SUPREME COURT OF THE STATE OF NEW YORK Index No. **17605/92**
COUNTY OF BRONX

Juan Cardena and Maria De; Carmen Goyri,
Plaintiff,

-against-

Present:
Hon. Paul A. Victor

Anjowar Realty Corp Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1 and 2**
X-motions	**3 and 4, 5 and 6**
Opposition	**7 and 8**
Reply	**9 and 10**

Upon the foregoing papers, the foregoing motion and cross-motions, as indicated, are consolidated for disposition and decided as follows:

Relief Sought

Defendant moves, inter alia, to set aside the verdict of the jury, and for a new trial pursuant to CPLR 4404. [1]Plaintiff cross-moves to set down for trial the cause of action for property damage. Defendant "cross-moves" for summary judgment with respect to the issue of property damage.

Facts and Procedural History

Plaintiff Juan Cardena, the superintendent of a building owned by the defendant and located in Bronx County, and plaintiff Maria Del Carmen Goyri, his wife, were savagely attacked at approximately 11:00 P.M. on October 9, 1991, as they entered the apartment building in which they resided at 120 Haven Avenue in Bronx County. Plaintiff Juan Cardena was the superintendent of the building, and was provided with an apartment as a benefit of his employment. The plaintiff

[1] Defendant has not provided the court with a trial transcript.

testified that he worked on a 7:00 A.M. To 2:00 P.M. shift in the subject building as a superintendent six days a week, and was also empoloyed on a 3:00 P.M. tp 11:00 P.M. shift as a doorman in another building. as a "full-time" doorman at another building, and thus worked only part-time at the subject premises. On the evening of the assault, the plaintiff and his wife left their residence at approximately 9:30 P.M., and had dinner at a nearby restaurant. They returned to the building, at which time the plaintiff checked the garbage, after which he joined his wife. The plaintiffs were assaulted in the common area of the premises. During the attack in the plaintiffs' apartment, a phone call from a tenant was received seeking building maintenance.

The plaintiffs recovered a judgment against the defendant owners of the premises after jury trial. Defendant now argues, first, that the defendants did not have notice of prior criminal activity at the premises so as to warrant a charge on liability; secondly, that the claim of plaintiff Juan Cardena is barred by Section 11 of the Workers Compensation Law; thirdly, that the Court's charge on proximate cause was confusing, misleading and inconsistent, in that it incorporated the terms "substantial contributing cause," "legal or proximate cause," "substantial contributing factor," "substantial factor," and "cause"; fourth, that the court erred in refusing to submit the issue of apportionment to the jury under Article 16 of the CPLR; and fifth, that the court erroneously permitted evidence of permanent injuries.

Plaintiff's cross-move for a trial on their claim for property damage pursuant to RPAPL 853, which was severed prior to the trial of the personal injury action.

Applicable Law and Discussion

Motion to Set Aside the Verdict as a Matter of Law or as Contrary to the Weight of the Evidence

C.P.L.R. 4404 (a) provides:

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

It is axiomatic that a jury verdict is entitled to the benefit of every fair and reasonable inference which can drawn from the evidence; and that it is the function of the jury, not the court, to make credibility determinations. However, it has often been observed that "whether a jury verdict is against the weight of evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence" (Nicastro v. Park, 113 A.D.2d 129, 132, 495 N.Y.S.2d 184). In addition "[a]lthough these two inquiries may appear somewhat related, they actually involve very different standards and may well led to disparate results" (Cohen v. Hallmark Cards, 45 N.Y.2d 493, 498, 410 N.Y.S.2d 282.)

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible inference which could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v. Hallmark Cards, supra, at p. 449; Nicastro v. Park, supra, at p. 132.) As stated in Nicastro, supra, "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent...[and] whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors [citations omitted]." The rule has been stated as requiring that a jury

verdict be set aside where "the jury could not have reached a verdict on any fair interpretation of the evidence" (Nicastro v. Park, supra at 134. See also, Burney v. Raba, 266 A.D.2d 174, 697 N.Y.S.2d 329; Maisonaves v. Friedman, 255 A.D.2d 494, 680 N.Y.S.2d 619; Delgado v. Board of Ed., 65 A.D. 2d 547, 408 N.Y.S. 2d 949, aff'd, 48 N.Y.2d 643, 421 N.Y.S.2d 198.)

It is fundamental that the Court's discretionary power, pursuant to CPLR 4404, to set aside a jury verdict as against the weight of the evidence "must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict." (Brown v. Taylor, 221 A.D. 2d 208, 209, 633 N.Y.S. 2d 170. See also, Berry v. Metropolitan Transportation Authority, 256 A.D.2d 271, 683 N.Y.S. 2d 30.)

DISCUSSION

Notice of Prior Criminal Activity

This court notes that evidence was submitted on motion prior to trial that the front door locks to the premises were broken; that intruders had been seen in the building; and that the owners refused to remedy the situation. This evidence resulted in the denial of a motion for summary judgment by defendants, which was affirmed by the Appellate Division. (See Slip Opinion 1016, May 2, 2000, which held "the motion court correctly determined that defendant failed to meet their burden and sufficient evidence was presented to establish a factual question as to the foreseeability of criminal conduct in the building...") Substantially, the same evidence as was adduced by the plaintiffs at trial. Based on the Appellate Division's reasoning, there was sufficient evidence to permit the jury to make a determination in this regard. Nor was the jury's conclusion contrary to the weight of the evidence, which established a prolonged failure to provide minimal security to the residents of the

building.

The Bar of Workers' Compensation

The court ruled as a matter of law during trial that the bar or Workers' Compensation would not preclude the plaintiff Juan Cardena's claim, and would, of course, not bar his wife's calim in any event. The court adheres to that ruling.

Defendant (relying upon, inter alia, Toro v. 1700 First Avenue Corporation, 16 A.D.2d 852, 227 N.Y.S.2d 605, affd. 12 N.Y.2d 1001, 239 N.Y.S.2d 130, 189 N.E.2d 625) argues that the assault on plaintiff Juan Cardena arose out of his employment, and thus recovery is barred by the exclusivity provision of the Workers Compensation Law. There was conflicting evidence at trial as to whether Mr. Cardena was a full time or part time employee. In any event, the credible trial testimony indicated that the plaintiff Juan Cardena and his wife had returned to the building after having had dinner at a local restaurant; that Mr. Cardena had checked on the garbage receptacles just before joining his wife in the outer vestibule; and that they were both in the common area of the building entering the inner vestibule when they were initially confronted and thereafter attacked.

In Toro v. 1700 First Avenue Corporation (supra), the Court held that a resident superintendent of several apartment buildings, subject to call 24 hours of each day, was assaulted in the course of his employment by unknown assailant late in evening shortly after superintendent left apartment to fix boiler in another building, and that the assault was within coverage of Workmen's Compensation Law. The Appellate Division opinion stated:

> **That the assault arose in the course of employment is demonstrated by uncontradicted evidence supplied in considerable measure by the employer itself...** No personal motive is ascribed for the attack on deceased. It is gleanable that the board regarded robbery as its incentive. This is indicated by its statements

> concerning the absence of deceased's wallet and the finding of his keys in an automobile owned by one of the tenants to which he had access for the purpose of changing its parking place periodically to comply with municipal regulations and subsequently found by the police to have been abandoned some distance from the scene of the crime. **The duties of deceased called him in the darkness of late evening to the basement of one of his employer's apartment houses to attend a faulty boiler about which tenants had complained.** The site of his work was separated from the traveled way by an intervening courtyard and at least to some extent removed from public view. In this physically opportune setting the exposure to the danger of assault by a footpad clearly transcended the peril common to mankind in general. **As an incident of the work deceased was thus brought 'within the zone of special danger' and in contact with the risk which caused his death. In these circumstances there is coverage under the Workmen's Compensation Law.** (Matter of Heidemann v. American Dist. Tel. Co., 230 N.Y. 305, 130 N.E. 302; Matter of Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522; Matter of Ramos v. Taxi Tr. Co., 276 App.Div. 101, 106, 92 N.Y.S.2d 744, 748, affd. 301 N.Y. 749, 95 N.E.2d 625; Matter of Christiansen v. Hill Reproduction Co., 262 App.Div. 379, 29 N.Y.S2d 24, affd. 287 N.Y. 690, 39 N.E.2d 300; Matter of Lanni v. Amsterdam Bldg. Co., 217 App.Div. 278, 216 N.Y.S. 763; Rosmuth v. American Radiator Co., 201 App.Div. 207, 193 N.Y.S.2d 769; 1 Larson, Workmen's Compensation Law, § 11.33.) (Emphasis supplied.)

(See also Fiorello v. Anastasi Bros. Co., 280 N.Y.S.2d 884 [1967] [where baker arrived for work at employer's plant in rural area at 6:30 a.m., parked his automobile near garage doors leading into the plant and upon alighting was struck on the head by an unknown assailant and robbed of his wallet and ring, there was no claim of a personal or private animus unconnected with employment, and there was no contention that incident did not occur within time and space limits of employment, the accident was compensable as 'arising out of and during course of employment'); but see Macari v. N. Y. Mid-Hudson Trans-Corp. (241 N.Y.S.2d 627 [1963] [accidental injury arising out of and in the course of employment was not established as causing the death of employee who was found murdered by an unknown assailant in his wife's automobile parked at the place where he customarily parked it while waiting for his place of employment to open].)

The superintendent in Toro was unquestionably engaged in his employment by virtue of the

need to repair a boiler in a secluded location at a late hour of the night. Here, on the other hand, the plaintiff and his wife were entering the public portion of the premises, and plaintiff was clearly not engaged in his employment duties when the assault began. The fact that the plaintiff checked the garbage is irrelevant, because the assault did not occur when the plaintiff was checking the garbage, and was not connected to his performance of that task. In addition, it is not clear that Juan Cardena was a full time employee, but in any event plaintiff, even if subject to being "on duty," was not actually engaged in the course of his employment at the time of the assault. Nor could the fact that a call for the plaintiff's services was made convert the assualt into one connected with plaintiff's employment, since plaintiff was clearly not performing his employment duties at the time of the assault.

Under these circumstances, Workers Compensation is not a bar to the maintenance of this action.

Court's Charge on Proximate Cause

It has been the experience of this court, and apparently the experience of may of other jurists, that jurors are often confused by the "substantial factor" instruction in the PJI, and often erroneously equate the term "substantial factor" with degrees of fault. (See, e.g., the comment of the dissenting justice in Kovit v. Estate of Hallums, 261 A.D. 2d 442, 690 N.Y.S. 2d 82 [2 Dept. 1999]. The PJI instructions has thus resulted in both inconsistent verdicts and/or verdicts which are not supported by the record. Consequently, in order to avoid juror confusion and an erroneous verdict it was deemed necessary by this court to embellish and expand upon the bare bones PJI version which, when left unexplained, invites jurors to speculate. Indeed, the PJI itself invites the Court to modify the standard charge. (PJI 2:70, 3rd Ed., at page 328, states. "Although the pattern charge thus states

a correct principle of law, it will be more readily understood by lay jurors if the principle is expanded upon and related to the facts of the particular case. The law must not only be stated accurately but 'be reduced to terms likely to be understood by the jury.'[Citation omitted.]."

The expanded charge was appropriate in all respects.

CPLR Article 16 Apportionment

The First Department has recently adopted conflicting determinations as to whether Article 16 apportionment is available in premises security cases. (See Roseboro v. NYCTA, 20001 N.Y. App. Div. LEXIS 7822; Concepcion v. NYCHHC, 20001 N.Y. App. Div. LEXIS 7823; Chianese v. Meier, 20001 N.Y. App. Div. LEXIS 7824.) The plaintiff did in fact plead exceptions to the applicability of Article 16.[2] Until the issue is further clarified by appellate rulings, this court will adhere to its determination that apportionment with intentional tortfeasors in a case of this type is not warranted, and was not intended by the Legislature.

Evidence of Permanent Injuries

Although the expert psychologist, Dr Aranda, who examined the plaintiffs in June, 2000, and issued a report dated November 27, 2000, did not specifically state that the psychological injuries were permanent, this was indeed implicit in his findings, and thus defendants can not genuinely claim either surprise or prejudice.

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[2]See amended answer. However, contrary to plaintiff's arguments, CPLR 1602(2)(iv) (relating to nondelegable duties) is not an exception to apportionment under CPLR article 16. Rangolan v. County of Nassau, 2001 WL 301932 (N.Y.), 2001 N.Y. Slip Op. 02793.

MOTION FOR SUMMARY JUDGMENT

Defendants "cross-move" for summary judgment on the severed cause of action for unlawful eviction, on the ground that the employment relationship of the plaintiff-tenants had terminated at the time the alleged "lock out" occurred. However, the motion was not brought within the 120 day time limitation of the CPLR. That part of the "cross-motion" which seeks to amend the answer to raise the affirmative defense of res judicata is granted pursuant to CPLR 3025 (b).

CONCLUSION

The motion to set aside the verdict is denied. The cross-motion to set the remaining causes of action down for trial is granted.

The parties are directed to appear in the STP part on October 19, 2001, at 9:30 A.M., for conference and trial assignment.

9/25/01
DATE

Hon. Paul A. Victor, J.S.C.