

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21361
G/kmg

_____AD3d_____

Argued - November 10, 2008

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
JOSEPH COVELLO
RUTH C. BALKIN, JJ.

2007-08002

DECISION & ORDER

Amy Handwerker, et al., appellants-respondents,
v Dominick L. Cervi, Inc., et al., respondents-
appellants.

(Index No. 6610/05)

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola, N.Y. (Jonathan A. Dachs of
counsel), for appellants-respondents.

Rivkin Radler LLP, Uniondale, N.Y. (Evan Krinick, Cheryl F. Korman, and Harris J.
Zakarin of counsel), for respondents-appellants.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from a judgment of the Supreme Court, Nassau County (Brandveen, J.), dated July 31, 2007, which, upon a jury verdict on the issue of damages finding that the plaintiff Amy Handwerker sustained a serious injury within the meaning of Insurance Law § 5102(d) and sustained damages in the principal sum of \$20,000 for past pain and suffering, and upon the denial of their motion pursuant to CPLR 4404(a) to set aside the damages verdict as against the weight of the evidence and inadequate, and for a new trial on the issue of damages, awarded them the principal sum of only \$20,000, and the defendants cross-appeal from so much of the same judgment as, upon the denial of their motion pursuant to CPLR 4401 to dismiss the complaint and for judgment as a matter of law on the ground that the plaintiff Amy Handwerker did not sustain a serious injury within the meaning of Insurance Law § 5102(d), made at the close of the plaintiffs' case, and renewed at the close of evidence, is in favor of the plaintiffs and against them in the principal sum of \$20,000.

ORDERED that the judgment is affirmed, without costs or disbursements.

A motion for judgment as a matter of law pursuant to CPLR 4401 may be granted

December 9, 2008

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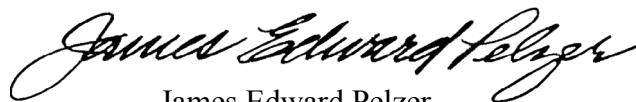
only when the trial court determines that, upon the evidence presented, there is no rational process by which the jury could find in favor of the nonmoving party (*see Szczerbiak v Pilat*, 90 NY2d 553, 556; *Hamilton v Rouse*, 46 AD3d 514, 516). In considering such a motion, “the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant” (*Szczerbiak v Pilat*, 90 NY2d at 556). Contrary to the defendants' contention, viewing the facts in the light most favorable to the plaintiffs, the evidence was sufficient to establish that the plaintiff Amy Handwerker (hereinafter the plaintiff) sustained a medically-determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her usual and customary activities for at least 90 out of the 180 days immediately following the accident, as set forth in Insurance Law § 5102(d).

The standard for determining whether a jury verdict is against the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached upon any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Tapia v Dattco, Inc.*, 32 AD3d 842). When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (*see Tapia v Dattco, Inc.*, 32 AD3d at 842). Here, a fair interpretation of the evidence supports the jury's conclusion that, based on the evidence before it, the plaintiff did not sustain a “significant limitation” or a “permanent consequential limitation,” within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident.

The damages award for past pain and suffering did not materially deviate from what would be considered reasonable compensation (*see CPLR 5501[c]; Ruiz v Hart Elm Corp.*, 44 AD3d 842, 844).

SKELOS, J.P., LIFSON, COVELLO and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court