Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA PART 18
Justice

MARTA PUCAR

-against-

CITY OF NEW YORK, et al.

Index Number 9156 2001

Motion Date September 12, 2007

Motion Cal. Number 31

Motion Seq. No. 3

The following papers numbered 1 to 9 read on this motion by plaintiff Marta Pucar moves for an order setting aside the verdict pursuant to CPLR 4404(a) and directing that judgment be entered in her favor on the grounds that the verdict is contrary to the weight of the evidence, and in the alternative granting a new trial.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits (A-B) ...	1-4
Opposing Affirmation - Exhibit(A)	5-7
Reply Affirmation	8-9

Upon the foregoing papers this motion is decided as follows:

Plaintiff Marta Pucar sustained personal injuries on May 5, 2000, when she tripped and fell on an allegedly defective sidewalk in the vicinity of 208-11 34th Avenue, Bayside, New York. A bifurcated trial of this action was held on March 8, 9, and 12, and the jury rendered a verdict in favor of the defendant on March 12, 2007.

At trial, the evidence presented established that a Big Apple Pothole Sidewalk Protection Corporation (hereinafter Big Apple) map was received by the New York City Department of Transportation on August 5, 1999, which had a mark for a raised sidewalk in front of 208-11 34th Avenue, Bayside, New York. The Big Apple map contained markings, in the direction of 208th Street, for a raised uneven

portion of sidewalk in front of the house next door to the subject address, an even sidewalk for the address two doors down from the subject address, and two uneven sidewalks in front of the address three doors down from the subject address. In the direction of 209th Street, the Big Apple map contained a marking for an extended section of uneven sidewalk in front of 208-17 34th Avenue.

Marta Pucar testified that on May 5, 2005, a little after 12:00 P.M., she was walking from her home to the mailbox, carrying some bills and her pocketbook, and that when she reached the middle of the block, she tripped and fell on the sidewalk. She stated that her leg caught in some kind of hole and the rising portion of the cement, and that she fell. She stated that the raised portion of the sidewalk was one and one half to two inches higher than the rest of the sidewalk, and that the hole in front of the raised sidewalk was one inch deep, that it was dirty and grass was growing in it. Ms. Pucar testified that the house adjacent to the site where she fell did not have an address on it at the time, and that she later learned that it was 208-11 34th Avenue. She stated that she lived around the corner from the said address for 20 years, and had walked down said section of 34th Avenue hundreds of times over the past 20 years, and had never noticed the sidewalk condition complained of, until after she fell. She stated that if she had seen the hole, she could have walked around it, that the rest of the sidewalk did not have a hole, and that it was fine. When asked if she knew what caused her to fall she stated that "Like I say I know I trip and I went forward and I fell, that's all" (T at page 82, lines 1-2). She also stated that just before she put her foot in the hole, there was a big tree right next to her, and a house on her right. Ms. Pucar confirmed that at her deposition she had testified that just before she fell, the tree was two feet away from her. Ms. Pucar stated that after she fell, she crawled to the next fence which she used to help pull herself up, and that she then went home. She stated that no one witnessed her accident.

A photograph of the area where the accident occurred was admitted into evidence at the trial. Ms. Pucar testified that she did not take the photograph, was not present when it was taken, did not tell anyone to take it, and did not know who took the photograph. She estimated that the grassy area between the sidewalk and the street, depicted in the photograph, was maybe three feet wide, and that it appeared wider than the sidewalk, and acknowledged that at her deposition that she testified that the grassy area was about one foot wide. She also testified that the photograph depicted stone or decorative brickwork around the grassy area, and acknowledged that at her deposition she testified that there was no decorative brickwork or stone at the edge of the grassy area in front of the house where she fell.

Since the Big Apple map indicated an uneven sidewalk in the vicinity of plaintiff's fall, and as the map was received by the City of New York prior to the accident on May 5, 2000, there was no factual issue to be determined by the jury as to prior written notice. As regards the City's duty to maintain the sidewalk in a reasonably safe condition, five of the six jurors found that the City of New York was not negligent in failing to maintain a reasonably safe sidewalk condition in the vicinity of 208-11 34th Avenue, Bayside, New York.

Plaintiff now seeks to set aside the verdict, pursuant to CPLR 4404 on the grounds that the verdict was irrational and entirely against the weight of the evidence. Plaintiff asserts that the testimony presented established that the City of New York had prior notice of the defect, that she fell over a raised sidewalk approximately one and one half to two inches high and approximately one inch deep, and that a photograph of the defect was submitted to the jury. It is asserted that the defendant failed to present any evidence that the defect was trivial, and that despite defense counsel's arguments concerning the angle of the photograph, the jury had no basis to infer that additional photographs would show the defect to be reasonably safe. It is thus asserted that the jury improperly seemed to infer that because only one photograph was in evidence, it somehow hid the dimensions of the defect.

Defendant, in opposition, asserts that based upon the evidence presented at trial, the jury's verdict is supported by a valid line of reasoning and permissible inferences. Defendant asserts that the jury could have agreed with the defendant's argument that plaintiff did not fall where she claimed, based upon inconsistencies in her testimony; that the City did not act unreasonably in maintaining the sidewalk; and that the photograph submitted was sufficient for the jury to infer that the sidewalk was reasonably safe. It is also asserted that based upon the plaintiff's testimony, including the dimensions of the alleged defect, the jury was entitled to determine issues of credibility, including the condition of the sidewalk.

To set aside a verdict and grant judgment as a matter of law, a court must determine "that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]; Severino v Schuyler Meadows Club, 225 AD2d 954, 958 [1996]; Krueger v Wilde, 204 AD2d 988 989 [1994]). A jury verdict in favor of a defendant should not be set aside as against the weight of the evidence unless the evidence

preponderates so heavily in the plaintiff's favor that the verdict could not have been reached on any fair interpretation of the evidence (see Harris v Marlow, 18 AD3d 608, 610 [2005]; Torres v Esaian, 5 AD3d 670, 671 [2005]; Spencer v City of New York, 300 AD2d 468 [2002]; Asaro v Micali, 292 AD2d 552 [2002]).

Here, the jury's finding that the City was not negligent in maintaining the sidewalk in a reasonably safe condition is supported by a fair interpretation of the evidence and is not against the weight of the evidence (see Trincere v County of Suffolk, 90 NY2d 976, 977 [1997]; McDermott v Coffee Beanery, Ltd., 9 AD3d 195, 206 [2004]; Nicastro v Park, 113 AD2d 129, 133-134 [1985]). Plaintiff variously described the alleged defect as a "hole," "cracked cement" and a raised sidewalk consisting of a "hole and raised area." Plaintiff maintained that she caught her foot in the hole, which she had failed to see, and that this caused her to stumble over the raised sidewalk and fall. The photograph submitted at trial does not unequivocally show a non-trivial defect. In addition, there is no evidence that the Big Apple map showed a hole, or cracked cement, in the vicinity of where the accident occurred. In any event, based on the charge, the jury could have found that the sidewalk condition was not sufficiently dangerous to impose a duty on the City to correct it (see Trincere, 90 NY2d at 977; Laughton v City of New York, 30 AD3d 472 [2006]; Revis v City of New York, 18 AD3d 290 [2005]).

In view of the foregoing, plaintiff's motion to set aside the verdict is denied.

Dated: November 8, 2007

J.S.C.