[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 115790/2006

WEISS, ELEANOR

VS.

TRANSIT AUTHORITY

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and Metropolitan Transportation Authority for an order, pursuant to CPLR §4404(a), to set aside the trial verdict in favor of plaintiff Eleanor Weiss, by her guardian, Self-Help Community Guardian Program, and direct a verdict in defendants' favor is denied; and it is further

ORDERED that the parties shall appear in Part 40 for a trial on damages on February 1, 2010, 10:00 a.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the decision and order of the Court.

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

Dated: 12/1/09

J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ELEANOR WEISS, by her guardian,
Self-Help Community Guardian Program and
BETTY KINSEY,

Index No. 115790/06

Plaintiffs,

-against-

DECISION/ORDER

NEW YORK CITY TRANSIT AUTHORITY,
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY and METROPOLITAN
TRANSPORTATION AUTHORITY,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiff Eleanor Weiss, by her guardian, Self-Help Community Guardian Program ("plaintiff") seeks to recover damages from defendants New York City Transit Authority ("NYCTA"), Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") and Metropolitan Transportation Authority ("MTA") ("defendants").[1]

Defendants now move for an order, pursuant to CPLR §4404(a), to set aside the trial verdict in favor of plaintiff on the issue of liability and direct a verdict in defendants' favor.

Background[2]

Plaintiff brought this action against defendants alleging that Michelle Johnson ("Ms. Johnson"), an MTA employee, was negligent in the operation of an M-22 bus (the "bus") on

[1] Based on the Amended Extract dated July 15, 2009, Betty Kinsey discontinued her action against defendants.

[2] Information is taken from defendants' motion.

February 27, 2006. Plaintiff, who is elderly, boarded the bus with the assistance of her home attendant Betty Kinsey ("Ms. Kinsey") at a stop on Frankfort Street just south of Pearl Street. Plaintiff chose to stand in the aisle instead of sitting. Ms. Johnson then pulled away from the bus stop and moved into the left-hand turn lane on Frankfort Street, intending to make a left turn onto Pearl Street. At some point, Ms. Johnson applied the brakes, the bus stopped suddenly, and plaintiff fell to the floor of the bus, sustaining injuries.

The liability portion of the trial was conducted from June 8, 2009 to June 11, 2009. On June 12, 2009, the jury rendered a verdict finding defendants 75% negligent and plaintiff 25% negligent.

Defendants' Motion

Defendants argue that at trial plaintiff failed to prove a *prima facie* case of negligence against defendants, the case should not have been given to the jury, and the Court should have granted a directed verdict in favor of defendants. Defendants contend that a plaintiff's mere characterization of a vehicle's movement as unusual or out of the ordinary, without additional objective evidence, is insufficient to establish negligence at the trial level. Instead, a plaintiff must establish that the stop caused a jerk or lurch that was unusual and violent.

Here, plaintiff offered no proof "beyond her unadorned word" that her fall aboard the bus was the result of an unusual and violent jerk or lurch. Plaintiff's testimony did not provide objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendants. Further, no one else on the bus who was sitting in a seat came out of his or her seat or was injured in any way when

the bus came to a stop.

Defendants further contend that a Court is not required to give credence to a story so inherently improbable as to be untrue. Here, it is improbable that a bus stopped at a bus stop could then proceed forward and gain enough speed to be considered excessive while changing lanes to position itself in the left-hand turn lane to make a left turn at the next intersection in approximately 100 feet.

At trial, defendants came forward with "credible proof" to explain the alleged sudden stop. Ms. Johnson testified that a traffic agent directed her to stop after another traffic agent had directed her to turn. In addition, Walter Clark ("Officer Clark"), an employee of the New York City Police Department, Traffic Division, testified that the intersection of Frankfort and Pearl is a priority intersection that is always controlled by traffic agents Monday through Friday from 6 a.m. to 7 p.m. Officer Clark testified that drivers are bound by law to obey traffic agents. Thus, despite the fact that plaintiff testified that she failed to see any traffic agents, plaintiff's testimony should not have been considered by the jury because of Officer Clark's testimony. Ms. Johnson had no choice but to follow the instruction of the traffic agent who directed her to stop the bus at the intersection of Frankfort and Pearl. If Ms. Johnson had failed to follow the instruction, she would have been subject to a summons and/or arrest. Although the actual traffic agent who controlled the intersection could not be produced at trial, arguably, even if the specific female traffic agent could be produced, she most likely would not recall signaling the bus to stop on February 27, 2006, because she controls traffic all day long and signals many buses to stop during the day. Moreover, the agent most likely would not recall the incident, because an accident did not occur at the intersection, meaning the bus did not make contact with another

vehicle, and the bus was not taken out of service at that intersection. The traffic agent would most likely not recall a bus stopping short and, due to the height of the bus, would not see a passenger on the bus fall.

Defendants contend that once they offered a non-negligent reason for the sudden stop, it became plaintiff's burden to come forward with evidence refuting defendants' non-negligent reason. Other than "bald-faced" allegations that no traffic agents were present at the time of the accident, plaintiff failed to produce any evidence at trial to refute defendants' non-negligent reason for the sudden stop. At the end of the trial, defendants argued that the case should not be given to the jury. Despite defendants' protests, the Court decided to give the case to a jury.

Further, as stated in PJI 2:165, titled "Common Carrier – Duty to Passenger – Sudden Stop or Jerk," starting or stopping may not always be done smoothly, and occasionally there may be some jolting. Accordingly, a carrier is not liable for injuries to a passenger when that happens. Depending on whose testimony is accurate, Ms. Johnson was either stopping at a red light or starting to move the bus forward after being stopped at a red light. Regardless of whose testimony is accurate, the bus was either stopping or starting. As such, plaintiff should have expected some jolting. Moreover, the PJI 2:165 states that a "passenger must also use reasonable care for his or her own protection." Because plaintiff is a woman of an advanced age who requires the aid of a home attendant on a daily basis, plaintiff should have taken a seat on the bus for her own safety. Plaintiff's failure to do so resulted in her being thrown to the floor when the bus jolted to a stop/start.

Plaintiff's Opposition

Plaintiff argues that the jury's verdict was adequately supported by legally sufficient

evidence and should not be disturbed. The evidence established that plaintiff was injured when Ms. Johnson made a sudden and violent stop on Frankfort Street as the bus approached the intersection of Pearl Street. A valid line of reasoning and permissible inferences certainly could lead rational people to the verdict reached by the jury, on the basis of the evidence presented.

Plaintiff further contends that a jury verdict should not be set aside as being against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence. Here, plaintiff and Ms. Johnson gave conflicting factual accounts of the manner in which the accident occurred. Notwithstanding defendants' contention that plaintiff's version of events was improbable, the two divergent accounts raised a question of credibility to be resolved by the jury. Defendants improperly attempt to portray the facts in a light most favorable to them and argue that the competing inferences that could have been drawn from the facts presented should have resulted in findings in their favor.

Plaintiff established a *prima facie* case of negligence against defendants by showing that the bus came to a stop that caused a jerk or lurch that was unusual and violent. Plaintiff's testimony that the stopping of the bus was unusually sudden and violent was corroborated by Ms. Kinsey and Ms. Johnson. The fact that plaintiff, while holding onto a pole, was thrown from her position behind Ms. Johnson to the stairs at the front of the bus, combined with the fact that Ms. Kinsey also was thrown to the floor of the bus is objective evidence of the force of the stop and is sufficient to establish an inference that the stop was extraordinary and violent.

Further, plaintiff produced evidence indicating that she did not see any traffic agents in the intersection. First, plaintiff's testimony is evidence. Moreover, the testimony of David Rockwell ("Mr. Rockwell"), the MABSTOA superintendent who responded to the accident and

made a report, was offered as supporting evidence. Mr. Rockwell testified that someone from NYCTA went to the location of the accident and found no agents there.

In addition, defendants' arguments are unsupported by the evidence. For instance, in alluding to the testimony of Officer Clark, defendants make the speculative argument that because traffic agents were supposed to be assigned to the intersection in question at the time of the accident, traffic agents would have controlled the intersection at the time of the accident. However, this was not Officer Clark's testimony. Officer Clark conceded on cross-examination that traffic agents are only required to be "visible" at the intersection, and that the traffic agents were permitted to be positioned outside the white painted crosswalks and not necessarily directing traffic at all times. Defendants' argument that any traffic agent allegedly present at the intersection would not have had any recollection of the incident also is speculative.

Despite the jury's verdict in plaintiff's favor, defendants seek to have this Court accept all of defendants' proof as true, disregard all of plaintiff's evidence to the contrary, and resolve all inferences in favor of defendants, in contravention of the law. A jury verdict in favor of plaintiff means that the facts must be considered in a light most favorable to plaintiff, with all inferences resolved in her favor. Nothing compels this Court to accept as true Ms. Johnson's testimony that she stopped the bus suddenly only as directed by a traffic agent and with a green light facing her, and then brought the bus to a gradual stop at the intersection. Plaintiff and Ms. Kinsey testified that the bus made a sudden and violent stop. Neither testified that the bus initially made a gradual stop. Moreover, plaintiff testified that when the bus made its sudden and violent stop, it was for the red traffic light at the intersection – not for any traffic agent.

Plaintiff further argues that Officer Clark's testimony that traffic agents were assigned to

the intersection where the accident occurred does not compel the granting of defendants' motion. At most, Officer Clark can testify that agents were *supposed* to be at the intersection. Moreover, even if traffic agents were present, Officer Clark's testimony was not probative as to the color of the traffic light as the bus approached the intersection, the actions taken by Ms. Johnson, or the actions, if any, taken by any traffic agents.

The jury remained free to accept plaintiff's testimony that the bus stopped suddenly and violently for a traffic light that Ms. Johnson should have known was red, and to reject Ms. Johnson's testimony that she initially made a gradual stop for a red light and that a traffic agent suddenly appeared "from nowhere" and decided to stop the bus for no apparent reason. Even if the jury accepted Ms. Johnson's testimony that traffic agents were present, the jury did not have to accept Ms. Johnson's story that a traffic agent decided to stop the bus for no reason. Instead, the jury reasonably could have inferred that if a traffic agent were going to stop a bus, there would be a reason for doing so, and that Ms. Johnson should have observed or anticipated that reason and brought the bus to a more gradual and less violent stop. Alternatively, the jury could have found that Ms. Johnson negligently stopped the bus violently for a traffic light that she should have realized sooner was red. The jury heard all of the evidence and obviously believed the testimony of plaintiff and Ms. Kinsey.

Defendants' claim that the burden shifted to plaintiff to come forward with evidence refuting defendants' non-negligent reason for the sudden stop is erroneous. Plaintiff testified that Ms. Johnson came to a sudden and violent stop at the intersection as a result of stopping for the red traffic signal, and not as a result of needing to follow the directions of a traffic agent. Since the jury was presented with two divergent reasons for Ms. Johnson's actions, plaintiff was not

required to rebut defendants' alleged non-negligent excuse for the sudden stop.

Defendants' argument that plaintiff should have taken a seat on the bus for her own safety ignores the fact that there was no obligation for her to sit down. Defendants' speculative statement that plaintiff was standing due to the fact that she was going to get off at the next stop was not plaintiff's testimony. Plaintiff testified that the bus started to move immediately after she entered and paid her fare, without allowing her an opportunity to take a seat on the bus. The fact that plaintiff was not sitting on the bus when the accident occurred was no doubt considered by the jury and presumably resulted in its finding plaintiff 25% at fault.[3]

Discussion

CPLR §4404(a) empowers the Court to set aside a verdict or any judgment entered thereon and to order a new trial when a jury's verdict is against the weight of the credible evidence. A jury verdict should not be set aside as being against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence (*White v New York City Transit Auth.*, 40 AD3d 297, 298 [1st Dept 2007]; *Gonzalez v City of New York*, 45 AD3d 347, 348 [1st Dept 2007], *lv denied* 10 NY3d 701[2008]; *Jorgensen v New York Foundation for Sr. Citizen Guardian Servs., Inc.*, 61 AD3d 612 [1st Dept 2009], *lv denied* 13 NY3d 703). Further, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Sweeney v Bruckner Plaza Assocs.*, 57 AD3d 347, 349 [1st Dept 2008], quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Finally, the Court

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[3] In their reply papers, defendants reiterate the arguments made in their motion. For the sake of judicial economy, the Court will not repeat them.

accords "great deference" to a jury's determinations regarding the credibility of witnesses (*White* at 298, citing *Nicastro v Park*, 113 AD2d 129, 136 [1985]; *Taylor v Lehr Const. Corp.*, 57 AD3d 214, 215 [1st Dept 2008]).

It is well settled that to establish a *prima facie* case of "negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop caused a jerk or lurch that was 'unusual and violent'"(*Urquhart v New York City Transit Auth.*, 85 NY2d 828, 830 [1995] [citation omitted]; *Cuadrado v New York City Transit Auth.*, 65 AD3d 434, 434-435 [1st Dept 2009]). "Proof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the plaintiff" (*Urquhart* at 830). The Court in *Urquhart* held:

> Plaintiff's proof here was sufficient to satisfy that requirement. *He testified that the swiftly moving bus stopped so suddenly and violently as to propel his body down its entire length, causing injuries to his shoulder, elbow, and knee. Such testimony provided more than a mere characterization of the stop. It also provided objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent*, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant.
> (*Id.*) (Emphasis added)

In *Fonseca v Manhattan & Bronx Surface Transit Operating Authority* (14 AD3d 397 [1st Dept 2005]), the plaintiff, an 81-year-old man, was injured when the bus he had just boarded "stopped hard," causing him and other passengers to fall. The First Department found that the plaintiff's testimony did not merely characterize the bus's stop as sudden or violent:

> "It also provided objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent . . . different . . . than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant." Hence it raised questions of fact that should be determined in the light of surrounding circumstances, such as whether defendants were negligent in the operation of the bus and whether such negligence caused plaintiff's injuries.
> (*Id.* at 398, quoting *Urquhart* at 830) (citations omitted)

The First Department held that it was error for the trial court to grant the defendants's motion for summary judgment and to find that the defendants were not negligent as a matter of law.

Similarly, in *Grant v New York City Transit Authority* (61 AD3d 422 [1st Dept 2009]), the plaintiff was injured while standing on a bus that came to a sudden stop. The First Department concluded:

> Plaintiff . . . testified that buildings within his view seemed to be "moving" by very quickly as the bus engine made a high-pitched sound. Plaintiff estimated the bus's speed to be at least 35 to 40 miles per hour immediately before deceleration. Plaintiff added that when the bus stopped, he was launched into the air even though he was holding the overhead grip. It was also plaintiff's testimony that the bus's sudden stop caused another standee to fall to his knee. *Such testimony constitutes "objective evidence* that the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant."
> (*Id.* at 422-423) (citations omitted) (emphasis added)

Relying on such evidence and the caselaw in *Urquhart* and *Fonseca*, the First Department in *Grant* held that an issue of fact was raised as to NYCTA's negligence, and that it was error to grant the defendants' motion for summary judgment.

Here, contrary to defendants' arguments, plaintiff provided objective evidence of the force of the bus' stop sufficient to establish an inference by the jury that the stop was unusual and violent (*Urquhart* at 830). According to the trial transcript ("Trans."), plaintiff testified that after picking her up and pulling from the bus stop, the bus was "going a little faster than normal" (Trans., p. 34). Plaintiff further testified that she was looking out the front window of the bus as it traveled on Frankfort Street toward the intersection with Pearl Street and saw that the traffic light was red (*id.*). Contrary to Ms. Johnson's testimony, plaintiff did not observe any person within the intersection directing traffic (*id.*). As the bus approached the intersection, it made an "abrupt, violent, sudden stop" (*id.* at 35). Plaintiff further described the bus as moving "from

side to side" after it stopped (*id.*). Plaintiff went on to testify that despite the fact that she was holding on to a pole with "both hands," she was "pulled from the pole" and "flung to the floor," landing in the front stairwell of the bus (*id.*). Contrary to plaintiff's argument that "no one else on the bus who was sitting in a seat came out of their seat or was injured in any way when the bus came to a stop," Ms. Kinsey, who was also holding onto a pole, testified that she, too, was thrown to the floor of the bus when it stopped (*id.* at 118).[4] Finally, Ms. Johnson testified that when she applied the brakes, the bus stopped immediately and that she did not have time to warn anybody of having to stop the bus (*id.* at 174-175). Ms. Johnson also testified that she applied "medium" pressure to the brakes, which caused the bus to stop a lot quicker than "a tap" (*id.* at 204). She also testified that as soon as she hit the brakes, plaintiff "immediately flew to the stairs" (*id.*). Therefore, the testimony of plaintiff, Ms. Kinsey and Ms. Johnson was sufficient to establish an inference by the jury that the bus' stop was extraordinary and violent.

Further, the Court does not find the jury's verdict to be against the weight of the credible evidence. Although defendants argue that they provided "credible proof" to explain the alleged sudden stop and to establish that Ms. Johnson was not negligent, the fact remains that the jury found plaintiff's proof of Ms. Johnson's negligence to be more credible (*Taylor* at 215 ["Issues of credibility are for the jury and its resolution of such issues is entitled to deference"]). Plaintiff and defendants provided conflicting testimony as to the presence of a traffic agent at the intersection of Pearl and Frankfort, a fact defendants acknowledged in their moving papers: "*Depending on whose testimony is accurate*, the bus driver was either stopping at a red light or starting to move the bus forward after being stopped at a red light" (motion, p. 15) (emphasis

[4]The Court notes that Ms. Johnson disputes that Ms. Kinsey fell (Trans. at 174).

added). Ms. Johnson testified that she stopped the bus suddenly only when directed to do so by a traffic agent, with a green light facing her, and then only after having brought the bus to a gradual stop at the intersection (Trans. at 68, 72-73). Plaintiff testified that the bus made a sudden and violent stop at a red traffic light at the intersection, and that no traffic agents were directing traffic at that intersection (*id.* at 34, 37-38, 52, 59-60). Mr. Rockwell, the MABSTOA employee who responded to the accident, testified that he learned that *no* traffic agents were at the intersection of Pearl and Frankfort: "I don't recall if it was over the radio or [Superintendent] Ruben told me that somebody checked out the scene. What I recall learning was no agent was seen over there, something along those lines" (*id.* at 110). Finally, Officer Clark only testified that agents *were supposed to be* at the intersection – not that agents actually were at the intersection on the date of the accident (*id.* at 142, 146). In such cases involving conflicting testimony, the Court must defer to the jury's determinations of the witnesses' credibility (*Taylor* at 215; *White* at 298).

As the evidence presented to the jury "is such that it would not be utterly irrational for a jury to reach the result it has determined upon" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]), the Court cannot conclude as a matter of law that the jury's verdict was not supported by the weight of the evidence (*Soto v New York City Transit Authority*, 6 NY3d 487, 492 [2006]); *Stephenson v Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 14 AD3d 325, 331 [1st Dept 2005]). Given the absence of any indication that justice has not been done (*Nicastro* at 132), this Court declines to disturb the jury's verdict in plaintiff's favor.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and Metropolitan Transportation Authority for an order, pursuant to CPLR §4404(a), to set aside the trial verdict in favor of plaintiff Eleanor Weiss, by her guardian, Self-Help Community Guardian Program, and direct a verdict in defendants' favor is denied; and it is further

ORDERED that the parties shall appear in Part 40 for trial on damages on February 1, 2010, 10:00 a.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: December 1, 2009

Hon. Carol R. Edmead, J.S.C.