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

PRESENT: HON. NICHOLAS FIGUEROA
Justice

PART 26

Index Number : 101155/2006
COLTON, ARTHUR
vs
TRANSIT AUTHORITY
Sequence Number : 001
TRIAL DE NOVO

INDEX NO. 101155/06
MOTION DATE 9/7/07
MOTION SEQ. NO. 001
MOTION CAL. NO.
motion to/for set aside order of CPLR 4404

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and order

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Jan 15 2008

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 46

ARTHUR COLTON,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 101185/06

DECISION
AND ORDER

Nicholas Figueroa, J.:

Plaintiff moves to set aside the verdict in favor of defendant (CPLR §4404). Plaintiff argues that the verdict was not based on a fair interpretation of the evidence and that it was the result of an erroneous jury charge.

Plaintiff alleges that he fell and was injured when the bus he was traveling in made a sudden and violent acceleration when starting to move from the curb, and then made attempts to sharply steer to the left and to the right to swing around a taxi that was stopped in front of it.

Marcos Perez, plaintiff's witness, testified that he had to hold on with both hands to avoid being thrown to the floor. Plaintiff relies on his testimony, as well as two other witnesses. Plaintiff testified that he felt as if he had been thrown from a horse. Plaintiff's wife Barbara Colton compared the movement to that of a "a bat out of hell." She noted she was thrown into an empty seat.

Plaintiff argues that the defense did not contradict this testimony and that the testimony "constituted both direct and circumstantial evidence evidence of a sudden, violent force, attributable both to acceleration and rapid changes of direction, which force caused the plaintiff, Arthur Colton,

to be knocked off his feet and hurled to the floor of the bus."

Plaintiff argues that defendant's expert witness Sebastian Paterno never examined the bus; therefore, he had no personal knowledge of whether the regulator, a device that limits sudden acceleration was functioning on the accident date. Further, plaintiff next argues that cross-examination of Paterno revealed that the bus manifested problems in its air intake, fuel and exhaust systems.

Plaintiff notes that one of defendant's employees, Donald Lacey, testified that the speed regulating device did not activate until the bus speed reached at least five miles an hour. This testimony, plaintiff argues, "negat[ed] the import of Mr. Paterno's testimony."

Plaintiff next argues that the court's charge improperly instructed the jury about Paterno's testimony. The court informed the jury that Paterno was called as an expert witness and testified about the regulator limits the speed a bus can reach from a stopped position. The court noted that there was testimony about the effects of dirty air or oil on the regulator and stated, "...what if the oil was dirty; what if the air was dirty. There is no evidence before you that this was the case at trial. There is no evidence. ..there was any effect on the regulator."

Plaintiff argues that this instruction was improper as it "directed the jury to conclude that the regulator functioned as intended", although the jury could have inferred that the device malfunctioned because of the testimony that the bus moved suddenly and violently.

Next, plaintiff argues that the court's characterization of Paterno's testimony was incorrect. The court charged that he testified because the issue was raised about the bus speed from a halted position, "and that's what the opinion actually dealt with." Plaintiff contends that this "instruction erroneously implied, by failing to balance the evidence tending to show that the bus acceleration was

sudden and violent, that the only evidence tending to establish the speed of the bus was that of Mr. Paterno."

Plaintiff next notes that the court charged that there would be "no negligence if a reasonably prudent bus driver could not have foreseen any injury as a result of his conduct or acted unreasonably in the light of what could have been foreseen."

Plaintiff then challenges a portion of the charge in which the court instructed the jury that a key determination would be whether Paterno's testimony concerning the regulator was reliable and accurate. "That is one of your chief determinations. And as a matter of fact, that is one of the many points the defense brings up in the course of the trial. That the bus could not have gone that fast."

Plaintiff next argues that the court erred by informing the jury that one of its determinations was whether the bus movement was "violent or extraordinary." He argues that the court should not have used the word "extraordinary", as it does not appear in the Pattern Jury Instruction. Continuing, plaintiff urges that the court erred in omitting the last two sentences in Pattern Jury Instruction 2:165. These two sentences refer to a stop or movement made necessary by an emergency.

Plaintiff notes that the court gave a curative charge in what he characterizes as its "...attempt to cure the multiplicity of errors...". However, he calls the curative instruction "limited". The court told the jury that "I may have mis-spoke as far as Paterno, the expert. His testimony is just another factor which you should consider with all the other witnesses that testified as to the speed of the bus when it left."

In opposing the motion, defendant argues that plaintiff's witnesses gave testimony that the jury could find useful in arriving at a defense verdict. Defendant argues that the jury was able to find that Barbara Colton exaggerated the bus speed. Defendant adds that although Ms. Colton was not

grasping a safety device another witness, Perez, testified that she was not thrown to the floor.

Perez's testimony, according to defendant, also provided a basis for a defense verdict. He testified that his prior experiences as a bus passenger were not dissimilar from his experience on the accident date: he had been on buses that suddenly jerked forward or sideway.

Plaintiff has not demonstrated that the verdict was adversely affected by the court's charge or that it was not based on a fair interpretation of the evidence (see *Lolik v. Big V. Supermarkets, Inc.*, 86 NY2d 744).

A common carrier is under a duty to exercise reasonable care (see *Bethel v. New York City Transit Authority*, 92 NY2d 348). Contrary to plaintiff's argument, there is no presumption that defendant was negligent in this case. Plaintiff's presumption argument incorrectly relies on two cases in which the doctrine of res ipsa loquitur applied (*Plumb v. Richmond Light and Railroad Company*, 233 NY 285, 288); *Renken v. Brooklyn and Queens Transit Corporation*, 280 NY 646, 648). Res ipsa loquitur does not apply in this case. Rather, the question is whether defendant was negligent by causing its bus to move in an extraordinary and violent manner (*Urquart v. New York City Transit Authority*, 85 NY2d 828, 830). Rather than a presumption of negligence, there was a question of fact for the jury to determine on the nature of the bus' movement, based on the competing evidence.

The jury was presented with evidence that the bus moved violently. Plaintiff's wife attributed the movement to the bus' extremely rapid start. However, other testimony from the defense, informed the jury that the bus could not have made a rapid start because a control device prevents this rapid acceleration. While plaintiff attempted to establish that the device may have malfunctioned, he did not provide evidence that would compel the jury to arrive at that conclusion.

Nor has plaintiff established that the driver's steering the bus around a stopped vehicle, caused an extraordinary movement, or constituted an emergency.

This court's power to set aside a verdict is limited. Its power "...must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict..." "[A] jury verdict in favor of a defendant should not be set aside unless 'the jury could not have reached its verdict on any fair interpretations of the evidence'" (*Brown v. Taylor*, 221 AD2d 208, citing *Nicastro v. Park*, 113 AD2d 129, 134). Plaintiff has not demonstrated that the jury reached its conclusion on an unfair interpretation of the evidence in resolving the conflicting proof.

Nor has plaintiff demonstrated that the court's charge resulted in an improper verdict.

The court gave a curative instruction, at the request of both parties, and informed the jury that Paterno's testimony was only one factor to consider. This instruction told the jury how to properly evaluate the evidence and prevented it from giving Paterno's testimony undue weight.

The court correctly used the word extraordinary. However, the Court of Appeals used that word interchangeably with violently in *Urquart v. New York City Transit Authority*, *id.* Therefore, this court did not err in using that word.

Plaintiff's argument that the jury instruction could absolve the defendant by finding that its driver acted unreasonably is without merit. The court informed the jury that the test in determining the existence of negligence, is how a "reasonably prudent person" would act. The slip-of-the tongue that plaintiff relies on could not have had an adverse affect on the jury, given the correct test given at the outset of this part of the charge.

The charge did not negate any attempt by plaintiff to show that the driver's steering around another vehicle caused the accident. The question before the jury was whether there was a violent jolt or lurch. The court was not required to inform the jury of all possible causes for this movement.

Nor was the court required to ask the jury to analyze the bus' movement in the presence or absence of an emergency. Moreover, the question of whether there was an emergency was not before the jury. Despite plaintiff's repetitive descriptions of the bus' movement around the taxi, he does not demonstrate any error in the court's charge.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: January 15, 2008

ENTER

J.S.C.