

**Germain v City of New York**

2008 NY Slip Op 31002(U)

March 31, 2008

Supreme Court, Queens County

Docket Number: 0017760/2004

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

-----	Index No. 17760/04
EVELINE GERMAIN,	Motion
Plaintiff,	Date January 22, 2008
-against-	
THE CITY OF NEW YORK and CAROL RADIN,	Motion
Defendants.	Cal. No. 8 and 9
-----	Motion
	Sequence No. 2 and 3

	<u>PAPERS</u> <u>NUMBERED</u>
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Upon the foregoing papers it is ordered that these motions are determined as follows:

These are two separate motions by defendant City of New York (hereinafter "City") and defendant Carol Radin (hereinafter "Radin") for an Order pursuant to CPLR 4404(a) setting aside a jury verdict rendered in favor of plaintiff Eveline Germain (hereinafter "Germain"), and directing judgment be entered in favor of defendants as a matter of law, or in the alternative, directing a new trial, upon the ground that the jury verdict is not supported by sufficient evidence, and is contrary to the weight of the evidence. These two motions are joined for purposes of disposition. Defendants' motions are granted for the reasons set forth below.

**I. PROCEDURAL HISTORY**

This court presided over a jury trial on the issue of liability on this case which was conducted from October 18, 2007 through October 22, 2007. On October 22, 2007, the jury rendered a verdict in favor of plaintiff and against defendant City

finding that the City was negligent and that its negligence was a substantial factor in causing the accident. The jury found defendant Radin negligent, but also found that her negligence was not a substantial factor in causing the accident. Notwithstanding the foregoing, the jury allocated fault between the defendants finding the City 80% at fault and defendant Radin 20% at fault.

By leave of the Court, defendants were granted an extension to file a post trial motion pursuant to CPLR 4404(a). This date was extended with the approval of the Court.

The undisputed facts in this case are as follows:

On October 15, 2003 at 7:30 A.M. plaintiff injured herself when she tripped and fell off a wooden board that extended from the sidewalk into the roadway of Archer Avenue over a water accumulation in the roadway in front of the premises known as 91-16 Sutphin Blvd., Jamaica, New York. Plaintiff did not know who put the board there. Defendant Carol Radin owned the property located at 91-16 Sutphin Blvd., Jamaica, New York and leased the premises to a grocery store. Plaintiff presented no direct evidence to show what caused the water to accumulate in the roadway of Archer Avenue adjacent to the premises of 91-16 Sutphin Blvd., Jamaica, New York. On or about November 12, 2003, plaintiff filed a notice of claim with the City. On or about August 4, 2004, plaintiff filed a summons and complaint. On or about September 3, 2004, by service of an Answer, the defendant City joined issue. On or about May 6, 2005, by service of an Answer, the defendant Radin joined issue.

## II. DISCUSSION

Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (see *Higbie Constr., Ltd. v IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]). To set aside a verdict as a matter of law, the trial court must conclude that there is "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" (see *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed 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" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v Park*, 113 AD2d 129 at 133).

Furthermore, on a motion to set aside a jury's verdict as against the weight of the evidence, the standard is whether the evidence "so preponderated in favor of the other side that the verdict could not have been reached on any fair interpretation of the evidence." (*Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]; *Voiclis v International Association of Machinist and Aerospace Workers*, 239 AD2d 339 [2d Dept 1997]). A verdict would not be against the weight of the evidence "unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion." (*Sperduti v Mezger*, 283 AD2d 1018 [4<sup>th</sup> Dept 2001]).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (*Siegel*, New York Practice § 406, at 687 [4<sup>th</sup> ed.]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendants to discover and remedy it (*see id.*).

Defendants argue that the verdict should be set aside the verdict both, as a matter of law and as against the weight of the evidence pursuant to CPLR 4404, because as a matter of law and fact there is no direct or indirect evidence in the record to support a finding that the defendants City and Radin were negligent. Defendants contend that the uncontroverted facts introduced as evidence at the trial support this argument that as a matter of law and fact the defendants had no actual or constructive notice of the unsafe condition, i.e. accumulation of

water or wooden board over the accumulation of water.

#### **A. Defendant City**

Plaintiff contends that the City failed to maintain the street in a reasonably safe condition for people who use them. Plaintiff rested her claim on two legal theories one of which required prior written notice to the City, and the other required no notice because the City caused or created the unsafe condition.

1. Plaintiff offered no evidence to prove that the City received prior written notice of an unsafe condition.

The jury was charged in pertinent part as follows:

As you have heard, the plaintiff, Eveline Germain, claims that she was injured when she tripped and fell as a result of an unsafe condition that is a wooden board extending from the sidewalk to the roadway over an accumulation of water in the roadway in front of 91-16 Sutphin Boulevard, Jamaica, New York, that plaintiff claims that the City of New York should have corrected. The law requires the City to maintain its streets and highways in reasonably safe condition for people who use them.

In order to recover for her injury, Plaintiff must first prove that on October 15, 2003, the City received written notice that there was a wooden board extending from the sidewalk to the roadway over an accumulation of water at the location where the Plaintiff claims to have fallen. The written notice can come from any person or organization, but the notice must be specific enough for the City to know that there was a wooden board extending from the sidewalk to the roadway over an accumulation of water at a particular location. The City claims that it did not receive any notice of a wooden board extending from the sidewalk to the roadway over an accumulation of water in front of 91-16 Sutphin Boulevard. (emphasis added). (PJI 2:225A).

Plaintiff concedes that she did not provide the City with written notice of the condition, because the City was not

available to receive such notice or complaint within the relatively short period of time that immediately followed a rainfall. Moreover, it is undisputed that there is no evidence in the record to prove that the City received written notice.

Accordingly, as there was no evidence to prove that the City received written notice of the unsafe condition, there is no evidence to support the jury's verdict that defendant City was negligent under this charge.

2. Plaintiff offered no evidence to prove that the City caused or created the unsafe condition by an affirmative act by the City.

The jury was also charged in pertinent part as follows:

As you have heard, the plaintiff claims that she was injured when she tripped and fell as a result of an unsafe condition, that is, an accumulation of rainwater on the roadway in front of 91-16 Sutphin Blvd., Jamaica, New York, that plaintiff claims the City should have corrected. The law requires the City to maintain its streets and highways in reasonably safe condition for people who use them.

In order to recover the plaintiff must prove that the accumulated rainwater in the street was caused by an affirmative act of defendant, City. An unsafe condition is caused by an affirmative act if it is produced by some specific action of the municipality, such as the construction or repair of the roadway or installation of a traffic sign. The failure of the City to correct an unsafe condition caused by traffic or weather conditions or erosion or by someone other than defendant, City is not an affirmative act. Plaintiff claims that the accumulation of rainwater in the street was caused by the affirmative act of defendant, City or its employees or agents when it failed to correct the condition of accumulation of rainwater in the street. City claims that the accumulation of rainwater in the street was not caused by the City.

If you find that the accumulation of rainwater in the street was not caused by an affirmative act of defendant, City and therefore the City was not negligent, you will proceed no further and report to the court. If you find that the

accumulation of rainwater in the street was caused by an affirmative act of defendant, City, you will proceed to consider whether the roadway in front of 91-16 Sutphin Blvd., Jamaica, New York, was not reasonably safe. (emphasis added.) (PJI 2:225B).

There was no evidence presented by plaintiff to show what caused the water to accumulate. The cause of the water accumulating could have been for any number of reasons including debris that blocked the drainage of the water into the sewer system, excessive rainwater in a short period of time, a broken water main, an inadequately designed sewer system that could not even withstand or accommodate even a normal rainfall. Plaintiff presented no direct or indirect evidence to support any of these theories, or any theory that would prove the cause of the water accumulation. Although plaintiff would have the jury speculate as to the cause of the water accumulation, speculation is not evidence and is insufficient to prove an affirmative act of the City.

Moreover, there was no evidence that the City sewer system caused the accumulation of water. There was no evidence as to what caused the water to accumulate. There was no evidence that a "reasonable inspection" of the sewer system would have prevented the flooding, as plaintiff claimed.

Accordingly, as there was no evidence to prove that the accumulated rainwater in the street was caused by an affirmative act of the City, there is no evidence to support the jury's verdict that defendant City was negligent under this charge.

## **B. Defendant Carol Radin**

Plaintiff contends that defendant Carol Radin failed to maintain the public sidewalk adjacent to her building in a reasonably safe condition. Plaintiff claimed that she slipped and fell while stepping from the sidewalk to the street adjacent to defendant Radin's building because of the presence of a water accumulation and a piece of wood that was placed from the sidewalk curb to the street over the water.

The jury was charged in pertinent part as follows:

Plaintiff must prove that Carol Radin was negligent in failing to correct the conditions if she was aware of them and had sufficient time and opportunity to correct them, or to provide reasonable safeguards or give an

appropriate warning; or to use reasonable care to discover the conditions and correct them, or to provide reasonable safeguards to prevent accidents, or to give a reasonable warning.

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonable prudent building owner would have used under the same circumstances. Negligence includes both a foreseeable danger of accidents and conduct which is unreasonable in proportion to the danger. In deciding whether Carol Radin was negligent, you must weigh the likelihood and seriousness of the risk of accidents against the burdens involved in maintaining the premises in a safe condition.

You will find that Carol Radin was negligent if you decide either: a) she knew about the conditions long enough before the accident to have allowed her, in the use of reasonable care, to correct them, provide reasonable safeguards or give a reasonable warning; or b) Carol Radin did not know about the dangerous conditions but, in the use of reasonable care, she should have known about them and either corrected them, provided reasonable safeguards or given a reasonable warning. If you find either that a) Carol Radin did not know about the conditions and, by the use of reasonable care, she would not have been able to discover and correct them; or b) she knew about the conditions but provided reasonable safeguards or gave a reasonable warning, then you will find that she was not negligent. (emphasis added). (PJI 2:91).

Plaintiff presented no evidence to show (1) that defendant Radin caused or contributed to the water condition or the presence of the piece of wood described by the plaintiff; (2) that Radin put the piece of wood over the water in the street; (3) that Radin had knowledge of the presence of the water condition or the piece of wood prior to the accident on October 15, 2003; (4) that even if she had knowledge of the water condition, she could have done something to correct it; (5) that even if Radin had knowledge of the piece of wood, she had a reasonable opportunity to remove the wood, or provide reasonable safeguards or give an appropriate warning.

Thus, as there is no evidence to prove that the defendant Radin knew or should have known about the wooden board, and if known had sufficient time and opportunity to correct the

condition there is no evidence in the record to support the jury's verdict that defendant Radin was negligent.

**IV. CONCLUSION**

Thus, as there was no evidence showing that defendants (i) caused or created the unsafe condition, and (ii) had actual or constructive notice of the unsafe condition, the Court finds that no jury could have reached the verdict in this case on any fair interpretation of the evidence. Therefore, the jury verdict was against the weight of the evidence. Accordingly, the motions by defendants City and Radin for judgment notwithstanding the verdicts are granted and the verdicts are set aside, the judgment vacated and judgment is granted in favor of defendants. The Clerk is directed to enter judgment dismissing the complaint.

The foregoing constitutes the decision and order of this Court.

Dated: March 31, 2008

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**Howard G. Lane, J.S.C.**