

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 21447/04
MARGARET RUSH and VINCENT RUSH, Plaintiffs,	Motion
	Date January 29, 2008
-against-	
	Motion
THE NEW YORK CITY TRANSIT AUTHORITY, Defendant.	Cal. No. 12
-----	Motion
	Sequence No. S001

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Plaintiffs' Memorandum of Law.....	5-6
Affirmation in Opposition.....	7-9
Reply Affirmation.....	10-12

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Margaret Rush moves for an Order pursuant to CPLR 4404(a), setting aside a jury verdict rendered on December 3, 2007 in favor of defendant New York City Transit Authority and directing a verdict in favor of plaintiff n.o.v., or in the alternative, ordering a new trial on the issue of defendant's proximate causation and permitting any retrial to be a bench trial by granting plaintiffs leave to withdraw plaintiffs' request for a jury trial of this matter, upon the ground, inter alia, that the jury's finding that defendant was negligent is inconsistent with the finding that defendant's negligence was not a factor that substantially contributed to causing the accident. Plaintiffs argue that defendant's negligence and proximate causation of the accident are inextricably linked and that the jury verdict is therefore against the weight of the evidence. Plaintiffs' motion is denied for the following reasons:

I. PROCEDURAL HISTORY

Plaintiffs commenced this action on or about August 2, 2004 seeking to recover money damages for personal injuries that plaintiff, Margaret Rush sustained as a result of accident that occurred while attempting to pass between stopped subway train cars. This Court presided over a jury trial on this case that was conducted from November 27, 2007 through December 3, 2007 as a bifurcated trial on the issue of liability only. On December 3, 2007, the jury rendered a verdict in favor of defendant. By leave of the Court, plaintiffs were granted an extension until January 29, 2008 to file a post-trial motion pursuant to CPLR 4404(a).

II. DISCUSSION

The question of whether a jury verdict should be set aside as against the weight of the evidence pursuant to CPLR 4404(a) is essentially a discretionary and factual one (*Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]). Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (see *Higbie Constr., Ltd. v IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]). Plaintiffs seek to set aside the verdict as against the weight of the evidence pursuant to CPLR 4404. To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed with considerable caution, 'for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict'" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to

ensure that a verdict is fair and supported by the evidence (McDermott v Coffee Beanery, Ltd., 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, New York Practice § 406, at 687 [4th ed.]).

On a motion to set aside a jury's verdict as against the weight of the evidence, the standard is whether the evidence "so preponderated in favor of the other side that the verdict could not have been reached on any fair interpretation of the evidence." (Lolik v Big V Supermarkets, Inc., 86 NY2d 744, 746 [1995]; Voiclis v International Association of Machinist and Aerospace Workers, 239 AD2d 339 [2d Dept 1997]). A verdict would not be against the weight of the evidence "unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion." (Sperduti v Mezger, 283 AD2d 1018 [4th Dept 2001]).

During plaintiffs' counsel closing argument to the jury, she advanced multiple theories of liability of defendant based upon independent and separate acts of negligence of defendant. Those acts of negligence by defendant were: (1) a sudden or violent lurch of the train car that was unusual, (2) lack of air conditioning in the train car, (3) failure to inspect the train car and take it out of service, and (4) failure to maintain the brakes. Transcript ("T") 27, line("l") 24-25; T. 28, l. 1-8; T. 29, l 14-25. A jury reviewing defendant's conduct, by a fair interpretation of the evidence could have found that plaintiff Margaret Rush did not use reasonable care for her own protection in traveling between train cars and /or defendant's conduct concerning the air conditioning, inspection and brakes were not substantial factors in bringing about the accident.

Plaintiffs' claim was adequately supported by witness testimony and exhibits. Defendant elicited evidence in rebuttal. The jury having considered the evidence of the parties, chose to accept defendant's view of the evidence. If a verdict for a plaintiff is based on a fair interpretation of the evidence, it should not be set aside as being against the weight of the evidence (Brosnan v Pratt, 37 AD3d 388 [2d Dept 2007]). There were valid lines of necessary and permissible inferences that would had led a rational jury to have concluded that defendant's negligence was not a proximate cause of the accident. Here, the jury could have reached its verdict upon a fair interpretation of the evidence (Kennedy v New York City Health and Hosp. Corp., 300 AD2d 146 [1st Dept 2002]).

III. CONCLUSION

Accordingly, plaintiffs' motion for an Order pursuant to CPLR 4404(a) setting aside the jury verdict rendered on December 3, 2007 in favor of defendant is denied as the verdict was not contrary to the weight of the evidence.

The Court has considered the plaintiffs' remaining arguments and finds them to be without merit.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 4, 2008

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Howard G. Lane, J.S.C.