to set aside the verdict as against the weight of the evidence is denied.

The branch of defendant's motion which seeks to reduce the amount of damages awarded to the plaintiff is granted in part, and denied in part. Although it is well settled that the amount of damages awarded is to be determined by a jury, where the award of damages "deviates materially" from what would be reasonable compensation, the court may set the award aside. The court finds

that the award with respect to loss of past earnings in the amount of $122,640.00 from the date of the accident, June 9, 1995 to date of verdict, May 9, 2002, and future earnings in the amount of $220,000.00 for a period of 12 years was sufficiently established by the plaintiff's testimony regarding his earnings as a factory worker, and his potential earnings in the future as a factory worker. The minimal amount of wages per hour the plaintiff alleged as a factory worker, and the amount of hours per week that a worker in his capacity would be expected to work was consistent with the number of hours one could be expected to work in that field. Additionally, the plaintiff's life expectancy and his inability to work in the stated field given the debilitation of his hand, was sufficient to support the jury's findings with respect to future earnings. The court also finds that the plaintiff's level of education completed, as well as his lack of training in any other professions would render him unable to support himself by working in another field or as a factory worker, which would require the use of his left hand, which the testimony indicated the plaintiff had limited function in as a result of the accident. Although the plaintiff, who had been employed at the job site for only two weeks prior to the accident, failed to set forth written proof of his earnings, the court finds that his earnings, which were not disputed at trial, were established with reasonable certainty, in light of his testimony. The jury award with regard to past medical expenses in the amount of $60,000.00 is supported by the evidence, and the award to future medical expenses in the amount of $30,000.00 is consistent with the award for past medical expenses and the amount of medical expense the plaintiff could be expected to incur.

The court further finds that the award of $750,000.00 for past pain and suffering and $1,250,000.00 for future pain and suffering each deviate materially from what would be reasonable compensation, and that it is excessive in view of similar verdicts. In determining whether an award for pain and suffering is excessive, the reviewing court may look to similar appealed verdicts. (See, Dolon v. City of New York, 284 A.D.2d 13). Although the court recognizes that the plaintiff suffered the loss of function in his left hand, and underwent three unsuccessful surgeries, the award of damages as to pain and suffering was excessive, and deviates materially from what would be reasonable compensation for such an injury. (See, McKeon v. Sears Roebuck & Company, 262 A.D. 2d 7). Consequently, defendant's motion is granted insofar as it seeks to set aside the award of the

amount of $750,000.00 in damages for past pain and suffering, and the award of $1,250,000.00 in the amount of damages for future pain and suffering over a period of 30 years. The court finds that both amounts are excessive and a new trial is directed solely on the issue of damages for past and future pain and suffering, unless within 30 days of the date of this order, the plaintiff stipulates to an entry of judgment reducing the award of past pain and suffering to $300,000.00, and reducing the award of damages for future pain and suffering to $750,000.00.

In the event that the plaintiff is able to stipulate to the modification of the verdict, as stated by this court, the plaintiff is directed to settle judgment in accordance with CPLR §50-B.

This constitutes the decision of this court.

Dated: August 6, 2003

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RONALD D. HOLLIE, J.S.C.