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

PRESENT: WALTER B. TOLUB Justice

PART 15

Index Number : 113140/2004
ANDERSEN, KELVIN D.
vs
YOUNG AND RUBICAM
Sequence Number : 002
TRIAL DE NOVO

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/25/08

J.S.C.
WALTER B. TOLUB

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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KELVIN ANDERSEN

Plaintiff,

-against-

YOUNG and RUBICAM

Defendant.

Index No. 113140/04
Mtn Seq.002

WALTER B. TOLUB, J.:

This is Plaintiff's post-trial motion for a new trial or for a judgment notwithstanding the verdict for the Defendant.

Facts

Plaintiff, a 58 year old former employee of Defendant, a global group of companies that provides marketing and advertising services. Wunderman is a direct marketing division of Defendant.

In July 1998, when Plaintiff was 50 years old, he was hired by Wunderman as a Creative Supervisor. In October of 2000, Plaintiff was promoted to a senior level position as an Associate Creative Director (ACD).

In April or May of 2002, Plaintiff received a written evaluation of his job performance as an ACD. Plaintiff received an overall rating of "meets expectations," but received a rating of "below expectations" in two categories, (1) "works quickly and handles multiple assignments, and (2) thinks about client needs beyond the current assignment." Examples put forth by the

Defendant for Plaintiff's "below expectations" rating included being approved for 10 hours on a certain project and billing 93 hours for it, being approved for 35 hours on a project and billing 93 hours for it and being approved 25 hours on a project and billing 50 hours for it.

At some point, Defendant received complaints from clients who specified that they did not want so many ACDs working on their projects because of the higher billing rate. Defendant came to the conclusion that it had more senior level employees than client billing supported and that one senior-level position would have to be eliminated. After an evaluation of senior level employees, Defendant decided that Plaintiff would be terminated.

In or about October 1, 2003, Plaintiff was called into his supervisor's office and was terminated from his position. Subsequently, Defendant hired two individuals substantially younger than the Plaintiff.

Plaintiff commenced the underlying action arguing that he was terminated from his position because of his age in violation for the New York Executive Law §§ 296 et. seq., and the New York City Administrative Code §8-101.

The trial of this matter commenced on March 17, 2008 and continued through March 26, 2008. At trial, Defendant argued that Plaintiff was an at-will employee and was terminated for legitimate business reasons, not because of his age. After a

five day trial, the jury returned a verdict in Defendant's favor, finding that Plaintiff failed to meet his burden of proving that age was a determinative factor in Defendant's decision to discharge him.

Plaintiff now brings this post-trial motion for a new trial or for a judgment notwithstanding the verdict arguing that the jury verdict was contrary to the weight of the evidence, that Defendant engaged in unfair surprise and that Defendant presented defenses that were not alleged as affirmative defenses in its Answer.

Discussion

CPLR §4404 provides that after a verdict is rendered, the court may (1) grant judgment to whichever party is entitled to it as a matter of law (JNOV) or (2) order a new trial on the ground that the verdict is contrary to the weight of the evidence. CPLR §4404(a) provides that:

> Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that a judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of judice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

(CPLR §4404(a)).

JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

First, it must be noted that by failing to move for a directed verdict on the question of whether Plaintiff was terminated because of his age, Plaintiff conceded that the question was one for the jury (Miller v. Miller, 68 NY2d 871 [1986]).

Once the jury returns a verdict, JNOV is only proper when the Judge believes that on "this" record, reasonable minds could not differ and there is therefore only one way the jury could or should be able to decide (Siegel, New York Practice, §405 (4th ed.) [2005]). Since the Plaintiff has the burden of proof, it has been held that a verdict for the Defendant can be set aside only when the evidence preponderates greatly in the plaintiff's favor. In other words, the scale must tip sharply in order for the judge to set aside a defendant's verdict (Siegel, New York Practice, §406 (4th ed.) [2005]; Cohen v. Hallmark Cards, 45 NY2d 493 [1978]).

Motion For a New Trial on the Weight of the Evidence

When the court sets aside a verdict on a post-trial motion under CPLR §4404[a], it may grant a new trial instead of awarding outright judgment to the other side (Siegel, New York Practice, §406 (4th ed.) [2005]). Granting a new trial is the route the court takes when, while not confident that any party is entitled to judgment as a matter of law, it nonetheless finds the verdict

contrary to the "weight of the evidence" (id.).

Although the question of whether a verdict is against the weight of the evidence involves a discretionary balancing of many factors, for a court to conclude that the verdict is against the weight of the evidence, there must be no valid line of reasoning 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 [1978]; Mann v. Hunt, 283 AD 140 [3rd Dept 1953]). In any case where it can be said that the evidence is such that it would *not* be utterly irrational for a jury to reach a certain verdict, the court may not grant a new trial (Mirand v. City of New York, 84 NY2d 44 [1994] (*emphasis added*); Larkin v. MVAIC, 23 AD2d 488 [1st Dept 1965]).

Issues of fact are to be resolved by the jury. If the facts give rise to conflicting inferences, it is for the jury to decide which inferences it will adopt (Rosen v. MVAIC, 22 AD2d 210 [3rd Dept 1965]). If there is an issue of credibility, it is for the jury to determine which witness is telling the truth (Sherman v. Smith, 23 AD2d 642 [1st Dept 1965]). If reasonable minds may differ, it is for the jury to determine who prevails (McDonald v. Metropolitan St., 167 NY 22 [1901]).

In short, a new trial cannot be granted if the jury could have reached its conclusion on any fair interpretation of the evidence (Goldstein v. Snyder, 3 AD3d 332 [1st Dept 2004]).

The Instant Application

In the underlying trial, there was conflicting testimony presented as to why the Plaintiff was terminated from his position. The jury was properly called upon to assess the credibility of the witnesses and properly considered the issues and facts in reaching its verdict.

Plaintiff has failed to establish that the verdict was against the weight of the evidence such that he may be entitled to a new trial. Plaintiff is unable to show that there was any prejudice such that a new trial could be warranted.

Plaintiff's argument that he was surprised by the evidence at trial is disingenuous. The same issues Plaintiff raises now were the issues which were the focus of pre-trial discovery presented by the Defendant at the summary judgment stage of this action.

Moreover, the Court properly instructed the jury pursuant to PJI 9:1 and adequately explained the parties' respective burdens of proof. On March 7, 2008, the parties submitted proposed jury instructions to the Court. Thereafter each party submitted objections to the other party's proposed jury charges. On March 25, 2008, the Court reviewed the charges on the record and ruled on the objections for both parties.

Plaintiff's remaining arguments are not supported by the record and cannot overcome the jury's factual determinations.

The jury's determination that the Defendant did not discriminate against the Plaintiff on the basis of age is entitled to great deference and should not be disturbed.

Accordingly, it is

ORDERED that Plaintiff's motion for JNOV or for a new trial is denied in its entirety.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/25/08

HON. WALTER B. TOLUB, J.S.C.