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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

GEORGE CHRIST and ELIZABETH CHRIST,

Plaintiffs,

-against-

LAW OFFICES OF WILLIAM F. LEVINE & MICHAEL B. GROSSMAN, LEVINE and GROSSMAN, ESQS. and MICHAEL B. GROSSMAN, ESQ.,

Defendants.

Motion Sequence # 2
Submitted August 8, 2008

INDEX NO: 11861/04

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition to Defendants' Motion.....2

Requested Relief

The defendants, LAW OFFICES OF WILLIAM F. LEVINE & MICHAEL B. GROSSMAN, LEVINE and GROSSMAN, ESQS. and MICHAEL B. GROSSMAN, ESQ. (hereinafter referred to as "LEVINE & GROSSMAN"), move for an order, pursuant to CPLR §4404, to set aside a jury verdict in favor of plaintiffs, GEORGE CHRIST and ELIZABETH CHRIST (hereinafter referred to as "the CHRISTS"). Defendants request an order of the

Court a.) entering judgment notwithstanding the verdict in favor of the defendant or granting a new trial on the issue of liability and damages; b.) precluding the plaintiffs from submitting a judgment including pre-verdict interest with respect to a portion of the damages award; c.) precluding the plaintiffs from using the date of the flooding incident in this case as the computation date for the calculation of interest; and d.) for such other and further relief as to this Court seems just and proper. The plaintiffs oppose the motion which is determined as follows:

Background

The trial of this action commenced on May 1, 2008 and continued thereafter on: May 2, May 5, May 6, May 7, May 8, and May 12, and concluded on May 13, 2008 for a total of seven (7) days. The jury found negligence on the part of both parties, allocating 90% to LEVINE & GROSSMAN and 10% to the CHRISTS, for a total of 100%. In response to questions on the verdict sheet, the jury awarded the CHRISTS damages of $36,500.00 for property damage and $44,300.00 for "other damage including legal fees, litigation and hotel expenses".

The underlying dispute herein concerns property damage to the CHRISTS' home which resulted in two (2) actions for legal malpractice. The property damage occurred on March 10 and March 11, 1996, when the sewers serving the CHRISTS' residence backed up depositing sewage into their basement. To pursue their claim for damages against the Village of Garden City (hereinafter "Village"), the CHRISTS retained an attorney, Harold Solomon, Esq., (hereinafter referred to as "Solomon"), to represent them in that matter. Thereafter, Solomon timely filed a Notice of Claim against the Village, however, he failed to timely file a summons and complaint.

The CHRISTS, having been deprived of their opportunity to present their claim for damages against the Village, brought an action against Solomon for legal malpractice, retaining LEVINE & GROSSMAN to prosecute their claims. During the course of those proceedings, Solomon moved for summary judgment on the theory that the Village could not have been found negligent in the underlying action and, therefore, he could not have committed legal malpractice. Hon. Justice Ralph Franco considered the legal arguments presented by the parties and did, in fact, dismiss the action for legal malpractice against Solomon. The Court found that LEVINE & GROSSMAN did not put forth any evidence to support their argument that there was a recurring condition. The Court found that there was no opinion offered by a sewer expert to support plaintiffs' theory of a recurring condition, only the attorney's affirmation espousing that argument which did not approach the requirements for raising a triable issue of fact challenging Solomon's request for relief.

Consequently the instant action for legal malpractice was commenced against LEVINE & GROSSMAN. The CHRISTS argued that LEVINE & GROSSMAN failed to obtain the documentation of recurring sewer backups in their neighborhood from the Village, which should have been presented to Justice Franco, thereby raising issues of fact in defense to Solomon's motion for summary judgment.

The new and present counsel for the CHRISTS requested leave of Justice Franco to renew the motion for summary judgment and to permit them to submit the reports the CHRISTS had obtained from the Village evidencing sewer stoppages in the area of the CHRISTS' home prior to the overflow into their basement. The motion to renew was denied as it was based on evidence that could have been discovered earlier with due diligence. There was a hiatus of eight (8) months following Justice Franco's decision and

the motion to renew.

The Trial

At trial, it was established that an attorney from the firm of LEVINE & GROSSMAN, who was responsible for the prosecution of the case after Judge Franco's original decision granting summary judgment to Solomon, sent a letter advising the CHRISTS that they had nine (9) months to file an appeal, which information was incorrect in that the appeal had to be filed within six (6) months. Upon application by the CHRISTS, the Appellate Division, Second Department extended their time to appeal which had expired. The Appellate Division affirmed the Lower Court.

At the trial of this action, the CHRISTS presented an expert in legal malpractice matters who opined that LEVINE & GROSSMAN had deviated from that degree of care and skill commonly possessed by a member of the legal community.

Another witness for the CHRISTS at the trial was Frank Koch, employed by the Village since 1991, as Deputy Superintendent of Public Works. He produced records for sewer obstructions dating back to 1994, which were certified in 2001. Over objections, they were admitted into evidence as business records. Koch testified that, in 1996 the Village record keeping regarding maintenance of the sewer system was haphazard. He testified that the sewers would certainly be flushed if a backup occurred. But on cross-examination, he acknowledged that the Village had a maintenance program calling for flushing of the district's sewer system once or twice a year.

Koch then proceeded to describe the sewer stoppages found in the report, as follows:

1. January 4, 1994: the cause of complaint - roots; there was no sewer backup into a residence;
2. April 3, 1994: the cause of complaint - roots, grease, paper; there was a sewer backup into the residence;
3. April 16, 1994: the cause of complaint - grease; no sewer backup into the residence;
4. April 27, 1994: the cause of complaint - stoppage; no cause was indicated and no sewer backup into the residence;
5. September 28, 1994: the cause of complaint - problem at the pump house; slight backup in in slop sink of a residence
6. March 1, 1995: the cause of complaint - roots, grease and paper; no sewer backup into a residence;
7. April 8, 1995: the cause of complaint - caused by private plumber who removed cap on the sewer trap in their residence. Village found paper and grease;
8. August 28, 1995: the cause of complaint - sewer smell; no sewer backup into the residence;
9. February 9, 1996: the cause of complaint - paper; caused a minor sewer backup into the residence;
10. March 10, 1996 - March 11, 1996: the CHRISTS' complaint caused by grease; there was a sewer backup into their basement.

Koch testified that, in response to complaints that the Village received, the sewer lines were flushed to clear the blockage. He stated that was in addition to the normal yearly flushing the Village performed to maintain the system. He pointed out that all of the complaints found in the report occurred in the sewer system serving the CHRISTS' residence but were not on the same line. Koch further testified that 6,700 homes, plus 300 to 500 commercial establishments, are connected to the sewer system and that the Village had no control as to what enters the pipes, such as excessive paper or the pouring of grease into the lines. He stated that restaurant areas received heightened attention because of the grease they emit and therefore the sewers are flushed four (4) or five (5) times a year.

In 2002, the CHRISTS retained Louis Schwartz, a professional engineer and sewer expert, who testified for the CHRISTS at the trial. Schwartz, who was employed by

Schneider Engineering for 14 years and held the title of Senior Staff Engineer, testified that, while employed by another firm in 1994, he performed work for the Village and did the preliminary engineering for upgrading the Meadow Street pumping station in the Village. He stated he was retained in this matter to review the Village's maintenance system and to determine the cause of the sewer backup at the CHRISTS' residence.

Schwartz stated that he initially went to the Village to check the records of sewer backups in the general area of the CHRISTS' home, in evidence herein as the sewer stoppages reports. He testified that sewer stoppages are usually cleared by putting a hose in the pipe and flushing the line with high pressure water. Also, the Village cuts tree roots found in the lines because grease and other matter will adhere to the roots and slow the flow of water. He testified that, generally, a sewer district will have a routine maintenance program of flushing sewer lines once a year. Schwartz claimed that he could find no maintenance records kept by the Village as to where, when or if any of the sewer lines were flushed for the period from 1990 to 1996.

Schwartz testified that the Meadow Street pump station was involved in all of the reports reviewed and that his research indicated a high concentration of grease in the area. After reviewing the reported stoppages, he opined that the efforts to unclog the sewer lines, which sometimes required 3 - 4 attempts, indicated that the Village was not doing proper maintenance of its sewer system. Schwartz explained that sewer blockages are caused by grease, paper or other things such a roots, that collect until the pipe fills and backs up the line occasionally allowing sewage into the house connection. He testified that the CHRISTS' damage resulted from the cover of the sewer trap in their basement blowing out under pressure, an unusual event. He stated that a trap in good condition was unlikely

to blow and allow sewage to enter the CHRISTS' residence. He also testified that, had the trap held, sewage could have flowed into the CHRISTS' basement through a sink or toilet. However, he also testified that a sewer backup which is for the most part water, usually flows to the lowest point in the line and, had the CHRISTS' residence been at a higher elevation than that of their neighbors, there was a strong possibility that the sewage would have gone to the lowest point in the line, bypassing the CHRISTS' residence.

At the end of his direct testimony, Schwartz opined that maintenance was the issue and that, had the Village flushed the lines annually, the backups would not have occurred. He conceded, however, that notwithstanding proper sewer maintenance, backups do occur.

On cross-examination, Schwartz was confronted with Koch's testimony that, before the CHRISTS' incident in 1996, the Village had regularly flushed the sewer lines in the district once or twice a year. Schwartz stated that, had the Village taken such action, it would have been sufficient maintenance of the system but that Koch told him that the Village had no maintenance program. However, Koch testified to the contrary at his deposition and at the trial. Indeed, Schwartz conceded that Koch, who worked in the system, had superior knowledge about the system and that Schwartz had only spent four (4) or five (5) hours reviewing the Village records over the course of the case.

It should be noted that all of the testimony from the sewer experts, including Koch, an employee of the Village, was elicited from witnesses called by the plaintiffs.

The plaintiffs' attorney also used the deposition transcript of Stephen Ditzel at the time of trial, an employee of the Village who gave a deposition in the matter of CHRIST v. SOLOMON. A copy of the transcript of that testimony was attached as an exhibit and

moved into evidence by LEVINE & GROSSMAN. The CHRISTS' attorney used the transcript to support their argument that the Village did not perform proper maintenance of the sewer system. Stephen Ditzel's gave deposition testimony to the effect that the Village tried to perform maintenance to the sewer system, if possible. He testified that, prior to the occurrence, he could not recall any sewer backups in the vicinity of the CHRISTS' home. It was LEVINE & GROSSMAN's position that Ditzel had no authority to speak for the Village concerning its sewer maintenance program.

The Law

CPLR §4404(a) provides:

> 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 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 justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

It is axiomatic that a jury verdict is entitled to the benefit of every fair and reasonable inference which can be drawn from the evidence and that it is the function of the jury, not the Court, to make credibility determinations. It has often been observed that "whether a jury verdict is against the weight of evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence". *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2nd Dept. 1985). In addition, "[a]lthough these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results". *Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d

1145 (C.A. 1978).

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible inference which could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence presented at trial". *Cohen v Hallmark Cards*, *supra; Nicastro v Park, supra.* Moreover, as stated in *Nicastro*, "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent . . . [and] whether a jury verdict should be set aside as against the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors (citations omitted)". The rule has been stated as requiring that a jury verdict be set aside where "the jury could not have reached a verdict on any fair interpretation of the evidence". *Nicastro v Park, supra; see also, Burney v Raba,* 266 AD2d 174, 697 NYS2d 329 (2nd Dept. 1999); *Licker v Brangan,* 177 AD2d 547, 576 NYS2d 288 (2nd Dept. 1991).

The Court, having heard the testimony and seen the demeanor of the witnesses, has the power to set the verdict aside in the supervision of the jury's work before it. The Court has "the duty of maintaining reasonable consistency between the weight of the evidence and the verdicts reached". *Mann v Hunt*, 283 AD 140, 126 NYS2d 823 (3rd Dept. 1953). It must employ the sum total of its legal experience to determine whether a new trial is required, in a decision that would not be regarded in the profession as unreasonable. *Mann v Hunt, supra.*

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree or care, skill and diligence commonly possessed by a member of the legal community, (2) proximate cause,

(3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (citations omitted) *Briggs v Berk,* 284 AD3d 423, 726 NYS2d 690 (2nd Dept. 2002); *cf., Mendoza v Schlossman*, 87 AD2d 606, 448 NYS2d 45 (2nd Dept. 1982). New York generally subscribes to the view that the value of the underlying (usually lost) claim is the measure of damage in a legal malpractice action. *Alva v Hurley, Fox, et al*, 156 Misc 2d 550, 593 NYS 2d 728 (Sup. Rockland, 1993) citing, *inter alia, Campagnola v Mulholland*, 76 NY2d 38, 556 NYS2d 239 555 NE2d 611 (C.A. 1990); *Vooth v McEachen*, 181 NY 28, 73 NE 488 (C.A. 1905); 76 NY Jur.2nd, Malpractice, § 67.

It must be shown that "but for" the negligence of the attorney, plaintiff, would have prevailed in the underlying action.

> An attorney is liable in a malpractice action if the plaintiff can prove that the attorney failed to exercise the skill commonly exercised by an ordinary member of the legal community, that such negligence was the proximate cause of damages, and that "but for" such negligence, the plaintiff would have prevailed in the underlying action (*see,* Marshall v Nacht, 172 AD2d 727).

McCoy v Tepper, 261 AD2d 592, 690 NYS2d 678 (2nd Dept. 1999).

Discussion

The issue which requires resolution before the Court may move on to address the matters of damages and accrued interest herein concerns the forth prong of the above quoted standard to prove legal malpractice – would the plaintiff have been successful in the underlying action had the attorney exercised due care? This brings us to the pivotal question– whether the Village was negligent.

The jury, by a 5 of 6 vote, answered "Yes" to Question # 1 on the verdict sheet: "Was the Village of Garden City negligent?". The jury responded similarly to Question #4

on the verdict sheet and found that the Village's negligence was a substantial factor in the happening of the sewer backup at the CHRISTS' residence.

The Court, in deciding the issues before it may grant judgment on the verdict; may grant judgment to the defendant as a matter of law, or may grant a new trial when the verdict is contrary to the weight of the evidence. After carefully reviewing the Memorandums of Law with annexed transcripts of the trial witnesses testimony submitted by the attorneys for the parties, and its own notes made during the trial, it is the judgment of the Court that no fair interpretation of the evidence could lead the jury to support the CHRISTS claim of negligence against the Village in the underlying action.

During cross-examination, Schwartz gave his analysis of the stoppage records in evidence indicating that, of the nine (9) backups reported in the Village records, five (5) were grease related, three (3) of the five (5) occurred two (2) years before the CHRISTS' sewage backup, and two (2) occurred one (1) year prior thereto. There were no further incidents of sewage backups involving grease for the period of one year, April 8, 1995 to March 10, 1996, the date of the CHRISTS' incident. That record does not support Schwartz' opinion that there was a grease problem in the area and that the Village was improperly maintaining the sewer system.

Conclusion

Based on the foregoing, the Court concludes that the jury verdict, finding that the Village was negligent, is contrary to the weight of the evidence. It is therefore

ORDERED, that the defendants' motion to set aside the jury verdict as being contrary to the weight of the evidence is granted and the Court directs a new trial. The issues raised by defendant as to damages and accumulated interest must await the verdict

or Court decision after a new trial.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 19, 2008

WILLIAM R. LaMARCA, J.S.C.

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