

Faas v Heymann

2007 NY Slip Op 32653(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 0102971/2003

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marcy S. Friedman**

Justice

PART 57

Index Number : 102971/2003

FAAS, CHRISTOPHER

vs

HEYMANN, DOUGLAS M.D.

Sequence Number : 004

VACATE

INDEX NO.

102971/03

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

this motion to/for

set aside & voided

PAPERS NUMBERED

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

1

Answering Affidavits - Exhibits

2

Replying Affidavits

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied as per
decision/order dated 8-16-07.

FILED

AUG 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated:

8-16-07

[Signature]
Hon. Marcy S. Friedman

J.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 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

CHRISTOPHER FAAS,

Plaintiff,

- against -

DOUGLAS HEYMANN, M.D., et al.,

Defendants.

x

Index No.: 102971/03

DECISION/ORDER

FILED
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COUNTY CLERK'S OFFICE

In this medical malpractice action, plaintiff moves to set aside a jury verdict, rendered on December 15, 2006, on the grounds that it was against the weight of the evidence and affected by juror misconduct. The action involved the loss of a needle during a laparoscopic surgery. There was no contention that the loss of the needle constituted malpractice, and the sole deviation that was put to the jury was whether defendant Dr. Heymann “depart[ed] from good and accepted standards of surgical practice by not using an x-ray or fluoroscope to visualize plaintiff’s entire abdominal cavity while attempting to locate the needle during the surgery on October 11, 2001?” The jury answered “no” to this question, and its verdict was therefore for defendant.

It is well settled that the determination of whether a jury verdict is against the weight of the evidence involves a “discretionary power” which “must be exercised with considerable caution.” (Yalkut v City of New York, 162 AD2d 185, 188 [1st Dept 1990]; Nicastro v Park, 113 AD2d 129 [2d Dept 1985]. A verdict should not be set aside as against the weight of the evidence unless “the jury could not have reached its verdict on any fair interpretation of the

* 3]

evidence.” (Delgado v Board of Educ., 65 AD2d 547 [2nd Dept 1978, affd no opn 48 NY2d 643 [1979]; Yalkut, 162 AD2d at 188, supra.; Nicastro, 113 AD2d at 134, supra.) “The history of the fair interpretation standard indicates that it was intended to accentuate the principle that when a jury, upon being presented with sharply conflicting evidence creating a factual dispute, resolved the controversy in favor of the defendant upon a fair interpretation of the evidence, that finding should be sustained [citation omitted] in the absence of some other reason for disturbing it in the interest of justice.” (Id.) This principle, in turn, rests on the recognition that the plaintiff, not the defendant, has the burden of proof on liability and damages. (See id.)

Applying these standards to the instant case, the court concludes that the jury’s verdict was not against the weight of the evidence. Plaintiff argues that in his initial testimony and in an affidavit submitted prior to the trial, defendant Heymann acknowledged that he did not scan plaintiff’s entire abdomen (i.e., from nipples to hips), and that he restricted the fluoroscope to the areas in the lower abdomen that he thought would be accessible through the laparoscopic incisions he had made. (Tr. at 134-135, 145; Heymann Aff., ¶ 12 [Ex. B to Motion to Set Aside Verdict].) It is undisputed that defendant’s own expert, Dr. Washington, testified that it would be a departure from good and accepted practice not to look through “the entire abdominal cavity” with the fluoroscope in order to try to find the needle. (Tr. at 361.) Plaintiff further argues that it was only after this expert testified that Dr. Heymann testified that he had searched with the fluoroscope through plaintiff’s entire abdomen.

Plaintiff is correct that there was an apparent conflict in Dr. Heymann’s own testimony. However, there was credible evidence in the record from which the jury could have concluded that he did in fact search plaintiff’s entire abdomen in order to try to find the needle. Dr.

* 4]

Heymann's partner, Dr. Joseph Iraci, who aided Dr. Heymann in searching for the needle, testified credibly that the search was made of the entire abdomen. A post-operative note made by Dr. Heymann also indicated that he searched the "upper abs." While plaintiff now argues that the entire abdomen differs from the entire abdominal cavity, the record was unclear as to the difference, if any, between these structures, and as to the precise area that defendant visualized with the fluoroscope. Plaintiff had the burden of proving that defendant did not search the proper area. Given the lack of any clear showing at the trial that the "entire abdomen" differs from the "entire abdominal cavity," the jury, if it accepted the testimony of Dr. Iraci that the entire abdomen was searched, could have concluded that such search comported with good and accepted practice.¹

As to plaintiff's claim of juror misconduct, it is "[t]he long-standing rule that statements by jurors may not be used to impeach a verdict once the jury has been discharged." (People v Redd, 164 AD2d 34, 36 [1st Dept 1990].) The purpose of this rule "is to discourage post-trial harassment of jurors in order to assure the finality of verdicts and to secure the privacy and secrecy of the jury deliberations." (Lam v Cheng, 196 Misc 2d 538, 547 [App Term 2003, McCooe, J.P., dissenting] [internal citation omitted], revd 5 AD3d 290 [1st Dept 2004] for reasons stated in dissenting op of McCooe, J.P.)

Here, two jurors have submitted affidavits complaining of hostile outbursts and anger manifested by the foreman towards other jurors. A verdict is not, however, subject to

¹It is also noted that defendant's written post-operative report showed that after the drapes were removed, the fluoroscope was used to scan plaintiff's "body surface" and that the needle was not seen. Plaintiff does not dispute that this final scan covered the area which plaintiff now asserts was part of the "entire abdominal cavity," and in which the needle was ultimately visualized by a post-operative x-ray.

[* 5]

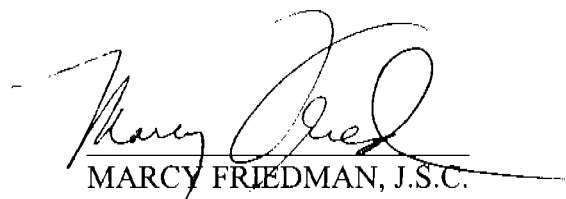
impeachment based on complaints “stemming from escalated tempers and of obscenities shouted by the foreman.” (People v Redd, 164 AD2d at 37; Lam v Cheng, 196 Misc 2d at 547.) The verdict is not subject to impeachment based on the submitted juror affidavits for the further reason that each juror, in the course of post-verdict polling, affirmed the verdict without reservation as his or her own. (see People v Redd, 164 AD2d at 37; People v Maddox, 139 AD2d 597 [2d Dept 1988], lv denied 72 NY2d 862.) In addition, after an initial episode of yelling in the jury room was brought to the court’s attention, the court gave the jury a supplemental charge on the conduct of deliberations, and the jury returned the following day and deliberated for several hours, without further incident, until it reached a verdict.

It is accordingly hereby ORDERED that plaintiff’s motion to set aside the verdict is denied; and it is further

ORDERED that defendant’s request for sanctions is denied in the discretion of the court.

This constitutes the decision and order of the court.

Dated: New York, New York
August 16, 2007


MARCY FRIEDMAN, J.S.C.

FILED
AUG 24 2007
NEW YORK
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