

Jamieson v Simon Prop. Group, Inc.

2009 NY Slip Op 32329(U)

October 1, 2009

Supreme Court, Nassau County

Docket Number: 15345/05

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

LAURIE JAMIESON,

**Motion Sequence #3
Submitted July 14, 2009**

Plaintiff,

-against-

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**SIMON PROPERTY GROUP, INC., and
THE RETAIL PROPERTY TRUST**

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Affirmation Reply.....	3

Requested Relief

Plaintiff, LAURIE JAMIESON (hereinafter referred to as "JAMIESON") moves for an order, pursuant to CPLR §4404(a), setting aside the jury verdict rendered on May 1, 2009, in favor of SIMON PROPERTY GROUP, INC. (hereinafter referred to as "SIMON PROPERTY") and THE RETAIL PROPERTY TRUST (hereinafter referred to as "THE TRUST") as being against the weight of the evidence, and entering a judgment in favor of JAMIESON or setting the matter down for a new trial on the issues of liability and damages. Counsel for defendants opposes the motion, which is determined as follows:

Background

Initially, the Court notes that, prior to the commencement of trial, the parties agreed to add THE REAL PROPERTY TRUST as an additional defendant and, upon motion at the conclusion of testimony, the Court dismissed the action against defendant, CONTROL BUSINESS SERVICES INC. Therefore, the jury only considered the evidence with respect to SIMON PROPERTY and THE TRUST.

The trial of this matter commenced on April 29, 2009 and continued to May 1, 2009, when the jury returned a unanimous verdict in favor of the defendants.

The testimony at trial reflects that, on February 16, 2003, JAMIESON alleged that she sustained personal injuries resulting from a fall in the parking garage located at Roosevelt Field Mall adjacent to the Bloomingdale's Department Store. At the trial JAMIESON testified that she slipped and fell on a patch of ice which was two (2) feet in diameter. JAMIESON stated at trial that, at that time, she viewed water stains on a wall to her left, some fifteen (15) to twenty (20) feet from where she fell, however, in her deposition testimony, which was read into the record, she placed herself some five (5) to six (6) feet from the stained wall.

The wall was a significant factor at the trial. JAMIESON asserted that the stains on the wall represented water seepage from a faulty expansion joint, which allowed precipitation from the uncovered parking lot immediately above the accident site to leak through to the lower level and puddle up and freeze, thus forming the two (2) foot diameter icy patch.

The weather records submitted into evidence for the subject period reflected that approximately seven (7) inches of snow fell between February 7th and February 10th, proceeding the February 16, 2003 accident date. The temperature was below freezing for several days before the accident, which JAMIESON argued corroborated her assertion that the leaking water from the melting snow from the uncovered parking area above the accident site, collected and froze on the lower level.

JAMIESON retained an expert architect to testify at trial, with experience in forensic architecture, to support her position regarding the formation of the icy patch. The architect, Thomas Reimels (hereinafter referred to as "Reimels"), opined that the nature of the water stains indicated that the leaks had been present for more than a year, prior to the accident. He stated that the expansion joint had been poorly maintained, allowing water to leak to the lower level. He stated that he performed an "on site" test by pouring water at the base of the wall allowing it to flow over the parking lot floor and observing its flow. He claimed that the water flowed in the direction of the accident site for some thirty (30) feet and covered the area where JAMIESON fell.

On the date of the accident, JAMIESON was shopping with her sister, Jill Irwin (hereinafter referred to as "Irwin") at the mall. Both testified that neither one saw the icy patch before the fall. However, Irwin, who was walking ahead of her sister, acknowledged that she didn't see the accident, but did testify as to the icy patch she observed when tending to her sister after the fall. Irwin testified that the ice was located between five (5) and (10) feet from the wall.

The defendants did not offer any witnesses in defense of the action, however, there was vigorous cross-examination of JAMIESON's witnesses, most particularly the architect. Under cross-examination, Reimels testified that he never inspected the alleged faulty expansion joint, nor did he pour water into the joint and observe the alleged leak. He also had no opinion as to how much snow melted during the several days before the accident. The expert further testified that he randomly chose the amount of water used in his test, which he stated flowed in stream like manner to a drain in the floor of the parking area. The expert's opinion as to the cause of the accident was aggressively challenged.

The case was turned over to the jury at approximately 11:30 A.M., on May 1, 2009, and, including lunch and settling into the jury room to begin deliberation, returned approximately two and one half (2 ½) hours later to deliver its verdict.

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*.

Conclusion


Based on a review of the trial evidence and the supporting papers submitted on the motion, the Court cannot conclude that the jury verdict is not supported by sufficient evidence to support the verdict, as a matter of law, and that no valid line of reasoning and permissible inference could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence given at trial. See, *Cohen v Hallmark Cards, supra*. In addition, although the Court has discretion to set aside the jury verdict as against the weight of the evidence, a less stringent standard set forth in *Nicastro, supra*, the Court finds that the jury reached its verdict by a fair interpretation of the evidence; that the verdict is sound and in keeping with the law. Based on the foregoing, it is hereby

ORDERED, that the relief requested in JAMIESON's motion is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 1, 2009



WILLIAM R. LaMARCA, J.S.C.

ENTERED
OCT 05 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Vincent D. McNamara, Esq.
Attorney for Plaintiff
Tower Square
1045 Oyster Bay Road, Suite 1
East Norwich, NY 11732

Berkman Henoch Peterson & Peddy, PC
Attorneys for Defendants
200 Garden City Plaza
Garden City, NY 11530

jamieson-simonpropertygroup.#3/cplr