Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

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NOCENZO CUSUMANO and PATRICIA CUSUMANO,

Index No: 4207/01
Motion Date: 6/21/06
Motion Cal. No: 4

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

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The following papers numbered 1 to 9 read on this motion, pursuant to CPLR § 4404, for an order setting aside the jury verdict, and entering judgment in favor of defendant, or in the alternative, ordering a new trial, and setting aside the damages awarded to plaintiffs.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Exhibits.....	
.....	
Affirmation in opposition-Memorandum of Law.....	5 - 7
Reply.....	8 - 9

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

Plaintiff Nocenzo Cusamano ("plaintiff"), a firefighter with the New York City Fire Department, reported to duty at Building 405, Fort Totten, the designated training center for Certified First Responders. He sustained personal injuries arising from a slip and fall on debris which caused him to fall down a flight of stairs on defendant's premises. During the liability phase of the trial, the case was submitted to the jury, over defendant's objections, for a determination as to whether defendant was negligent in violating sections 27-127 and 27-375(f) of the New York City Administrative Code, the building maintenance and handrail provisions, respectively, of which, the jury found defendant was negligent in violating both sections. It is upon the foregoing that defendant moves pursuant to CPLR § 4404, for an order setting aside the jury verdict, and entering judgment in favor of defendant, or in the alternative, ordering a new

trial, and setting aside the damages awarded to plaintiffs.

The power to set aside a jury verdict and order a new trial is an inherent power [Nicastro v. Park, 113 A.D.2d 129 (2nd Dept.1985)], which is codified in section 4404(a) of the CPLR, which provides, in pertinent part: "After a trial of a cause of action... upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and... may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence." "'[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised 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' [Nicastro v. Park, 113 A.D.2d 129,133, 495 N.Y.S.2d 184(2nd Dept.1985). A verdict should not be set aside unless 'the jury could not have reached the verdict on any fair interpretation of the evidence' (citation omitted)." Gallagher v. Sosa, 293 A.D.2d 710 (2nd Dept. 2002); see, also, Ruscito v. Early, 253 A.D.2d 461 (2nd Dept. 1998).

"In reviewing the record to ascertain whether the verdict was a fair reflection of the evidence, great deference is accorded to the fact-finding function of the jury, as it is in the foremost position to assess witness credibility." Teneriello v. Travelers Companies , 264 A.D.2d 772, 772-3 (2nd Dept. 1999); see, Evers v. Carroll, 17 A.D.3d 629 (2nd Dept. 2005). "Indeed, the court must cautiously balance the great deference to be accorded to the jury's conclusion... against the court's own obligation to assure that the verdict is fair (citations omitted), and the court may not employ its discretion simply because it disagrees with a verdict, as this would unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty (citations omitted)." McDermott v. Coffee Beanery, Ltd., 9 A.D.3d 195, 206 (1st Dept. 2004). Nonetheless, the power of a trial court to exercise its discretion in setting aside a jury verdict, however, is a broad one, that is intended to ensure that justice is done. See, Aunchman v. Palen, 186 A.D.2d 104 (2nd Dept.1992).

Here, defendant alleges that the verdict should be set aside because the stairs upon which plaintiff fell, are inapplicable to section 27-375(f), the provision mandating the requirements for handrails on interior staircases. As such, defendant contends that the subject stairs which are located between the first floor and the basement, and do not provide an exit to the exterior of the building as defined by section 27-232 of the code, are access stairs, and therefore, not covered under the relevant statute. Defendant further contends that as there is no violation of section 27-375(f), there is no evidentiary basis to find a lack of compliance with section 27-127, which generally provides that buildings shall be maintained in a safe condition. Additionally, defendant asserts that "no evidence was offered to show when Building 405 was built, what use was made of it before it became property of defendant, or whether any changes made to the building, [as a result of its recent renovations at that time], were sufficient to require compliance with newer provisions of the building Code."

In opposition, plaintiffs contend that defendant never pled or "raised the affirmative defense of failure to comply with General Municipal Law § 205(a), or alternatively, that section 27-375 does not apply to the subject staircase." Plaintiffs further contend that as defendants failed to assert this as a defense, move for summary judgment, or make a motion in limine,

defendant has waived this argument. Plaintiffs' state that allowance of this argument at this late juncture, which was never asserted prior to the close of plaintiffs' case, would be very prejudicial to plaintiffs. Lastly, plaintiffs contend that regardless of defendant's failure to assert this affirmative defense and carry its burden of establishing that the section is inapplicable, plaintiffs introduced ample evidence, through, inter alia, the unchallenged testimony of Michael Just, a licensed architect specializing in renovation of existing structure in New York, who testified to the applicability and violation of the instant section. This Court agrees.

CPLR § 3018, provides, in pertinent part, that affirmative defenses shall be pled as to "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading..." Here, contrary to defendant's position, the argument asserted for the first time after the close of plaintiffs' case should have been asserted in its answer, and therefore is waived. See, Morgan v. Morgan, 21 A.D.3d 1068 (2nd Dept. 2005). Arguendo, even if this defense was not waived, as this Court finds that it has been, despite defendant's contention that section 27-375 is inapplicable, defendant failed to present any contradictory evidence to support the contention of inapplicability which would refute the evidence introduced by plaintiff which was conclusive in establishing that the subject stairs fell within the meaning of Administrative Code of the City of New York. Grayson v. Hall, ___ A.D.3d ___, 817 N.Y.S.2d 904 (2nd Dept.2006); see, Asaro v. Montalvo, 26 A.D.3d 306. (2nd Dept.2006). Moreover, notwithstanding defendant's contentions to the contrary, it cannot be said that the jury's verdict was not based upon a fair interpretation of the evidence submitted at trial. "The jury properly assessed the witnesses, the accuracy of their testimony, and the discrepancies therein [see, Teneriello v. Travelers Cos., 264 A.D.2d 772, 695 N.Y.S.2d 372(2nd Dept.1999)]." Gallagher v. Sosa, 293 A.D.2d 710, 710 (2nd Dept. 2002); see, also, Monteleone v. Sicurelli, 292 A.D.2d 430 (2nd Dept. 2002).

Additionally, although the elements of a claim predicated on General Municipal Law § 205-a are a violation by a defendant of a relevant statute, ordinance, or regulation, and the reasonable connection between the violation and plaintiff's injury, irrespective of the applicability of section 27-375, General Municipal Law § 205-a gives additional rights of action to firefighters. It provides the following:

> This section shall be deemed to provide a right of action regardless of whether the injury or death is caused by the violation of a provision which codifies a common-law duty and regardless of whether the injury or death is caused by the violation of a provision prohibiting activities or conditions which increase the dangers already inherent in the work of any officer, member, agent or employee of any fire department.

Consequently, contrary to defendant's contentions, sections 27-375 and 27-127 of the Administrative Code provide sufficient predicates for liability for separate claims under General Municipal Law § 205-a. See, Brennan v. New York City Housing Authority, 302 A.D.2d 483 (2nd Dept. 2003). Accordingly, it is this Court's finding that the verdict was not against the weight of the evidence, and therefore, the branch of the motion to set aside the verdict and enter

judgment in defendant's favor, as well as the branch sought in the alternative, to set aside the verdict and order a new trial, are denied.

Moreover, that branch of defendant's motion seeking to set aside and reduce the amount of damages as excessive, is likewise denied. It is well settled that the amount of damages in a personal injury action is principally a question of fact to be resolved by the jury. See, Stylianou v. Calabrese, 297 A.D.2d 798 (2nd Dept.2002); Douglass v. St. Joseph's Hosp., 246 A.D.2d 695 (3rd Dept.1998). Nevertheless, an award may be set aside where the record indicates that an award deviates so materially from what would be reasonable compensation, that the verdict could not have been reached on any fair interpretation of the evidence. See, Stylianou v. Calabrese, 297 A.D.2d 798 (2nd Dept.2002); Britvan v. Plaza At Latham LLC, 266 A.D.2d 799 (3rd Dept. 1999). Consequently, unless the evidence militates against upholding the amount of damages awarded, "considerable deference should be accorded to the interpretation of the evidence by the jury." Duncan v. Hillebrandt, 239 A.D.2d 811, 814 (3rd Dept.1997)."

Here, based upon the nature and extent of the injuries sustained by plaintiff, which include severe fractures, dislocations and ligament damage to the left hand resulting in permanent limitations and restrictions in use, several surgical repairs to the hand, right meniscus tear in the knee, and right shoulder, it is evident that neither the award for past, nor future pain and suffering totaling $1,700, 000.00, materially deviate from what would be considered reasonable compensation. See, Crockett v. Long Beach Medical Center,15 A.D.3d 606 (2nd Dept.2005); Day v. Hospital for Joint Diseases Orthopaedic Institute, 11 A.D.3d 505 (2nd Dept. 2004). Accordingly, as the award was not against the weight of the evidence, that branch of the motion to set aside the verdict as excessive is also denied.

Dated: August 21, 2006 _____

J.S.C.