

Ruiz v Port Auth. of N.Y. & N.J.

2009 NY Slip Op 31635(U)

July 16, 2009

Supreme Court, New York County

Docket Number: 105097/94

Judge: Lottie E. Wilkins

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

PRESENT: LOTTIE E. WILKINS
Justice

PART 18

ANTONIO RUIZ,

Plaintiff,

- v -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Defendant.

INDEX NO. 105097/94

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

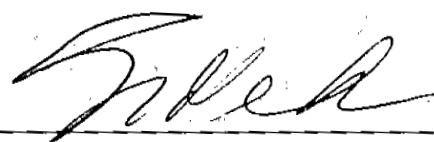
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion to set aside jury verdict is denied in accordance with the attached decision and order.

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 16, 2009



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

-----X
ANTONIO RUIZ,

Plaintiff,

- against -

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Defendant
-----X

PART 18

Index No. 105097/94

DECISION AND ORDER

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Lottie E. Wilkins, J.:

Defendant moves pursuant to CPLR 4404(a) to set aside the jury's verdict rendered on January 21, 1009 after a jury trial on damages only. The sole grounds for setting aside the verdict alleged in the papers are that plaintiff's counsel prejudiced the defense during cross-examination and summation by making damaging remarks concerning the timing of defendant's retention of a psychological expert to rebut plaintiff's claim that he suffered from post-traumatic stress disorder. While there is some mention in the moving papers to the quality of plaintiff's proof that he suffered from post-traumatic stress disorder – specifically, defendant characterizes the evidence as "weak" – this argument is not made in support of a claim that the jury's verdict was against the weight of the evidence, but rather to highlight the fact that, under such circumstances, "the instances of misconduct necessarily will play a more significant role in tainting the outcome" of the trial (Defendant's affirmation at (the first) ¶ 32).

In this trial, plaintiff alleged injuries caused by defendant's negligence leading up to the 1993 bombing of the World Trade Center. The issue for the jury was limited to damages, as liability had already been established (see, Nash v Part Auth. of New York and New Jersey, 51 AD3d 337 [1st Dept. 2008]). As relevant here, the jury awarded \$300,000.00 for past pain and suffering and \$243,750.00 for future pain and suffering over 26 years. The jury also awarded plaintiff \$52,000.00 for past loss of earnings.

The issue of post-traumatic stress disorder and the timing of the parties' retention of expert witnesses to testify about that injury was a problem in this trial. It was first brought to the Court's attention during an "*in limine*" motion by defendant to preclude plaintiff from offering evidence on the subject. Specifically, defendant's counsel moved to preclude testimony from plaintiff's psychological expert, Dr. Boland, on grounds that notice of plaintiff's intention to call Dr. Boland was untimely. As is recounted in the papers submitted by both sides, rather than preclude Dr. Boland from testifying, this Court attempted to effect a compromise solution by giving defendant an opportunity to retain its own psychological expert and examine plaintiff on an expedited basis. Upon agreement from both sides, defendant retained its own expert psychologist, Dr. Nassar, who examined plaintiff during a short break in the trial and then testified before the jury as to his findings.

Defendant now argues that plaintiff's counsel made comments about Dr. Nassar's, both during his cross-examination of the doctor and in his summation, which were so prejudicial that they require setting aside the jury's verdict. Notably, the moving papers do not point to any extended commentary on this issue by plaintiff's counsel, nor is there a transcript of the proceedings attached. Instead defendant asserts that plaintiff's counsel repeatedly commented during cross-examination and summation that Dr. Nassar was hired "to defend the case" and concludes that those comments were unfairly prejudicial to the defense.

Analysis

As an initial matter, the absence of a transcript of the proceedings makes detailed analysis of the issues difficult. Where the argument for setting aside the jury's verdict is based on comments made to the jury during the trial, it is essential to understand exactly what was said during the proceedings, if for no other reason than so that the nature, context and frequency of the comments complained of can be established. Instead of providing a record of the proceedings defendant chooses to rely on its own characterization of those comments as "frequent" and "significant". While this Court has no doubt that defendant sincerely believes that the comments by

plaintiff's counsel were significantly prejudicial and that they were made with unacceptable frequency, some record-based proof is necessary.

Timeliness/Preservation

As far as the Court can recall in the absence of a record, defendant did not object to any comments by plaintiff's counsel at the time they were made, either during cross-examination or summation. Indeed, the moving papers are silent as to any attempt to object to comments that might have been made during the cross-examination of Dr. Nassar. As for summations, defendant concedes that no objections were made to allegedly prejudicial comments until the following day, after the jury had begun its deliberations. While defendant offers no explanation for the failure to object to prejudicial comments at the time they were made during summations, counsel suggests that his efforts to object immediately after summations were thwarted by the Court's zeal to proceed to its charge on the law as an explanation for why objections were not made until the following day, after the case had been submitted to the jury.

The purpose of objections at trial, and more specifically objections made during summations, is not merely to preserve a record for appellate review, but to give the trial court an opportunity admonish offending counsel or take other curative measures (see, Layton Sales & Rentals, Inc. v Somat Realty Corp., 39 AD2d 640 [4th

Dept. 1972]). Whether defendant's blanket objection to the totality of the comments made by plaintiff's counsel over the course of the entire trial sufficiently preserves the issue for appellate review is a question for the higher court (see, Binder v Miller, 39 AD3d 837 [1st Dept. 2007]). However, given that an objection was not made until after the case had been submitted to the jury, this Court was effectively deprived of an opportunity to take timely remedial action at a time when it would not have unduly emphasized the issue for the jury and cause even more prejudice to the opposing side. This is unfortunate because the Court will venture to say that the record of this trial will reveal that counsel was in no way discouraged from making timely objections during the course of plaintiff's cross-examination or summation (compare, Binder, supra). Counsel's argument that objections were made "at the first available moment" is simply not persuasive given that the issue was never even raised until both the cross-examination of Dr. Nassar and the summations were concluded.

The moving papers further recite that, when an objection was finally made, the Court queried as to what remedy defendant sought. Defendant concedes that no relief was sought from the Court at that point because it was too late. The purpose of the objection at the time it was made, according to defendant's papers, was to "preserve the record." The question of preservation, as already stated, is one for the appellate court, but given that defendant seems to concede that there were no objections

made at the time the offending comments were made, and that there was no relief sought from the Court when the objection ultimately made, it is difficult to discern what relief defendant is entitled to now that could not have been sought before. At best, this motion appears to be a belated request for a mistrial made upon reflection after the passage of time. Such relief, however, is not appropriate in a motion pursuant to CPLR 4404.

Prejudice

Leaving aside the questions of timeliness and the preservation of defendant's objections, even if this Court were to credit the argument that plaintiff's counsel repeatedly commented that Dr. Nassat was retained "to defend the case" the prejudice caused by such comments is not readily apparent and therefore does not warrant setting aside the jury's verdict. Once again, it is difficult to judge the frequency or the context of such comments in the absence of a record, but a comment made by opposing counsel that an examining physician was "hired to defend the case" does not seem so prejudicial in the abstract as to warrant setting aside the jury's verdict under these circumstances. Indeed, such kinds of "collateral attacks" on the credibility of testimony by examining experts are often the subject of cross-examination and summation commentary. Without better information as to the frequency or context of

these comments this Court cannot say, as a matter of law, that they caused so much prejudice as to require setting aside the jury's verdict.

Conclusion

Notwithstanding the claim of prejudice, defendant effectively concedes that no objections were made at a time when the Court might have taken remedial measures to ameliorate the damage that was done. Moreover, when defendant finally did object, no relief was sought from the Court. Having allowed the prejudicial damage to be done without bringing it to the Court's attention in a timely manner or asking for any specific relief, the defense now suggests that the verdict must nonetheless be set aside, presumably in the interests of justice. This argument might require more serious analysis had there been a clear record of the true nature of the prejudicial comments that were allegedly made, but these comments are recounted by defendant in an extremely vague and cursory manner. Thus there is no apparent justification for granting the relief that defendant seeks. Accordingly, it is

ORDERED that the motion to set aside the verdict is denied.

This constitutes the decision and order of the Court.

Dated:

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK


Justice E. Wilkins, J.S.C.