

Diaz v City of New York
2009 NY Slip Op 31091(U)
April 30, 2009
Supreme Court, New York County
Docket Number: 116703/03
Judge: Kibbie F. Payne
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

ANGELO DIAZ

INDEX NO. 116703/03

MOTION DATE 12-03-08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

THE CITY OF NEW YORK,

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

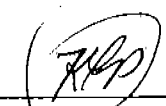
	PAPERS NUMBERED
Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Motions 001 and 002 are consolidated for disposition and these motlons are decided in accordance with the accompanying memorandum.

FILED
MAY 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 30, 2009


J.S.C.

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: PART 4

-----X

ANGELO DIAZ,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant

-----X
KIBBIE F. PAYNE, J. :

FILED

MAY 07 2010

COUNTY CLERK'S OFFICE
NEW YORK

Index No. 116703/03

Judgment/Decision

The post trial motions of plaintiff Angelo Diaz (plaintiff) and defendant City of New York (defendant) are consolidated for disposition. Plaintiff moves for additur to the jury's verdict for his damages of future pain and suffering. Defendant, on the other hand, moves for an order, pursuant to CPLR 4404(a) vacating the jury's verdict on the grounds that the award was not supported by legally sufficient evidence; dismissing plaintiff's claim for failure to state a cause of action; or directing that judgment be entered in favor of defendant as a matter of law. Additionally, defendant requests this Court grant a new trial on the groundsthat the verdict is not supported by the weight of the evidence or that this Court reduce the verdict as excessive. Both motions of defendant and plaintiff are, in all respects, denied.

This personal injury action was tried before this Court and a jury. After a ten day trial, the jury on September 26, 2008, the jury rendered favorable verdict to plaintiff in amount

totaling \$3,000,000.00. The jury awarded plaintiff \$800,000.00 for past pain and suffering; \$150,000.00 for future pain and suffering; \$350,000.00 for future medical expenses; \$1,700,000.00 for loss of future earning and impairment of future earning capacity.

Plaintiff's counsel opposes the defendant's post judgment application and maintains that plaintiff had established a prima facie case against defendant. Plaintiff's counsel further maintains that the Court properly charged the jury with the circumstantial evidence charge, and defendant's failure to produce a witness. Plaintiff further claims that defendant City of New York failed to demonstrate that the verdict was excessive.

The undisputed evidence presented to the jury demonstrated that plaintiff Angelo Diaz was severely injured when he slipped while exiting the cab of defendant's sanitation truck.

Defendant's employee, Supervisor John Capozzoli (Capozzoli) testified that the sanitation operators had the duty and obligation to inspect and to clean the inside of the sanitation vehicles daily. In order to establish a prima facie case of negligence as a matter of law, plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately caused by the breach *See, Solomon v City of New York*, 66 NY2d 1026, 1027; *J.E. v Beth Isreal Hospital*, 295 AD2d 281, 283; *Cruz v Madison Detective*

Bureau, 137 AD2d 86, 89-90.

At trial, plaintiff called the garage utility sanitation worker, Ventura Hidalgo (Hidalgo), who testified that the vehicle in which the plaintiff fell was neither washed, nor maintained, nor cleaned while it was with the Manhattan Lot Cleaning Division. Plaintiff told the jury and the Court that the cab of the vehicle in his accident occurred was dirty. He further testified that prior to the accident he complained to his supervisor, Al Maesano, that the vehicle in question was dirty and needed to be cleaned. According to plaintiff, the supervisor said he would take care of it, but the condition of the vehicle remained the same. Thus plaintiff "slipped and fell," and sustained injuries when exiting the dirty vehicle. Defense counsel inexplicably failed to present any contradictory evidence on these issues with respect to the testimony of plaintiff, Capozzoli or Hidalgo. Overwhelming evidence of defendant's negligence was established at trial, clearly indicating the vehicle was not properly maintained or cleaned by defendant's employee. The City's negligence having been overwhelming established, in the absence of any evidence rebutting plaintiff's claims, this Court will not disturb the jury's determination on the issues of defendant's liability, and the jury's finding that the defendant's negligence was the proximate cause of the accident. As a matter of law, it cannot be said that plaintiff

failed to establish a prima facie case against defendant.

With respect to defendant's claim that the Court "erred in giving the jury a charge on circumstantial evidence," defendant argues this charge was inappropriate and prejudicial. Circumstantial evidence consists of proof of collateral fact from which the facts or facts in issue may be indirectly established *Delacy v Ettrich*, 217 AD2d 838, 839; *People v Vitalis*, 67 AD2d 498, 503. At trial plaintiff relied upon circumstantial evidence to support his claim that defendant's employee and operator of the truck, Eric Stevens (Stevens) created a dangerous condition by failing to clean and maintain the inside cab of the truck. The testimony of the cab's condition and plaintiff's claim of an unsafe condition supported the basis for the requested circumstantial evidence charge. It was within the jury's province to accept or reject plaintiff's counsel's arguments and inferences to support plaintiff's claims of negligence. The jury also had the option of adopting or rejecting inferences of the cab's condition from Hildago's testimony. Other than a general objection to the circumstantial evidence charge as prejudicial and inappropriate, defense counsel cites no authority supporting his argument that such charge was unwarranted. It is counsel's obligation and duty to present favorable arguments and inferences on behalf of their clients. Clearly arguments and inferences favorable to one side are prejudicial to the opponent. The fact

that the jury may draw an unfavorable inference against a party from the charge is an insufficient basis to omit the charge. It is counsel's obligation to present the jury with sufficient evidence tending to support the requested jury charge. In this case, one of plaintiff's theories of negligence was predicated upon circumstantial evidence. Therefore, there was sufficient basis to warrant the circumstantial evidence charge given to the jury.

Defense counsel further argues that this Court erred in giving the missing witness charge as to defendant's employee Eric Stevens. A party seeking a missing witness charge must promptly notify the Court that there is an uncalled witness knowledgeable of a material issue pending in the case, that uncalled witness would naturally be expected to testify favorably to the party that failed to call him, and that the uncalled witness is available to such party *People v Gonzalez*, 68 NY2d 424, 427-428. Prior to resting on plaintiff's case, counsel notified the Court and opposing counsel of his request for a missing witness charge regarding Stevens. As a result, defense counsel knew or should have known that his opponent was seeking to have the jury so charged. Counsel could have adopted his trial strategy and called Stevens to testify before the jury. However for reasons known only to defense counsel, Stevens was not called in defendant's case in chief.

In order to grant a missing witness the proponent must demonstrate that the uncalled witness had knowledge of material evidence, the uncalled witness would be expected to give favorable testimony to the opponent and the uncalled witness was available to the party against whom the charge is sought See, *People v Macana*, 84 NY2d 173, 177; *People v Gonzalez*, *supra* at 428; *People v Kitching*, 78 NY2d 532, 537. Counsel had the opportunity to present his arguments against the missing witness charges with respect to both Stevens and the examining physician Dr. Eric L. Freeman. Defense counsel's arguments on this issue at the charge conference, immediately after the jury charge and on his mistrial motion were unpersuasive and devoid of merit. The Court notes that the failure to produce a witness charge given to jury was in accordance with PJI 1:75 and that said charge strictly adhered to that section.

With respect to defendant's motion to set aside the jury verdict as excessive, regarding the future lost earnings award, past pain and suffering award, the future pain and suffering and future medical expenses award defense counsel's motion is, in all respects, denied. With the exception of the cross-examination testimony of plaintiff's witnesses who gave testimony on the issue of damages, plaintiff's witnesses present the only evidence as to damages. Other than the cross-examination testimony, defendant failed to present any evidence contradicting

plaintiff's evidence on the issue of damages. Here, plaintiff suffered a medial meniscus tear of the left knee with post operative recurring complications with four successive surgeries. Eventually, plaintiff retired from the Department of Sanitation on disability. The jury accepted and adopted Dr. Wilson's opinion that the plaintiff would require medical treatment in the future. The award of damages for personal injuries is primarily a jury determination and a jury determination on an award for damages should only be set aside when the award materially deviates from reasonable compensation *See, Walsh v Kings Plaza Replacement Servs.*, 239 AD2d 408,409 also see, CPLR 5501[c]. Based upon this Court's review of both counsel's papers I conclude that the jury's award is not excessive, and that the award does not deviate materially from what would be reasonable compensation.

With respect to the plaintiff's application for additur to the jury's award for future pain and suffering that motion must be denied. Ample basis exists for the jury's determination on its award for future pain and suffering. Following my review of counsel's papers, I am unpersuaded that there is any basis for disturbing the jury's determination. Accordingly, both counsel's

post trial motions are denied. The foregoing constitutes the decision and order of the Court.

Date: April 30, 2009



KIBBIE F. PAYNE
J.S.C.

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