

Greene v Neto

2008 NY Slip Op 32700(U)

October 3, 2008

Supreme Court, Kings County

Docket Number: 691/2003

Judge: James G. Starkey

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL TERM, PART 6
HON. JAMES G. STARKEY

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THOMAS GREENE,

Plaintiff,

DECISION AND ORDER

-against-

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MARIE NETO, SUSAN RUSSO, GEORGIANA
RAFANIELLO ,

Defendant.

Dated: October 3, 2008.

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APPEARANCES OF COUNSEL

For the Plaintiff(s):

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For the Defendant(s): Marie Neto

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For Former Defendant(s): New York City Board Of Education,
P.O. Marilyn Trapanotto, P.O. Mary Faulkner, Sgt. Carey,
The City of New York and The New York City Police Department

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Caption: Greene v. Neto, Russo & Rafaniello

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Plaintiff, Thomas Greene (hereinafter “Greene”), by motion dated April 29, 2008, seeks judgment notwithstanding the verdict and as a matter of law against defendant Marie Neto (hereinafter “Neto”), and a new trial against the other defendants and former defendants, all pursuant to CPLR § 4404(a).

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

On January 4, 2002, plaintiff Greene, then an assistant vice principal of Fort Hamilton High School, sought entry into the office of defendants Neto, Susan Russo (hereinafter “Russo”), and Georgiana Rafaniello (hereinafter “Rafaniello”), then members of the Fort Hamilton High School Athletic Department. The office was located on the pool deck inside the natatorium of Fort Hamilton High School, Brooklyn, New York. At the time plaintiff sought access, he was acting in his capacity as a director of the Harbor Seals, a community sponsored youth swimming organization permitted periodic access and use of the Fort Hamilton High School pool at pre-scheduled times. On that day, the Harbor Seals were scheduled to meet at 5:30PM, after conclusion of the high school team’s scheduled meet. At approximately 5:00PM, plaintiff attempted to enter defendants’ office to obtain a first aid kit for use by the Harbor Seals. Defendants were locking the office and preparing to leave for the day. A shoving match ensued between plaintiff and defendants Neto, Russo and Rafaniello. The shoving match culminated when defendant Neto punched plaintiff in the nose.

The police were called and, after a short investigation defendant Neto was placed in custody on the complaint of plaintiff Greene. Defendant Neto was then transported to the sixty-eighth precinct by police officers Marilyn Trapanotto and Mary Faulkner. Plaintiff was

transported by ambulance to Lutheran Medical Center for treatment. While defendant Neto's arrest was being processed at the precinct, she advised the officers that she had been injured in the altercation and desired medical treatment. Defendants Rafaniello and Russo also appeared at the precinct as did an assistant principal named Peter Devlin. Each expressed the desire to file charges against plaintiff in connection with the altercation. Defendant Russo stated that she had been injured and her bruises were documented. Mr. Devlin advised the officers that plaintiff had been previously warned both in writing and verbally by Principal JoAnn Chester not to enter the teachers' office located in the natatorium for any reason and that plaintiff was not authorized to be on the pool deck before 5:30PM.

Thereafter, plaintiff was contacted at the hospital in person by Police Officer Trapanotto and told to report to the precinct upon his discharge from the emergency room. When plaintiff arrived later that evening, he was also taken into custody.

Several days later, plaintiff appeared at the precinct with a lawyer and sought to press charges against defendants Russo and Rafaniello. Approximately two weeks after the incident, those defendants were also arrested. All charges against plaintiff and defendants Russo and Rafaniello were eventually dismissed. Defendant Neto was convicted, after a bench trial, of attempted assault in the third degree and menacing in third degree, both class B misdemeanors, and harassment in the second degree, a violation. Thereafter, plaintiff commenced this suit for assault and battery against defendants Neto, Russo and Rafaniello, as well as false imprisonment and malicious prosecution against former defendants Peter Devlin, Police Officers Marilyn Trapanotto and Mary Faulkner, a sergeant whose last name is Carey, the City of New York, the New York City Police Department and the New York City Board of Education.

The parties appeared in Part 6 for trial on February 7, 2008, and on February 19, 2008, the jury returned a verdict in favor of defendants Neto, Russo and Rafaniello concerning plaintiff's claims for battery. The jury also awarded defendants Neto and Russo the sum of \$10,000.00 each on their respective counterclaims of battery against plaintiff.

LAW AND APPLICATION

Plaintiff's motion to set aside the verdict pursuant to CPLR § 4404(a) and grant judgment as a matter of law in favor of plaintiff as against defendant Marie Neto

Plaintiff urges entitlement to judgment as a matter of law against defendant Neto in light of her criminal convictions, based upon the same incident, in which defendant Neto raised justification defenses, i.e.: defense of self and/or defense of others. The contention is without merit. Defendant Neto's answer to plaintiff's complaint contained the defense of justification which had also been raised in the criminal proceeding and her response also included counterclaims for civil assault and battery. If plaintiff intended to rely on the doctrine of collateral estoppel as to the justification defense, he was required to raise his objection in his reply to the counterclaims pursuant to *CPLR § 3211(e)*, or make a timely motion seeking dismissal of the defense pursuant to *CPLR § 3211(b)*. Since plaintiff did neither, and in fact waited until trial to claim collateral estoppel, his objection was waived. See *Matter of Hall*, 275 A.D.2d 979, 713 N.Y.S.2d 622 (4th Dept. 2000); see also, *CPLR § 3211(e)*. Thus, plaintiff's motion for judgment as a matter of law against defendant Neto must be denied and the same is true as to the request for a new trial as against defendant Neto. See *Jarvis v. LaFarge N. Am., Inc.*, 2008 N.Y. Slip. Op. 05117, 859 N.Y.S.2d 788 (4th Dept. 6-6-2008).¹

¹ Which is not to say that defendant Neto was not an extremely lucky beneficiary of what seems to have been an unintended waiver of the collateral estoppel principle.

*Plaintiff's motion to set aside the verdict pursuant to CPLR § 4404(a)
and grant a new trial as against defendants Neto, Russo, and Rafaniello based
upon the weight of the evidence standard*

Plaintiff also seeks to set aside the jury verdict as against the weight of the evidence and directing a new trial. It is well established that a jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence. See *Baldwin v. City of New York*, 290 A.D.2d 465, 736 N.Y.S.2d 248 (2nd Dept. 2002). The record in this matter reflected a sharp contrast in the evidence on the central issue of liability for the altercation, which in turn rested on the credibility of the witnesses presented. In addition to his own testimony, plaintiff presented several non-party witnesses to the occurrence, while defendants testified on their own behalf.

The mere fact that one party produced a greater number of witnesses is not dispositive in terms of the operative standards under *CPLR § 4404(a)*. See *Niewieroski v. National Cleaning Contractors*, 126 A.D.2d 424, 510 N.Y.S.2d 127 (1st Dept. 1987). Determinations regarding the credibility of witnesses are for the jury, which had the opportunity to see and hear the witnesses, and its resolution of the issues of credibility should be afforded great deference. See *Raymond v. Henry*, 306 A.D.2d 336, 760 N.Y.S.2d 661 (2nd Dept. 2003).

For a court to conclude that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial. See *Mitchell v. Wu*, 38 A.D.3d 507, 831 N.Y.S.2d 483 (2nd Dept. 2007). In considering such a motion, the court must view the evidence in a light most favorable to defendants. See *Mitchell v. Wu*, supra at 508.

Contrary to plaintiff's contention, the jury determination was supported by legally sufficient evidence. As noted above, the testimony about the altercation conflicted sharply concerning whether or not plaintiff was the initial aggressor. The jury could have found that the evidence adduced at trial established that defendant Neto's conduct was justified in response to what was perceived as aggression by plaintiff. See *Dupre v. Maryland Management Corporation*, 283 A.D. 701, 127 N.Y.S.2d 615 (1st Dept. 1954). The verdict reached is consistent with such a view, and the jury may be presumed to have adopted it. See *Harris v. Marlow*, 18 A.D.3d 608, 610, 795 N.Y.S.2d 608 (2nd Dept. 2005).

Plaintiff's motion to set aside the verdict pursuant to CPLR § 4404(a) and grant a new trial because two jurors were improperly seated over plaintiff's peremptory challenges

Prior to the commencement of voir dire, counsel for defendants made a motion in limine seeking a ruling that there could be no questioning of potential jurors about their sexual orientation. This application was based on plaintiff's pre-trial attempt to portray his arrest as the product of a "lesbian conspiracy." This application, made before the Trial Assignment Part Justice, was granted. After voir dire commenced defendants, relying on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), challenged plaintiff's use of two peremptory challenges contending that plaintiff was attempting to remove two jurors from the panel based upon their sexual orientation. Defendants' challenge was upheld by the Trial Assignment Part Justice.

As to this motion, a court of coordinate jurisdiction has no authority to rule on a matter already reviewed by another Justice of equal authority. See *Trakansook v. 39 Wood Realty Corp.*, 18 A.D.3d 633, 796 N.Y.S.2d 367 (2nd Dept. 2005). To the extent that plaintiff was aggrieved by the ruling, his options were to seek re-argument pursuant to *CPLR § 2221* or take an immediate

appeal. See *Belcher Co. of New York v. City of New York*, 157 A.D.2d 585, 550 N.Y.S.2d 331 (1st Dept. 1990). It is worthy of note, however, that if the merits were considered here, the result would be the same.

Plaintiff's motion to for a directed verdict dismissing the counterclaims of Defendants Neto and Russo as a matter of law, or granting a new trial pursuant to CPLR § 4404(a)

As to the verdicts of defendants Neto and Russo against plaintiff for battery,² a “civil battery is an intentional wrongful physical contact with another person without consent.” *Charkhy v. Altman*, 252 A.D.2d 413, 414, 678 N.Y.S.2d 40 (1st Dept. 1998). Though injury may be unintended, accidental, or unforeseen, to establish a civil battery a party need prove only that there was intentional offensive contact without that party’s consent. See *Villanueva v. Comparetto*, 180 A.D.2d 627, 629, 580 N.Y.S.2d 30 (2nd Dept. 1992). Therefore, plaintiff’s contention that defendant Neto’s expert witness, a psychologist, was unqualified to testify as to “proximate causation” is without merit. The established contact with defendants by plaintiff, coupled with the pictures of defendants’ bruises, established their injuries for purposes their respective battery claims. That the bruises suffered by defendants Neto and Russo resulted from the battery (whether unintended, accidental or unforeseen) was established by the evidence and the logic of common experience. See *Schneider v. Kings Highway Hospital Center*, 67 N.Y.2d 743, 745, 500 N.Y.S.2d 95 (1986). As to defendant Neto’s psychological problems, the testimony dealt almost exclusively with the consequences of her own conduct rather than the result of any claimed battery against her.

² At trial, plaintiff and defendants waived their respective assault claims and permitted the jury to consider only their respective battery claims.

Plaintiff's motion to vacate and set aside the directed verdict in favor of former defendants P.O. Marilyn Trapanotto, P.O. Mary Faulkner, "Sgt. Carey", The City of New York and The New York City Police Department and granting plaintiff a new trial.

Plaintiff asserted claims for false arrest and malicious prosecution against the former defendants. After all defendants rested, counsel for the former defendants made a motion for a directed verdict which was granted by the court.

It is true that the issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts. See *Parkin v. Cornell Univ.*, 78 N.Y.523, 529, 577 N.Y.S.2d 227 (1991). But the uncontroverted evidence presented by the former defendants, who carried the burden of justification, established as a matter of law that the former defendants had probable cause to arrest plaintiff. That evidence, considered in a light most favorable to plaintiff included the testimony of Assistant Principal Peter Devlin which unequivocally asserted that plaintiff had been warned both in writing and verbally by Principal JoAnn Chester, prior to January 4, 2002, not to enter the teachers' office located in the natatorium *for any reason*, and that plaintiff was not authorized to be on the pool deck before 5:30PM. Indeed, Mr. Devlin had appeared at the police precinct after the altercation and had so advised the police officers. This testimony gave the police probable cause to arrest plaintiff for trespass. Further, defendant Neto had advised the arresting police officer that she had suffered injury at the hands of plaintiff and that she wished to press charges against him. Pictures of the bruises were taken, and the pictures admitted into evidence at trial. This also gave the arresting officer probable cause to arrest plaintiff for assault. None of this evidence was disputed at trial by plaintiff, and his own statements concerning the events of January 4, 2002, showed the existence of probable cause, thereby negating a necessary

element of both the false arrest and malicious prosecution claims. See *Chetrick v. Cohen*, 52 A.D.3d 449, 859 N.Y.S.2d 705, 2008 NY Slip. Op. 05029 (2nd Dept. 2008). Plaintiff's remaining contentions on this issue are without merit.

However, in light of the minimal injuries incurred, the awards to defendant Neto and defendant Russo are reduced from \$10,000.00 to \$1,000.00 since they deviate materially from what would be reasonable compensation. See *Carter v. Shah*, 31 A.D.3d 1151, 818 N.Y.S.2d 383 (4th Dept. 2006); See also, *CPLR § 5501(c)*.

CONCLUSION

In light of the above, plaintiff's motion is granted to the extent that defendant Neto's award is reduced from \$10,000.00 to \$1,000.00, defendant Russo's award is reduced from \$10,000.00 to \$1,000.00, and otherwise denied. This constitutes the decision and order of the court.

J.S.C.