Begum v New York City Health and Hospitals Corporation
2005 NY Slip Op 30275(U)
November 28, 2005
Supreme Court, Kings County
Docket Number:
Judge: Wayne P. Saitta
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At a Term, Part 29, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 360 Adams St. Brooklyn NY, on the 28th day of November, 2005.

Present: HON. WAYNE P SAITTA, Justice

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SUKI BEGUM

Plaintiff, Index No. 00958/98

-against- DECISION AND ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, WOODHULL MEDICAL AND MENTAL HEALTH CENTER, ALLIED CENTRAL AMBULETTE SERVICE INC., MARION CONTE and ALMA CONTE

Defendants.

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The plaintiff, SUKI BEGUM, moves, for an order pursuant to CPLR 4404(a) setting aside a verdict rendered in favor of defendants and setting the matter down for a new trial on the grounds the verdict is inconsistent, against the weight of the evidence, the result of inflammatory statements by defense counsel and the result of juror confusion, and for such other and further relief as this court deems just and proper.

Now upon the Notice of Motion by Plaintiff dated May 6, 2005, the Affirmation of Dario Perez, Esq. dated May 6, 2005; the Affirmation in Opposition of Arnold Goldstein dated May 30th, 2005 the Reply Affirmation dated, September 29, 2005, the trial transcript annexed thereto, after hearing oral argument from attorneys and upon all the proceedings heretofore had herein and after due deliberation, the motion is granted for the reasons stated below.

This is a personal injury action brought by plaintiff to recover for injuries she sustained when she fell from her wheelchair, down a flight of stairs, while she was being carried by an ambulette driver employed by defendant ALLIED AMBULETTE SERVICE INC.

The trial was had before a jury on February 28, March 2-4, 7 , 9 & 10, 2005. At the time of trial ALLIED AMBULETTE SERVICES INC. was the only remaining defendant.

At the portion of the trial dealing with liability the plaintiff testified, and called as a witness an EMT worker who responded at the scene. The defendant did not call any witnesses on liability, but did read from the deposition of the plaintiff.

The evidence adduced at trial was that plaintiff suffers from polio, and at the time of the accident could not walk and was confined to a wheelchair. An ambulette driver employed by ALLIED was attempting to carry plaintiff in her wheelchair down a flight of approximately 15 steps to bring her to an ambulette. He attempted to carry her down alone and was carrying the wheelchair from behind as he descended the stairs. Plaintiff was strapped into the chair by a belt. As he was carrying plaintiff she fell from the wheelchair and down the flight of stairs. The belt ripped as plaintiff fell and she became separated from the chair. The ambulette driver was left holding chair after plaintiff fell.

The jury found that defendant ALLIED was negligent but that ALLIED's negligence was not a substantial factor in causing the accident.

Plaintiff argues that the verdict was against the weight of the evidence, the result of inflammatory statements made by defense counsel and the result of jury confusion.

Specifically, the plaintiff asserts that the jury having found the defendant's driver attempted to carry plaintiff down the stairs in a negligent manner, could not have rationally concluded that his negligence was not a significant cause of the accident, based on the evidence presented. Defendant counters that a reasonable jury could have concluded from the Plaintiff's own testimony that the failure of the belt to hold her in the chair was the cause of the accident.

To conclude that a verdict is not supported by the evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational jurors to the conclusion

reached by the jury based on the evidence presented at trial. *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 (2nd Dept. 2004); *Fellin v Sahgal* 296 AD2d 526 (2nd Dept. 2002);*Nicastro v Park,* 113 AD2d 129 (2nd Dept. 1985).

Although the court denied an oral trial motion by plaintiff for a directed verdict on the issue of proximate cause, after reviewing the entire transcript it is clear that there was no rational basis to conclude that the defendant's negligence was not a significant factor in causing plaintiffs injuries.

In this case, the issues of defendant's negligence and proximate cause are so inextricably interwoven as to make in logically impossible to find negligence without also finding proximate cause. *Misa v Filancia,* 2 AD3d 810, 769 NYS 2d 404 (2nd Dept. 2003); *Bennett v City of New York,* 303 AD2d 614, 756 NYS2d 633 (2nd Dept. 2003); *Kovit v Estate of Hallums,* 261 AD2d 442, 690 NYS2d 82 (2nd Dept. 1999).

The jury's finding of negligence was based on Allied's driver's act of attempting to carry plaintiff down a narrow flight of steps alone and carrying her wheelchair from behind. Evidence was also adduced that defendant's internal policies prohibited employees from carrying patients downstairs unassisted.

Having found the manner in which the driver attempted to carry Plaintiff down the stairs negligent, there is no rational basis to conclude from the evidence, that the manner which he attempted to carry plaintiff was not a substantial factor in causing her fall. Plaintiff could not have fallen out of the wheelchair, unless at some point while the driver was carrying Plaintiff , he had come to hold the wheelchair at such a angle that plaintiff's center of mass shifted to a point outside the seat.

There was some inconsistency in the evidence as to whether the ambulette driver pushed Plaintiff or carried her down the stairs. However, this apparent inconsistency is not material. Even if one assumes that the jury agreed with defendant that Plaintiff was not pushed but carried down the

stairs it is incontravertible that the negligent manner in which plaintiff was carried down the stairs was a substantial factor in causing her fall.

Further, the fact that the seat belt ripped does not negate this causality. It is elemental that the belt would not have ripped if plaintiff had not been falling out of the chair. It was the force or weight of plaintiff falling from the chair, that caused the belt to rip. While the belt might have prevented her from falling out of the chair and down the stairs, its failure was not the initial cause of her fall.

There may be more than one proximate cause an accident. In this case, the evidence showed that there were two causes. The first, the manner in which plaintiff was carried down the stairs and the second the failure of the belt to hold Plaintiff in the chair was a second.

There is nothing in the evidence that would allow a rational jury to infer that the failure of the belt was the sole cause of the accident. A photo of the wheelchair was put into evidence which showed the belt still buckled and one side of the belt ripped from the side of the chair. There was no evidence as to the design or purpose of the belt. Also, because defendant did not serve expert witness notice they were precluded from putting in evidence as the cause of the belt's failure.

Defendant argues that the jury may well have believed that what caused her to be separated from her wheelchair was the fact that the seat belt was torn away from the chair. This is true as far as it goes. However, the fall can be said to have had two stages. This first stage was when plaintiff's center of mass shifted was it was no longer within the seat of the chair and she began to fall. The second stage was, as she was falling, the force of her falling body was to great for the seat belt and it ripped allowing her to continue to fall out of the chair and then down the flight of stairs. At this second stage the fall could have been stopped by two things. First, the seat belt could have prevented her from falling out of the chair. Second, had someone either the driver or a second attendant been in front of the chair, they could have prevented plaintiff from continuing to fall down the stairs.

Even assuming that the jury did find that the failure of the seat belt was a cause of the second stage of the fall, they could not have rationally concluded that it was the cause of the first stage of the fall.

As there was no rational basis for the jury to conclude from the evidence presented that the defendant's negligence was not a substantial factor in the fall, the verdict should be set aside.

Additionally, plaintiff should be given a new trial because of inflammatory and prejudicial remarks made by defense counsel during summation.

Although counsel are given a great deal of latitude in making closing remarks, comments that go beyond fair comment on the evidence and unduly prejudice the rights of a party, can require a new trial. *Taormina v Goodman,* 63 AD2d 1081, 406 NYS2d 350 (2nd Dept. 1980); *Bishin v New York Central Railroad Co.,* 20 AD2d 921, 249 NYS2d 778 (2nd Dept. 1964);

In his closing, defense counsel argued to the jury: "The hospital report shows that the Begum family, . . .came to the United States in 1994 which was about two years before the accident took place, and I guess here in America everyone knows if an accident happens, what do you do? You sue." Counsel also stated in his closing "There is a record that the mother doesn't work, nor of course does Suki work. In fact, for the record, nobody in the family works according to the record."

The statements went well beyond the bounds of what is permitted even during closing arguments. The fact that plaintiff is an immigrant and that her family members are not employed are in no way relevant to the issues before the jury. The statements had no other purpose or effect than to appeal to a possible prejudice against immigrants. Although the court did give a curative instruction following the summations, such instructions are often of limited effectiveness in erasing the impact of such improper statements.

Given the lack of support in the record for the Jury's finding on proximate cause, it is not unlikely that the inflammatory nature of the statements had some effect on the jury. *Taormina v Goodman,* 63 AD2d 1018, 406 NYS2d 350

Plaintiff also argued that the verdict was the result of jury confusion. However, it is the well established law of the State the a jury can not impeach their own verdict except for fraud and duress. *Moisaskis v Allied Building Products Corp*. 265 AD2d 457, 697 NYS2d 100 (2nd Dept. 1999). Where there is no allegation of misconduct a party, may not seek to explore or attack the deliberative process of the jury. *Russo v Rifkin,* 113 AD2d 570, 497 NYS2d 41 (2nd Dept.1985) ; *Labov v City of New York,* 154 AD2d 348, 545 NYS2d 826 (2nd Dept. 1989).

The court examined the jurors after the verdict in the presence of both counsel. While there was some confusion among the jurors as to the concept of proximate cause there was no allegation of either fraud or duress in reaching a verdict. Thus, the court does not base its decision to vacate the jury's verdict on the allegation of juror confusion.

WHEREFORE, by reason of the foregoing Plaintiff's motion to set aside the verdict and for a new trial is granted. This constitutes the decision and order of the court.

ENTER:

HON. WAYNE P. SAITTA
J.S.C.

JSC