

Canick v Cranin

2008 NY Slip Op 31520(U)

May 28, 2008

Supreme Court, New York County

Docket Number: 0104248/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE

PART 10

Justice

Carnick

INDEX NO.

104248/06

- v -

MOTION DATE

Cranin

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

JUN 04 2008

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

COUNTY CLERK'S OFFICE
NEW YORK

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

Motion decided in accordance with accompanying memorandum decision and order.

Dated: 5/28/08

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 10

-----X

Alice Canick,

Plaintiff,

Decision/Order

-against-

Index#104248/06
Mot. Seq. #002

Present:
Hon. Judith J. Gische, JSC

Dr. Norman Cranin,

Defendant.

-----X

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS

Notice of Motion, JMK affirm., exhibits.....	1
MHZ affirm. in opp., exhibits.....	2
JMK reply affirm.....	3
MHZ sur reply affirm.....	4 ¹
Steno transcript/ruling dated May 1, 2008.....	5

FILED
 JUN 04 2008
 COUNTY CLERKS OFFICE
 NEW YORK

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This dental malpractice action was tried before a Jury on October 19, 22, 23 and 24, 2007. The Jury rendered a verdict in favor of defendant. Specifically it answered "No" to five express questions about whether defendant had departed from good and accepted dental practice and "Yes" to a question regarding whether plaintiff was provided with informed consent. The relevant questions and answers on the jury verdict sheet were as

¹ By order made in open court on May 1, 2008, the sur-reply was permitted except to the extent of item (e) on page 5 and the request for sanctions.

follows:

- 1a. Did the defendant, Norman Cranin, DDS, depart from good and accepted standards of dental practice in the fit of the caps for the upper arch of plaintiff, Alice Canick's mouth?

The Jury answered "No".

- 2a. Did the defendant, Norman Cranin, DDS, depart from good and accepted standards of dental practice by using tooth number one (#1) in plaintiff, Alice Canick's mouth, as an abutment for a bridge?

The Jury answered "No".

- 3a. Did the defendant, Norman Cranin, DDS, depart from good and accepted standards of dental practice by using acrylic material to create a bridge for a segment of the upper arch in plaintiff, Alice Canick's mouth?

The Jury answered "No".

- 4a. Did the defendant, Norman Cranin, DDS, depart from good and accepted standards of dental practice by failing to diagnose and/or properly treat plaintiff, Alice Cannick's tooth decay on or after June 15, 2005?

The Jury answered "No"

- 5a. Did the defendant, Norman Cranin, DDS, depart from good and accepted standards of dental practice in the fit of the caps for the lower left quadrant of plaintiff Alice Canick's mouth?

The Jury answered "No".

- 6a. Did the defendant, Norman Cranin, DDS, provide appropriate information before obtaining plaintiff Alice Canick's consent to the dental treatment?

The Jury answered "Yes".

Plaintiff now seeks to set aside the verdict as being against the weight of the evidence. Defendant opposes the motion. For the reasons that follow the motion is denied.

Plaintiff's motion is procedurally defective. She fails to set forth the full trial record for the court's evaluation. Instead, her attorney relies upon trial extracts and his own recollection of the testimony, as confirmed by his personal notes. This, in itself, renders the motion defective because the record is inadequate to enable the court to render an informed decision on the merits. Nakyeoung Seoung v. Vicuna, 38 AD3d 734 (2nd dept. 2007); McCarthy v. 390 Tower Associates, LLC, 9 Misc3d 219 (Sup. Ct. NY Co. 2005).

Plaintiff improperly relies on post trial affidavits from "experts" that include information and testimony that could have been, but were never, put before the Jury.² Likewise her attorney, who is also an orthodontist, includes his own opinions about the defendant's theories. The underpinning of a motion to set aside a verdict as being against the weight of the evidence is a consideration of the evidence that was actually before the Jury when the verdict was rendered. This additional evidence dehors the record and will not be considered by the court on this motion. In this regard, this evidence cannot be considered "new" evidence, since the information was available and could have been put before the court at the actual time of trial. See: Acosta v. Miller Transport Co., 276 AD 1005 (1st dept. 1950).

When a jury verdict is against the weight of the evidence, a party may move to set it aside. CPLR § 4404. A verdict is against the weight of the evidence, however, only if it could not have been reached on any fair interpretation of the evidence adduced at trial. McDermott v. Coffee Beanery, Ltd., 9 AD3d 195 (1st dept. 2004); Sepulveda v. Aviles, 308

²The motion contains the affidavit of Dr. Michael Seiden, one of plaintiff's former treating dentists. He was never a witness at trial. The motion also contains the affidavit of Dr. Lawrence Simon, who actually did testify at trial.

AD2d 1 (1st dept. 2003). Before setting a verdict aside, the court must determine that there is no valid line of reasoning and permissible inferences from the evidence that could support the decision reached by the jury. 1/5th LP v. HL One, LLC, 23 AD3d 170 (1st dept. 2005). The inherent discretion of the trial judge to set aside a verdict may only be made after the court has cautiously balanced the great deference to be accorded a jury's conclusion against the court's own obligation to assure the verdict is fair. The court may not employ its discretion simply because it disagrees with the verdict. McDermott v. Coffee Beanery, Ltd., *supra*. Moreover, the defendant's evidence must be accepted as true and the defendant is entitled to every favorable inference which can reasonably be drawn from the evidence. Broadie v. St. Francis Hosp., 25 AD3d 745 (2nd dept. 2006).

The gravamen of plaintiff's argument is that the expert testimony of defendant's expert, Dr. C. Benson Clark, was so far lacking in credibility and science as to be incredible as a matter of law. Plaintiff repeatedly refers to Dr. Clark's testimony as "perjury," "fabrications" and "drivel." In making this argument, plaintiff relies primarily on the testimony of her own expert witnesses. In general, where there is a conflict in expert testimony the jury is not required to accept one expert's testimony over that of the other, but is entitled to reject either expert's position in whole or part. Mejia v. JMM Audubon, Inc., 1 AD3d 261 (1st dept. 2003). The jury's resolution of conflicting expert testimony is entitled to great weight, because the jury had the opportunity to observe and hear the experts. Speciale v. Achari, 29 AD3d 674 (2nd dept. 2006).

In reviewing the motion, it is clear that plaintiff and her experts believe that there is no scientific basis for any of the conclusions reached by Dr. Clark. Thus, in considerable detail, they dispute and reject his conclusions that her dental problems were the result of

any long standing bite issues, jaw repositioning problems, TMJ and/or affected by osteoporosis. Plaintiff also disagrees with Dr. Clark's conclusion that a sinus lift was not a viable alternative treatment for her. They further reject his conclusion that Dr. Cranin, the defendant, did not deviate from good and acceptable dental practice in his treatment of plaintiff. Plaintiff further takes issue with whether Dr. Clark forthrightly explained his professional credentials to the Jury.

Plaintiff has not sustained her heavy burden of showing that as a matter of law Dr. Clark's opinions are invalid and/or incredible. She has shown that they are completely in conflict with her own experts. This, however, presents only a factual issue for resolution by the jury and is not the standard for overturning a jury verdict. Mayer v. Oswego County Ob-Gyn, PC, 287 AD2d 985 (4th dept 1994).

It is significant that defendant's expert theories with which plaintiff has a dispute were substantially all disclosed in the defendant's 3101(d) expert disclosure. Thus, plaintiff had and on many issues took the opportunity to counter Dr. Clark's conclusions with her own expert's testimony. She had the opportunity to develop a full record and convince the Jury on the viability of her own positions. For example, defendant disclosed before trial that his expert would opine that plaintiff's osteoporosis contributed to her bone loss and about the effect of her bite on her dental problems. Plaintiff had and/or took the opportunity to have her experts testify to the contrary to the Jury. On the issue of the viability of a sinus lift as an alternative procedure, both plaintiff's experts and Dr. Clark testified on this issue.

Similarly, plaintiff argues that Dr. Clark misrepresented his professional credentials to the court. She claims that he identified himself as the head of the department of

implantology at Howard University, but plaintiff asserts in this motion there is no such department. She also argues that he claims to be a diplomate of societies that are not recognized by the American Dental or the New York Dental Associations and further argues that such representations violate professional rules of Ethics. The Associations, however, were fully disclosed on defendant's 3101(d) disclosure. Anything at odds with the disclosure could have been objected to at trial and/or plaintiff could have cross-examined Dr. Clark on these issues. They do not warrant setting aside a verdict. Additionally her motion has no proof (either in the trial record or her own motion) of her present assertions about the organization of the dental school at Howard University or that the societies are not recognized by dental associations or the specific ethical rules that plaintiff claims were violated by Dr. Clark .

The fact that Dr. Clark's professional opinion differed from that of the defendant himself is likewise not a basis to set aside a verdict. A party is free to set forth alternative theories for consideration by the finder of fact See: Jeremy's Ale House Also, Inc. v. Joselyn Luchinick Irrevocable Trust, 22 AD3d 6 (1st dept. 2005).

Finally, even to the extent plaintiff argues that Dr. Clark's testimony does not contradict plaintiff's own expert's testimony about any deviation, the argument is unavailing. The jury is free to reject the plaintiff's experts' testimony even if not otherwise contradicted in the record. Mechanick v. Conradi, 139 AD2d 857 (3rd dept. 1988).

Overall plaintiff's arguments really reflect differing opinions by the experts. The court is not in position on this record to conclude that the Jury, in either choosing to disbelieve plaintiff's experts or in choosing to believe defendants' expert, made a mistake warranting the setting aside of the verdict.

Plaintiff further argues that Dr. Clark's testimony would not survive a Frye type analysis and urges the court to make such a determination post trial. This argument is misplaced and rejected. Frye hearings are limited pre-trial hearings in which the court is called upon to determine whether the expert's deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable. Marsh v. Smith, 12 AD3d 307 (1st dept. 2004). First it is too late to challenge Dr. Clark's based upon Frye. Moreover even if there had been a timely challenge, no Frye hearing would have been warranted. Plaintiff is not contesting the acceptance of some novel and/or new scientific theory. Her challenge is really to the overall credibility of the defendant's expert. Credibility of experts, however, is an issue that is reserved for the Jury to decide. Page v. Marusich, ___AD3d ___, 2008 WL 1969757 (3rd dept. 2008).

The court has reviewed plaintiff's objections to the Jury verdict in detail and finds that they do not rise to the level of warranting the setting aside of the Jury verdict in this case.

CONCLUSION

in accordance herewith it is hereby:

ORDERED that plaintiff's motion to set aside the verdict as being against the weight of the evidence is denied, and it is further

ORDERED that any requested relief not expressly granted herein is denied and this shall constitute the decision and order of the court.

Dated: New York, New York
May 28, 2008

FILED

JUN 04 2008

COUNTY CLERK'S OFFICE
NEW YORK

SO ORDERED:

J.G. J.S.G.