

Cioffi v American Airlines, Inc.

2005 NY Slip Op 30191(U)

October 31, 2005

Supreme Court, New York County

Docket Number: 0124258/2002

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

— 0124258/2002

CIOFFI, DENNIS
VS
AMERICAN AIRLINES

SEQ 3

VACATE

EX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED CAL. NO. _____

The following papers are filed in connection with this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

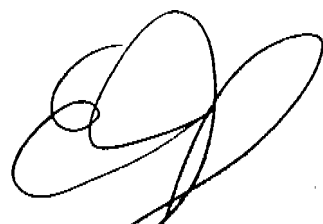
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *not withstanding the verdict is decided in accordance with the attached memorandum.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/31/05



EMILY JANE GOODMAN *V.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
DENNIS CIOFFI and SHERYL CIOFFI,

Plaintiffs,

-against-

Index No. 124258/02

POST TRIAL
DECISION

AMERICAN AIRLINES, INC., and
V.R.H./TORCON, A JOINT VENTURE,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C:

On November 1, 2002 iron worker Dennis Cioffi (Cioffi) sustained severe injuries to his knee, shoulder, and back when he tripped and fell on debris while carrying planking at an American Airlines terminal at JFK airport. This action was tried before a jury which found that Defendants violated Labor Law §§200 and 241(6), that Cioffi was 10% at fault for the accident, and awarded damages to Cioffi and his wife.

Defendants move to set aside the verdict and for a new trial, or alternatively, to reduce the damages award. In over 100 pages of argument,¹ Defendants complain

¹Rule 14 of the General Rules of the Justices of the Supreme Court, Civil Branch, New York County provides that, unless advance permission is granted for good cause, "memoranda of law shall not exceed 30 pages each." Defendants' Memorandum Of Law

unpersuasively (as they did continuously at trial) about purported errors not only by the jury, but also by the judge and opposing counsel. Plaintiffs oppose this motion. Because Plaintiff “consents to discontinue his claim under Labor Law §200” (see Memorandum of Law In Opposition to Motion To Set Aside Verdict at 1), the Court need not reach Defendants’ arguments that the verdict, finding Defendant V.R.H./Torcon liable under Labor Law §200 and common law negligence, should be vacated.² Therefore, the jury’s verdict finding that V.R.H./Torcon was liable under Labor Law §200 (Question 1.A. and 1.B. on the verdict sheet) is vacated, and the cause of action in the complaint based on Labor Law §200 and common law negligence is dismissed as to V.R.H./Torcon.

Complaints about the Jury

Defendants maintain that the evidence does not support the jury’s award to Cioffi for lost earnings, annuity, legally required benefits,³ pension benefits, future medical care costs and lost health insurance benefits (collectively “future work related losses”).

Defendants also maintain that the jury’s award to Cioffi for past and future pain and

In Support Of Their Motion For A New Trial And/Or For Conditional Reductions Of The Damages Awards totals 56 pages and their reply totals 34 pages. Because the Court sought to extend counsel courtesy, it did not reject the papers for exceeding the page limit, without seeking prior leave to do so.

²Defendants argued that the evidence did not indicate that V.R.H./Torcon supervised the manner/means of Cioffi’s work, or, had actual or constructive notice of the debris and therefore, could not be liable under Labor Law §200 and common law negligence.

³ Legally required benefits represent all benefits that Cioffi’s employer was required by law to contribute on behalf of Cioffi, such as for social security.

suffering, and to his wife, for past and future loss of services, was excessive. Plaintiffs maintain that the award to Cioffi and his wife does not deviate materially from reasonable compensation.

A. Adequacy of Evidence

In assessing Defendants' arguments, the Court must bear in mind that reconsideration of a jury verdict 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 AD2d 208, 209 [1st Dept 1995]). To set aside a jury's verdict, there must exist "no valid line of reasoning and permissible inferences" which could lead rational persons to the conclusion reached by the jury on the basis of the evidence (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]). Furthermore, the movant must demonstrate that the evidence so preponderates in favor of the movant's position that the verdict could not have been reached by any fair interpretation of the evidence (see Niewieroski v Natl. Cleaning Contr., 126 AD2d 424 [1st Dept 1987]). Moreover, with respect to damages, so long as the figure arrived at has a reasonable basis of computation and was not merely speculative, resort can be made to reasonable conjectures and estimates to make the best approximation, especially where the conduct of the wrongdoers has rendered it difficult to ascertain the damages with precision (see Matter of Rothko's Estate, 43 NY2d 305 [1977] [damages could be based upon the appraisal value of unreturned works of art]). Notably, a lost earnings award may be based

upon the plaintiff's testimony alone (see Grinnell v City of New York, 244 AD2d 171 [1st Dept 1997]).

Defendants claim that the jury's award for future work related losses was not supported by the evidence because it was based on the improper assumption that Cioffi would retire at age 62 and work a certain number of hours, which Defendants maintain is inflated. This is without merit. Cioffi's labor economist testified that Cioffi would work an average of 1,609 hours per year, until retirement at the age of 62 years old. Peter Myers, the fund director for the Ironworkers Union Local 580, testified that the typical retirement age was between 60-65. Contrary to Defendants' arguments, the jury's determination is not inconsistent with the testimony of Cioffi's vocational rehabilitation expert, who opined as to a "minimum" retirement age of 55. Although the economist, Dr. Missum, testified that as ironworkers get older, some work more and some work less, the jury was free to accept or reject the expert's projection that Cioffi's retirement age would be 62. The jury was free to accept or reject the jury charge on statistical work expectancy. Further, although Defendants point to fluctuations in Cioffi's income for the years 1999-2001, and to the testimony of Peter Myers, regarding the hours Cioffi worked for the first 10 months of 2002, the Court cannot say that there is no valid line of reasoning and permissible inferences which could possibly lead the jury to their conclusion based on the evidence (see Curiale v Peat, Marwick, Mitchell & Co, 214 AD2d 16 [1st Dept 1995]).

Defendants also maintain that the jury's award of \$900,000 for future medical care and \$200,000 for lost health insurance benefits⁴ was improper because, according to Defendants, Cioffi failed to establish that he would lose the health insurance which he received through his wife's employment, and he failed to establish that there was a difference in the costs and benefits of his employer's health plan and his wife's health plan. As Plaintiffs correctly argue, if the award is duplicative of Cioffi's wife's insurance (Tr at 964), the issue is to be addressed by the Court, not the jury, at a collateral source hearing⁵ (see Bryant v New York City Health and Hosp. Corp., 93 NY2d 592 [1999] [CPLR 4545 (c), was enacted to eliminate double recoveries]).

Reduction of Jury Award

Additionally, contrary to Defendants' arguments, the jury's award to Cioffi of \$1,157,000 for past pain and suffering (for approximately 2 years) and \$2,600,000 for future pain and suffering (for 33 years) was not excessive. The evidence demonstrated that Cioffi sustained an annular tear of his disc at L5-S1, radiculopathy at the L4-L5 level,

⁴Lost health insurance benefits represent the cost of insurance for family coverage to replace the insurance that Cioffi lost from his employer [Tr at 801, 817].

⁵CPLR 4545 [c] provides, in relevant part that "In any action brought to recover damages for personal injury . . . where the plaintiff seeks to recover the cost of medical care . . . loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance."

tears of his acromioclavicular and coracoclavicular ligaments in his left shoulder, a tear in his anterior cruciate ligament, chondromalacia, surgical derangements at the C3-C4 and C6-C7 disc levels, and tingling in the left hand. The evidence further demonstrates that Cioffi underwent spinal fusion of his lower back, surgery to his knee to repair tears, and surgery to his shoulder to repair the separation. Plaintiffs' expert testimony established that Cioffi could never return to ironwork, or, even sedentary work. Therefore, the jury could consider the effect that this would have on Cioffi's quality of life. The jury was also free to consider that Cioffi was very athletic before his accident (playing baseball, swimming and running track) (Tr at 669), and, as a result of the accident, he would miss the opportunity to engage in these activities and to hold or play ball with his child (Tr at 742).

The amounts awarded by the jury are within the range of other awards for pain and suffering for similar injuries. In Young v Tops Market, Inc. (283 AD2d 923 [4th Dept 2001]), the Fourth Department reduced an award for 4 ½ years of past pain and suffering from \$1.5 million to \$1 million, and an award for 25 years of future pain and suffering from \$5.5 million to \$2.5 million, for a total award of \$3.5 million. In that case, plaintiff suffered injuries to his right femur, spine, pelvis, right knee and heel (see also Barrowman v Niagara Mohawk Power Corp., 252 AD2d 946 [4th Dept 1998] [award of \$3 million for past and future pain and suffering for plaintiff who suffered herniated discs in the back and neck, necessitating a cervical and a lumbar discectomy, with fusion and grafts, did

not deviate materially from reasonable compensation)).⁶ Kirby v Turner Constr. Co. (286 AD2d 618 [1st Dept 2001]) does not dictate a contrary result. In that case, the First Department found that the total award of \$2 million for past and future pain and suffering, as reduced by the trial court from \$4 million, did not deviate materially from reasonable compensation. In Kirby, the plaintiff did not have any back surgery at the time of trial (although future surgery was possible). Here, Cioffi underwent spinal fusion surgery before trial. Moreover, in this action, Cioffi sustained injuries to his knee, shoulder and back, whereas the plaintiff in Kirby sustained injury only to his hip and back.

Furthermore, the minimal award to Cioffi's wife of \$37,500 for past loss of services, and the award of \$100,000 for future loss of services, does not deviate materially from reasonable compensation. Much higher awards have been made where the plaintiff suffered similar injuries. In Young, supra, the Court held that \$400,000 was reasonable compensation for loss of services. Additionally, in Kirschhoffer v Barry Van Dyke, Sr. (173 AD2d 7 [3d Dept 1991]), the Court held that \$400,000 was reasonable compensation for loss of services, where plaintiff, who was still able to work part-time, underwent spinal fusion surgery, experienced lower back and leg pain and the inability to participate in pre-accident activities. Accordingly, a total award of \$137,500 on the

⁶ Unlike Cioffi, the plaintiff in Barrowman had no shoulder or knee injuries and the Court still found that \$3 million in damages for pain and suffering did not deviate materially from reasonable compensation.

derivative claim does not deviate materially from reasonable compensation. Additionally, Defendants fail in having the loss of services award reduced by discrediting the marriage as lacking a “track record.” Defendants point to the fact that, after the couple’s honeymoon, Cioffi returned to New York, without his wife (who worked in California). Thus, Defendants claim that the couple never intended to cohabit together. However, it was in the province of the jury to assess the credibility of Cioffi and to rely upon his testimony that his wife was moving to New York, especially given that the couple was expecting a child (Tr at 717) (see Cholewinski v Wisnicki, 2005 NY Slip Op 6733, 2005 LEXIS 9157 [1st Dept 2005] [credibility is for the jury to resolve]).

Complaints about Opposing Counsel

Defendants argue that the jury’s verdict should be vacated and a new trial ordered because of remarks by Plaintiffs’ counsel during summation. Defendants argue that Plaintiffs’ counsel accused Defendants’ experts of lying for a fee; spoke about facts not in evidence (including about Cioffi’s wife’s health insurance); made inflammatory statements; and referred to Defendants’ failure to produce documents and two witnesses, even though the Court declined to give a missing documents and missing witness charge. Defendants maintain that these statements, separately and especially cumulatively, deprived them of their right to a fair trial.

Plaintiffs counter that the majority of these complaints were not preserved for review because Defendants’ counsel failed to object. In any event, Plaintiffs claim that

the statements were either responses to opposing counsel's statements or fair comment on the evidence; that the remark about Cioffi's wife's health insurance was appropriate, because the Court instructed Defendants' counsel not to mention it; that the Court gave curative instructions regarding certain comments; and that any comments about missing documents and witnesses were appropriate, despite the Court's refusal to instruct the jury in a missing witness or documents charge.

In reply, Defendants point to their counsel's objection to one of Plaintiffs' counsel's comments: "If Torcon spent the time and money on safety protection at the site that this lawyer did in bringing this defense to you, you know what? We wouldn't be here" (Tr at 1693). Defendants do not point to any other time or page in the transcript where they made objections to any of the many statements about which they now complain. Apparently realizing that they failed to preserve the record, Defendants now contend that the remarks were the equivalent of fundamental error, citing the rare exception to the rule of preservation (see Rosso v Beer Garden, Inc., 12 AD3d 152 [1st Dept 2004] [Court reached issue of the applicability of a statutory amendment, even though defendants failed to preserve the issue, because it was "sufficiently fundamental to warrant the exercise of our power to review an unpreserved issue in the interest of justice"]; Pivar v Graduate School of Figurative Art, 290 AD2d 212 [1st Dept 2002] [because the jury never considered the central issue of bailment, the Court granted the request for a new trial holding that "where the error is so fundamental as to preclude

consideration of the central issue upon which the claim is founded, the court may, in the interests of justice, proceed to review the issue”]).

Defendants have waived their objection to most of the statements of which they now complain (see Horton v Smith, 51 NY2d 798 [1980]). Assuming that counsel had timely objected to the Torcon safety statement, the isolated statement is not a ground to reverse the jury’s verdict.⁷ The statement, although hyperbole, did not prejudice Defendants. The Court gave a general instruction to the jury that attorney’s remarks are not evidence and that the case should be decided only on the evidence. The fact that the jury found that Plaintiff was comparatively negligent indicates that the jury was not inflamed by the statement.⁸ As to Defendants’ complaints about counsel’s reference to the firing of Goldman and the Goldman methodology, the Court gave a curative charge to the jury (Tr at 1778). Defendants acknowledge that the Court gave a curative charge regarding Plaintiff’s counsel’s “Darryl Whiteley Day” comment, although they still maintain, unpersuasively, that the curative charge was inadequate. As to the objections which were not preserved notwithstanding the presence of appellate counsel, the Court does not find that the remarks were the equivalent of fundamental error. Unlike Pivar v

⁷Counsel represents that the objection was made on page 1694 of the transcript, which was not submitted to the Court.

⁸As to Plaintiffs’ counsel’s comment that Defendants “want to toss the guy out without a job, without a career on his broken butt, as a matter of fact” (Tr at 1723), no objection was made to preserve that comment for review and, the remark is not enough to warrant a new trial.

Graduate School of Figurative Art, *supra*, Defendants' complaints do not involve the fundamental issue in this Labor Law case, nor do the complaints involve an erroneous ruling that a statutory amendment applies, as in Rosso v Beer Garden, Inc., *supra*.

Moreover, Defendants incorrectly maintain that Plaintiffs' counsel made himself an unsworn witness by telling the jury not to cheat Plaintiffs out of health insurance, because when Cioffi's wife leaves her job, and moves to New York, the insurance is "gone" (Tr at 1749-50). Contrary to Defendants' allegation, his statements were fair comment on the evidence. Cioffi testified that his wife planned to move to New York and his wife was expecting a child (Tr at 717).⁹ The statement regarding Defendants' experts "all they did was talk about what Mr. Whiteley gave them and in one hour spit it back at you" (Tr at 1733) was responsive to Defendants' counsel's statement (Tr at 1625) about Dr. Missun (*see Freeman v Kirkland*, 184 AD2d 331 [1st Dept 1992] [defendants' claim, largely unpreserved, that plaintiff's counsel's remarks on opening and summation deprived defendants of a fair trial was rejected because the statements were either in response to remarks by opposing counsel or were fair comment]). The statement regarding two missing witnesses was also in response to Defendants' counsel's statements about a missing witness, co-worker Jerry McKenon, a person for whom the

⁹Counsel represents that this testimony was given on page 717 of the transcript, but somehow did not submit that page to the Court. Nevertheless, the Court recalls such testimony. In any event, the comment was not harmful because any reduction to Cioffi's recovery will be determined by the Court at a collateral source hearing.

Court also declined to give a missing witness charge (Tr at 1661-1662). Moreover, where a missing witness charge is not appropriate, counsel may comment in summation upon the failure of opposing counsel to call a witness, even if the witness is technically available to both sides (see Seligson, Morris & Neuburger v Fairbanks Whitney Corp., 22 AD2d 625 [1st Dept 1965]; People v Mendez, 138 AD2d 637 [2nd Dept 1988]; PJI 1:75 Vol. 1 A at 108]). Additionally, the jury was frequently instructed that counsel's statements are not evidence.

Complaints about the Court

In their unseemly effort to portray the Court as consistently favoring Plaintiff, depriving Defendants of a fair trial, Defendants complain that the Court erred in (i) failing to rule on two for-cause challenges during jury selection, before prompting Defendants to use their last preemptory challenge, (ii) allowing Cioffi's surgeon, Dr. Merola, to testify that Cioffi would require future spinal surgery, and (iii) precluding Frank Cook from testifying as a fact witness even though he was only disclosed as a record witness.¹⁰

These arguments are baseless. The verdict should not be vacated based on

¹⁰Defendants selectively omit reference to rulings in their favor, including when the Court declined to give Plaintiffs a missing documents charge, a missing witness charge and declined to direct a verdict in favor of Plaintiffs on any cause of action. Movants claim that the Court was "pro-plaintiff" even when the Court precluded testimony (e.g., Dr. Merola's testimony regarding future spinal surgery discussed infra) or gave curative charges (e.g., regarding "Darrell Whiteley Day" discussed supra).

Defendants' argument that the Court failed to rule on two for-cause challenges (asserted against potential jurors Hubbard and Eisenberg) before prompting Defendants to exercise their last peremptory challenge (which Defendants exercised against potential juror Shapiro). Defendants maintain that had they known that the Court would not excuse Eisenberg for cause, they would have exercised their peremptory challenge on him.

However, no reporter was present at that time Defendants claim the Court erred (which Defendants state was in chambers, during lunch recess). The jury was sworn in, opening statements were made, and several witnesses gave testimony, all before counsel made his untimely record, based on his recollection of what transpired (Tr at 284-288).

Additionally, contrary to Defendants' arguments, the "Struck Method" of selecting a jury does not mandate the time period by which the Court must decide for cause challenges.

Moreover, in ruling on the for-cause challenges, the Court queried Eisenberg and properly determined that he could be fair and impartial before impaneling him (Tr at 286-287). In their papers, Defendants have admittedly not questioned whether Mr. Eisenberg was a competent and impartial juror. Thus, the only cases cited by Defendants in support of the very drastic relief requested are inapplicable because they involve the court's failure to exclude biased jurors, which is not the claim here (see, e.g., French v Schiavo, 300 AD2d 119 [1st Dept 2002] [jury verdict set aside because of juror's expression of bias toward plaintiff's case sufficient to have warranted probing by the court or removal]).

Contrary to Defendants' characterization, the Court did not allow Dr. Merola,

Cioffi's surgeon, to testify that Cioffi would require future spinal surgery. Dr. Merola never testified to that effect because the Court agreed that such testimony would be improper.¹¹ Thus, the Court instructed the jury that Dr. Merola's testimony was limited to the extent that only future examination and testing will be able to ascertain whether future spinal surgery will occur (Tr at 152). Further, Defendants' life care specialist, Dr. Provder (who was not a medical doctor) was not "ambushed" by Dr. Merola's testimony. Dr. Provder conceded on cross examination that his opinion that Cioffi could return to work was based on his admittedly erroneous assumption that Cioffi was medically stable (Tr at 1185-1186). However, this concession followed Plaintiffs' counsel's question to Dr. Provder as to whether he would have the same opinion if he knew that Cioffi's medical doctors testified that Cioffi could not even do sedentary work. The fact that counsel's question (which was not objected to) elicited Dr. Provder's concession, bore no relation to Defendants' unfounded argument that the Court erred in allowing Dr. Merola to testify about Cioffi's need for future spinal surgery.

Nor should the verdict be vacated because the Court precluded the testimony of Frank Cook, who had not been disclosed to Plaintiffs as a fact witness, but merely as a witness to admit records. Regardless of whether Plaintiffs knew that Frank Cook was a witness to the accident, Defendants revealed their intention to call Frank Cook as a fact

¹¹Because Plaintiffs' expert disclosure did not reveal that Dr. Merola had an opinion regarding Cioffi's need for future spinal surgery, the Court agreed with Defendants that Dr. Merola could not testify that Cioffi would need future spinal surgery.

witness only after Plaintiffs rested their case [Tr at 1097]. Because Defendants apparently knew they wanted to call him as a fact witness before the trial commenced [Tr at 1090-1091]), the Court had a basis to conclude that Defendants' non-disclosure was willful. The cases cited by Defendants do not persuade the Court otherwise (see Breen v Laric Entertainment Corp., 2 AD3d 298 [1st Dept 2003] [plaintiff's failure to disclose witness was not willful where plaintiff disclosed the witness before the outset of trial, and, where the witness was included on defendants' own witness list]; Rivera v City of New York, 253 AD2d 597 [1st Dept 1998] [defendants' failure to disclose witness was not willful where defendant announced its intention to call that witness at the outset of trial]; Gomez v NYCHA, 217 AD2d 110 [1st Dept 1995] [defendant's failure to disclose two witnesses was not willful where the name of one witness was disclosed nearly 10 months before trial, and the address two weeks before trial, and the name and address of the second witness was disclosed two months before trial]).

Lastly, Defendants claim that the Court was hostile and biased towards their counsel, who throughout this trial, and despite the threat of sanctions, repeatedly refused to follow the Court's directives to "move on" once a record had already been made. As Plaintiffs note, Defendants overlook that their counsel acted unprofessionally and caused tension, particularly in his refusal to respect adverse Court rulings (Tr at 871-879). An example of such disrespectful behavior occurred when defense counsel introduced (to the jury) an attorney assisting him as "appellate counsel," implying to the jury that an appeal

would be necessary due to judicial errors. Appellate counsel also engaged in colloquy, outside the presence of the jury, attacking the Court with, “rarely have we seen a Judge engage—basically come off the bench and join plaintiff’s counsel” (Tr at 1554-1557). It was defense counsels’ own behavior that caused the tension in the courtroom (see People v Straniero, NYLJ, April 14, 2005, at 1 [“to the extent that the court’s conduct could in any remote way be perceived as hostile, this was the direct result of the defense counsel’s constant baiting, belittling, provoking and showing disrespect to the court throughout the trial”]). Defendants remaining arguments are unavailing.¹²

Accordingly, it is

ORDERED that this motion pursuant to CPLR 4404 (a) is denied, except that the jury’s verdict finding that V.R.H./Torcon was liable under Labor Law §200 (Question 1.A. and 1.B. on the verdict sheet) is vacated, and the cause of action in the complaint based on Labor Law §200 and common law negligence is dismissed as to V.R.H./Torcon; and it is further

ORDERED that the parties contact the Court forthwith to schedule an immediate

¹²Defendants list, but do not substantively discuss, a number of other instances where the Court purportedly allowed Plaintiffs to introduce undisclosed facts and opinions while not permitting Defendants to do so, and where the Court made certain evidentiary rulings. However, Defendants have not demonstrated that timely objections were made, nor do they raise any argument as to why such rulings were incorrect. Reliance on rulings, which have not been demonstrated to be incorrect, cannot support the allegation of favoritism.

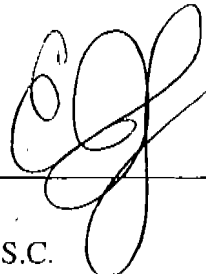
collateral source hearing, unless the issue of collateral offsets, if any, is resolved by stipulation; and it is further

ORDERED that after resolution of the above, Plaintiffs shall submit a proposed Judgment With Notice of Settlement in compliance with Article 50-B of the CPLR to the Court after review and approval by the Clerk. Defendants may submit objections and a proposed Counter-Judgment within 15 days after their receipt of the proposed Judgment.

This constitutes the Decision and Order of the Court.

Dated: October 31, 2005

ENTER:



A handwritten signature in black ink, consisting of stylized, overlapping loops and lines, positioned above a horizontal line.

J.S.C.

EMILY JANE GOODMAN