

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

D30414  
Y/kmb

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Argued - February 7, 2011

REINALDO E. RIVERA, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
L. PRISCILLA HALL, JJ.

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2010-04898

DECISION & ORDER

Saida Matamoros, plaintiff-respondent, v Itzak Tovbin,  
defendant, Eduardo M. Cornejo, defendant-respondent,  
Rajiv R. Mody, et al., appellants.

(Index No. 28010/07)

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James G. Bilello (Montfort, Healy, McGuire & Salley, Garden City, N.Y. [Donald S. Neumann, Jr.], of counsel), for appellants.

Avanzino & Moreno, P.C., Brooklyn, N.Y. (John Elefterakis of counsel), for plaintiff-respondent.

In an action to recover damages for personal injuries, the defendants Rajiv R. Mody and Rufino Rodriguez appeal from an order of the Supreme Court, Kings County (Solomon, J.), dated April 13, 2010, which granted the plaintiff's motion and the defendant Eduardo M. Cornejo's cross motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the defendants Rajiv R. Mody and Rufino Rodriguez on the issue of liability and for a new trial.

ORDERED that the order is reversed, on the law and the facts, with costs, the plaintiff's motion and the defendant Eduardo M. Cornejo's cross motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the defendants Rajiv R. Mody and Rufino Rodriguez on the issue of liability and for a new trial are denied, and the matter is remitted to the Supreme Court, Kings County, for the entry of an appropriate judgment.

Initially, the Supreme Court properly considered the merits of the plaintiff's motion and the defendant Eduardo M. Cornejo's cross motion pursuant to CPLR 4404(a) to set aside a jury

March 15, 2011

MATAMOROS v TOVBIN

Page 1.

verdict in favor of the defendants Rajiv R. Mody and Rufino Rodriguez on the issue of liability and for a new trial. The parties' so-called "high-low" agreement did not expressly prohibit the making of the subject postverdict motion and cross motion (*see Doubrovinskaya v Dembitzer*, 77 AD3d 609, 610; *Grochowski v Fudella*, 70 AD3d 1407, 1408; *Cunha v Shapiro*, 42 AD3d 95, 100).

However, the Supreme Court should have denied the motion and cross motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of Mody and Rodriguez on the issue of liability and for a new trial. Setting aside the jury verdict on the issue of liability was not warranted on the basis of certain comments made by one of the attorneys representing Mody and Rodriguez. These comments did not divert the jurors' attention from the issues to be determined with respect to liability or deprive the plaintiff and Cornejo of a fair trial (*see Pello v Syed*, 41 AD3d 568; *Vingo v Rosner*, 29 AD3d 896, 897; *Torrado v Lutheran Med. Ctr.*, 198 AD2d 346, 347).

RIVERA, J.P., BALKIN, LEVENTHAL and HALL, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court