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SHORT FORM ORDER

INDEX No. 15166-81

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/19/05
ADJ. DATES 12/2/05
Mot. Seq. # 013 - MD

THOMAS E. O'BRIEN, EVELYN E. O'CONNELL: THE CHASE MANHATTAN BANK, as successor trustee of the Trust for the benefit of. C.H. COSTER: GERARD, under Trust Deed dated Dec. 28, 1935 of SUMNER GERARD, et al, Plaintiffs, -against- TOWN OF HUNTINGTON and THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Defendants.	EDWARD J. LEDOGAR, ESQ. Attys. For Plaintiffs 630 Montauk Hwy. - POB 275 West Islip, NY 11795 ESSEKS, HEFTER & ANGEL, ESQS. Attys. For Plaintiffs - Gerard 108 E. Main St. - POB 279 Riverhead, NY 11901 BERKMAN, HENOCH, PETERSON ETAL Attys. For Defendants 100 Garden City Plaza Garden City, NY 11530

Upon the following papers numbered 1 to 23 read on this motion to set aside and vacate jury verdict; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 4-5; 6-7; Replying Affidavits and supporting papers 8-9; Other 10-11 (memorandum); 12-13 (memorandum); 14-15 (memorandum); 16-17 (memorandum); 18-19 (memorandum); 20-21 (memorandum); 22-23 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an Order pursuant to CPLR 4404 dismissing the plaintiff's complaint, vacating and setting aside the jury verdict rendered on May 24, 2005 and directing a verdict in favor of the defendants, declaring their title to the subject properties, is denied; and it is further

ORDERED that movant shall serve a copy of this order upon plaintiffs' counsel with Notice of Entry pursuant to CPLR 2103(b)(2) or (3) within twenty-five (25) days of the date herein and thereafter file the affidavit of service with the Clerk of the Court.

This is an action brought by the plaintiffs pursuant to Article 15 of the Real Property and Proceedings Law (RPAPL) to acquire title to nine parcels of unimproved real property located in the Town of Huntington, in an area known as "Pine Hill." The Court presided over a jury trial which spanned over a period of approximately six weeks and included 23 days of testimony. The jury returned a verdict in favor of the plaintiffs on eight of the nine parcels of land but were unable to reach a verdict on the ninth parcel of land.

By this post-trial motion[1] pursuant to CPLR 4404, defendants move for a judgement as a matter of law for a directed verdict dismissing the plaintiffs' case as to all nine parcels of land and for an Order vacating the jury verdict (including the jury deadlock as to parcel "1") alleging that the verdict was against the weight of the evidence. In support of their motion, defendants claim that the plaintiffs' claims are time barred under the theory of a taking by the defendants and thus, the Court lacks jurisdiction; that the Court, in refusing to take notice of the defendants' dedication of the subject property as park land, erred in charging the jury because it did not apply the facts to the law; and that the Court improperly terminated the re-cross examination of a plaintiffs' witness.

Plaintiffs oppose the motion on the basis that the jury verdict was based upon a fair interpretation of the evidence including the conflicting testimony of the experts presented on behalf of the plaintiffs and defendants.

The relief requested is warranted under CPLR 4404 only when, as a matter of law, the court finds that no reasonable jury could have found as against the plaintiff (*see* ***Adamy v Zinkus***, 92 NY2d 396, 681 NYS2d 463 [1998]). With regard to the testimony offered by plaintiffs' witnesses, the Court is reminded of the principle noted by the Court of Appeals in ***Cohens v Hess***, 92 AD2d 511, 683 NYS2d 161 (1998):

> We begin our analysis with the general guiding principle of evidence, that '[a]ll facts having rational probative value are admissible unless some specific rule forbids' (1 Wigmore, Evidence § 10, at 667 [Tillers rev 1983]).

Pursuant to CPLR 4404(a), a "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 . . . . " However, a jury verdict should not be set aside as against the weight of the evidence unless the evidence so preponderates in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence (*see* ***Goldman v City of New York,*** 8 AD3d 528, 778 NYS2d 719 [2d Dept 2004]; ***Ramirez v Sears, Roebuck & Co.,*** 236 AD2d 530, 653 NYS2d 944 [2d Dept 1997]; ***Grassi v Ulrich,*** 87 NY2d 954, 641 NYS2d 588 [1996]; ***Lolick v Big V Supermarkets, Inc.,*** 86 NY2d 744, 631 NYS2d 122 [1995]; ***Cohen v Hallmark Cards, Inc.***, 45 NY2d 493, 410 NYS2d 282 [1978]).

The evidence presented by plaintiffs' experts, including the conflicting and divergent views of defendants' experts, raised issues of fact which were peculiarly within the province of the jury to resolve (*see* ***Stoves v City of New York,*** 293 AD2d 666, 741 NYS2d 269 [2d Dept 2002]; ***Bobek v Crystal,*** 291 AD2d 591, 739 NYS2d 396 [2d Dept 2002]; ***Norfleet v New York City Tr. Auth.,*** 124 AD2d 715, 508 NYS2d 468 [2d Dept 1986]). It is a fundamental foundation of law that issues of credibility must be resolved by the trier of fact, here the jury, as the jury is in the best position to observe the witnesses, evaluate the testimony and accept one expert's opinion over the other (*see* ***McDermott v Coffee Beanery, Ltd.,*** 9 AD3d 195, 777 NYS2d 103 [1st Dept 2004]; ***Buckenberger v Clark Constr.,*** 208 AD2d 790, 618 NYS2d 392 [2d Dept 1994]; ***Norfleet v New York City Tr. Auth.,*** 124 AD 2d 715, *supra*). The jury's resolution of credibility issues is entitled to great deference (*see* ***Bertelle v New York City Tr. Auth.***, 19 AD3d 343, 796 NYS2d 415 [2d Dept 2005]; ***Robinson v City of New York***, 300 AD2d 384, 385, 751 NYS2d 533 [2d Dept 2002]; ***Baldwin v City of New York,*** 290 AD2d 465, 736 NYS2d 248 [2d Dept 2002]; ***Anderson v Grimes,*** 270 AD2d 371, 705 NYS2d 248 [2d Dept 2000]).

Moreover, a successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence (*see* ***Bertelle v New York City Tr. Auth.,*** 19 AD3d 343, *supra*; ***Louis Puccio Devs., Inc. v Dean,*** 18 AD3d 826, 796 NYS2d 630 [2d Dept 2005]; ***Miglino v Supermarkets Gen. Corp***., 243 AD2d 451,

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[1] The Court notes for the record that the moving defendants did not submit a complete record of the trial transcript with the motion papers (*see* ***Matison v County of Nassau***, 290 AD2d 494, 736 NYS2d 115 [2d Dept 2002]).

451, 662 NYS2d 818 [2d Dept 1997]). The fact-finding function of the jury is accorded great deference (*see* ***O'Brien v Barretta***, 1 AD3d 330, 766 NYS2d 871 [2d Dept 2003]) since the jury had the opportunity to observe and hear the experts (*see* ***Bobek v Crystal,*** 291 AD2d 591, *supra*). A jury verdict should not be set aside and a new trial ordered "unless the jury could not have reached the verdict on any fair interpretation of the evidence" (***LePatner v VJM Home Renovations, Inc.***, 295 AD2d 322, 323, 744 NYS2d 337 [2d Dept 2002]; *quoting* ***Nicastro v Park,*** 113 AD2d 129, 495 NYS2d 184 [2d Dept 1984]; *see also* ***Castano v Aguera,*** 23 AD3d 327, 803 NYS2d 439 [2d Dept 2005]). Finally, the Supreme Court's disposition of a motion to set aside the verdict as against the weight of the evidence is entitled to great respect (*see* ***Harris v Marlow***, 18 AD3d 608, 795 NYS2d 608 [2d Dept 2005]; ***Nicastro v Park***, 113 AD2d 129, *supra*). Defendants' moving papers fail to establish that the jury verdict was not based upon a fair interpretation of the evidence (*see* ***Castano v Aguera,*** 23 AD3d 327, *supra*; ***Rivera v 4064 Realty Co.,*** 17 AD3d 201, 794 NYS2d 18 [1st Dept 2005]; ***Asaro v Micoli,*** 292 AD2d 552, 739 NYS2d 591 [2d Dept 2002]; ***Martin v McLaughlin,*** 162 AD2d 181, 557 NYS2d 1 [1st Dept 1990]).

Defendants also assert an interest of justice argument based upon their contention of perceived errors in various evidentiary rulings made by the Court during the trial (*see* ***Stevens v Atwal,*** ____ AD3d ____, ____ NYS2d ____ [4th Dept 2006]; ***Raphael v Booth Mem. Hosp.,*** 46 AD2d 894, 316 NYS2d 704 [2d Dept 1974]). Each aspect relates to the scope of the permissible inquiry during the examination or cross examination of expert witnesses. In support of their motion, defendants object to virtually every significant evidentiary ruling made during the course of this long trial that was adverse to the defendants. The Court finds that the defendants' arguments as to its evidentiary rulings made during the trial to be without merit and unavailing and said rulings were made during the trial under the facts and circumstances presented therein (*see* ***Matter of State Farm Mut. Ins. Co. v Joseph,***198 AD2d 226, 604 NYS2d 791 [2d Dept 1993]; *see e.g.* ***Liuni v Haubert,*** 289 AD2d 729, 734 NYS2d 317 [3d Dept 2001]).

Additionally, it is apparent that the jury determined that the defendants failed to prove their claim that they had title to the property in question before it was purportedly dedicated as park land. The absence of title renders the dedication a void act.

Defendants' remaining contentions in seeking a new trial are also without merit. Defendants contend that the Court's charge and instructions to the jury were in error and that the jury instructions were incomplete and misleading. The Court rejects the defendants' contentions in this regard and finds the assertion to be without merit. In its charge to the jury, the Court very carefully explained the facts and the law wherein both the plaintiffs and defendants had to sustain their respective burdens of proof as to their claims regarding the subject property under Article 15 of the RPAPL. Additionally, the Court read each question in the jury verdict sheet to the jury and explained the procedure as to how to answer and how to proceed from each question after their answer. The questions in the jury verdict sheet were clear, straight-forward and self-explanatory. "No objections or exceptions were made to the court's instructions to the jury and a series of questions for the jury were submitted" (***Harris v Armstrong,*** 97 AD2d 947, 468 NYS2d 740 [4th Dept 1983]). Furthermore, after its verdict, the jury was polled individually on the record and not one juror expressed any confusion.

It is a well established principle of law that in deciding a motion to set aside a verdict as a matter of law, a Court must guard against overstepping the fact finding function of a jury by usurping the jury's duty. A successful litigant, in the absence of indications of substantial injustice, is entitled to a favorable verdict given by a jury (*see* ***Salazar v Fisher,*** 147 AD2d 470, 537 NYS2d 306 [2d Dept 1989]). Here, the Court has not found anything that would arouse its suspicions regarding the verdict. Nor was it irreconcilably inconsistent in this Court's view. As required, this Court accords due reference to the jury's evaluation of the conflicting expert's testimony, as presented at trial, and the Court should not substitute its judgment in place of the jury's (*see* ***Wilson v Mary Imogene Bassett Hosp.,*** 307 AD2d 748, 762 NYS2d 556 [4th Dept 2003]). The jury evidently credited the testimony of the plaintiffs' witnesses presented on their behalf regarding the history, the circumstances of the land purchases and their subsequent ownership of the parcels of land and found ample evidence upon which to make its determination. Plaintiffs, as prevailing parties, are entitled to every favorable inference which can reasonably be drawn from the facts adduced during the

course of this extended trial (*see* ***Poulakis v Town of Orangetown***, ____ AD3d ____, 814 NYS2d 539 [2d Dept 2006]; ***Cucuzza v New York City Tr. Auth.,*** 251 AD2d 445, 673 NYS2d 331 [2d Dept 1998]). The factual determinations by the jury rests on a fair interpretation of the evidence adduced and cannot be said to be contrary to its weight (*see* ***Dombrowski v Moore,*** 299 AD2d 949, 752 AD2d 183 [4th Dept 2002]; ***Lamneck v County of Nassau,*** 257 AD2d 648, 682 NYS2d 631 [2d Dept 1998]). This Court will not substitute its views for that of the unanimous jury (*see* ***Teneriello v Travelers Companies,*** 264 AD2d 772, 695 NYS2d 372 [2d Dept 1999]; ***O'Neill v Midlac Properties,*** 162 AD2d 441, 556 NYS2d 387 [2d Dept 1990]; ***Sellnow v O'Donnell,*** 84 AD2d 589, 444 NYS2d 484 [3d Dept 1981]; *see also* ***Ellis v Hoelzel,*** 57 AD2d 968, 394 NYS2d 91 [3d Dept 1997]).

Accordingly, the motion is denied and the jury's verdict will not be disturbed. This constitutes the Order and decision of the Court.

DATED: 6/21/06

THOMAS F. WHELAN, J.S.C.