

Noghrey v Town of Brookhaven

2010 NY Slip Op 30394(U)

February 11, 2010

Supreme Court, Suffolk County

Docket Number: 01-18557

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

Motion Dates: 01/08/10; 01/15/10
Submit Date: 01/15/10
Mot. Seq 005: MD
Mot. Seq 006: MD

-----X		
PARVIZ NOGHREY,	:	GLEICH, SIEGEL & FARKAS,
	:	ESQS.
	:	Attys. For Plaintiff
Plaintiff,	:	36 So. Station Plaza
	:	Great Neck, NY 11021
-against-	:	
	:	SNITOW, KANFER, HOLTZER
THE TOWN OF BROOKHAVEN and THE	:	Attys. For Defendants
PLANNING BOARD OF THE TOWN OF	:	575 Lexington Ave.
BROOKHAVEN,	:	New York, NY 10022
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 13 read on these separate motions by the defendants and the plaintiff for orders setting aside the jury verdict; Notices of motion and Supporting papers 1-3; 4-5; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-7; 8-9; Replying Affidavits and supporting papers 10-11; 12-13; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#005) by the defendants for an order setting aside the jury verdict rendered in this action on December 2, 2009 is considered under CPLR 4404 and is denied; and it is further

ORDERED that the separate motion (#006) by the plaintiff for an order setting aside the jury verdict as to damages is considered under CPLR 4404 and is also denied.

The instant motions arise out of the re-trial of the plaintiff's partial regulatory taking claims which was directed by the decision of the Supreme Court, Appellate Division Second Department on February 13, 2008 (*see Noghrey v Town of Brookhaven*, 48 AD3d 529, 852 NYS2d 220 [2d Dept 2008]). The 1989 rezoning of the plaintiff's two separate parcels of real property from J-2 Business to B-1 Residence is at the center of the plaintiff's regulatory taking claims.

The re-trial began on November 16, 2009 and ended on December 2, 2009. The claims to be determined by the jury were limited to whether the defendants' actions effected a partial regulatory taking of the plaintiffs properties "under federal law pursuant to the balancing of factors best articulated in *Penn Cent. Transp. Co. v City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631" (*Noghrey v Town of Brookhaven*, 48 AD3d at 531, *supra*). During the course of the re-trial, the jurors were afforded the opportunity to take notes, a task which most undertook to perform (*see* 22 NYCRR § 220.10 [c]). After being charged by this court on the law, the jury was given a written copy the court's charge for review during the deliberation process (*see* 22 NYCRR § 220.11 [b]).

The jury returned a verdict in favor of the plaintiff, finding, with respect to each of his two parcels that, upon consideration of the economic impact of the rezoning and/or interference with plaintiff's distinct and reasonable investment backed expectations and/or the character of the government action that the rezoning constituted a regulatory taking. The jury also found, with respect to both parcels, that the rezoning was a substantial factor in causing the regulatory taking. The jury went to award damages with respect to the Diamond Plaza parcel in the amount of \$842,000.00 and with respect to the Liberty Plaza parcel, damages in the amount of \$360,000.00

By the instant motions (#005 & #006), the parties separately move for an order setting aside the jury verdict. Though both are interposed pursuant to CPLR 4404, the motions are predicated upon separate and distinct claims with respect to the propriety of the verdict. The court shall thus address the motions, and the claims underlying, them separately.

DEFENDANTS' MOTION (#005):

By notice of motion dated December 16, 2009, the defendants move for an Order (i) nullifying and vacating the jury verdict in this matter rendered on December 2, 2009 and granting defendants judgment as a matter of law pursuant to CPLR 4404; and (ii) for such other relief as the Court deems just and proper. In his supporting affidavit, plaintiff's counsel enlarges his demands for relief so as to include a claim that the verdict is against the weight of the evidence.

In support of their claims that the verdict should be nullified and judgment granted to the defendants as a matter of law, the defendants assert that the plaintiff failed to satisfy the "bare residue standard" and that the failure to do so rendered the verdict incorrect as a matter of law

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because satisfaction of the “bare residue standard” is a predicate or condition precedent to proceeding with the balancing test enunciated in the Penn Central case (*see Penn Cent. Transp. Co. v City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631[1978]). In support of their alternative claims that the verdict was against the weight of the evidence, the defendants contend that the plaintiff failed to adduce evidence sufficient to sustain the jury’s finding of a regulatory taking, as charged by the court, under Penn Central balancing test.

PLAINTIFF’S MOTION (#006):

By notice of motion dated December 16, 2009, the plaintiff separately moved for an order pursuant to CPLR 4404 for “Judgment NOV, setting aside the verdict on damages and directing that judgment be entered in the amount of \$3,572,000.00 or in an amount determined by the court”. Alternatively, the plaintiff moves for order “reinstating” the damages awarded by the jury in the prior trial in the amount of \$1,647,000.00.

In support of his motion, the plaintiff argues that the jury’s award of damages in the amount of \$842,000.00 with respect to the Diamond Plaza parcel and \$360,000.00 with respect to the Liberty Plaza parcel was incorrect and that the court should direct an award of damages in the total amount of \$3,572,000.00. This amount equals the amount of plaintiff’s losses as measured by the expert appraiser he retained who testified at the trial. The plaintiff alternatively claims that the \$1,647,000.00 damage award rendered by the jury in the first trial should stand since the Appellate Division’s decision of February 13, 2008, which directed a remittal of the plaintiff’s regulatory taking claims to this court for a new trial, did not disturb the jury’s award of damages.

CPLR 4404:

It is well established that on motion to set aside a jury verdict on the ground that, as a matter of law, said verdict is not supported by legally sufficient evidence, the proponent of such a motion must demonstrate that there is no valid line of reasoning and permissible inferences which would lead rational persons to the conclusions reached by the jury (*see* CPLR 4404; *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 410 NYS2d 282 [1978]; *Segal v City of New York*, 66 AD3d 865, 887 NYS2d 624 [2d Dept 2009]; *Hamilton v Rouse*, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]). *Patrella v Atlantic Chiropractic Group*, 41 AD3d 806, 839 NYS2d 177 [2d Dept 2007]. “In considering such a motion, ‘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’” (*Hamilton v Rouse*, 46 AD3d at 516, *supra*; *citing Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252 [1997]).

CPLR 4404 provides an alternate ground for setting aside a jury verdict, namely, that the verdict was contrary to or against the weight of the evidence adduced at the trial (*see Lolik v Big V*

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Supermarkets, 86 NY2d 744, 631 NYS2d 122 [1995]; *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 [2d Dept 1985]). Nevertheless, it is well settled that a jury verdict should not be set aside as against the weight of the evidence unless the verdict could not have been reached on any fair interpretation of the evidence (see *McGovern v Iqbal*, 63 AD3d 803, 880 NYS2d 508 [2d Dept 2009]). Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to a presumption that the jury adopted that view (see *Barnett v Schwartz*, 47 AD3d 997, 848 NYS2d 663 [2d Dept 2007]; *Favier v Winick*, 212 AD2d 755, 624 NYS2d 854 [2d Dept 1995]).

Whether a jury verdict should be set aside as contrary to the evidence does not involve a question of law but rather, a discretionary balancing of many factors (see *Davison v New York Tr. Auth.*, 63 AD3d 871, 881 NYS2d 892 [2d Dept 2009]). The test in determining such application is simply whether the trial evidence so preponderated in favor of the plaintiff that the verdict could not have been reached on any fair interpretation of such evidence (see *Lolik v Big V Supermarkets, Inc.*, 86 NYS2d 744, *supra*; *Said v 109 Indus., Co. LLC*, ___AD3d ___, 2010 WL 187482 [2d Dept 2010]; *Kihl v Pfeffer*, 47 AD3d 154, 848 NYS2d 200 [2d Dept 2007]). Great deference is to be accorded to the fact finding function of the jury as it, alone, has responsibility for resolving questions of credibility and the weight that is given to the trial evidence (see *Goldberg v Sottile & Megna, MD, PC*, 54 AD3d 359, 863 NYS2d 70 [2d Dept 2008]; *Ahr v Karolewski*, 48 AD3d 719, 853 NYS2d 2172 [2d Dept 2008]; *Casimir v Bar-Zvi*, 36 AD3d 578, 828 NYS2d 175 [2d Dept 2007]).

“While it is within a trial court’s discretion to set aside a verdict as contrary to the weight of the evidence, a court must do so cautiously, ‘for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict’” (*Healy v Carmel Bowl, Inc.*, 65 AD3d 665, 884 NYS2d 473 [2d Dept 2009], *citing Nicastro v Park*, 113 AD2d at 133, 495 NYS2d 184 [2d Dept 1985]). A contention that a jury verdict is inconsistent and irreconcilable must be reviewed in the context of the court’s charge and where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (see *Casella v City of New York*, ___AD3d ___, 2010 WL 28505 [2d Dept 2010]).

Upon application of the foregoing principles to the defendants’ application, the court finds that they are not entitled to an order setting aside the jury verdict as a matter of law or as contrary to the weight of the evidence.

Here, each party’s appraisal expert was exhaustively cross-examined over a period of days. Every comparable sale relied upon by each party was examined in detail. Many of the jurors took ample notes throughout the trial. The charge to the jury, in keeping with PJI 1:90, explained:

You may reject an expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject the opinion if, after careful consideration of all the evidence in

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the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Moreover, aside from the extensive attack on the valuation opinions of each expert, defendants repeatedly challenged the contracts of sale for each parcel, as either too close in time to the proposed rezoning or "subject to" the zoning classification, casting doubt upon the viability of each contract as a basis for valuation. Additionally, significant testimony was offered as to the effects of the stock market crash in 1987 and the stagnation of the real estate market thereafter and prior to the rezoning. Finally, the purchase prices for the parcels and date of purchase were known to the jury

Mistakenly and simplistically, the motions before the court present the valuation evidence of each expert as merely a matter of placing values in boxes or upon a chart, as if the valuation evidence was uncontested. The valuation reports were not before the jury and, as noted, the testimony was not submitted to the jury as an elementary matter of accepting one valuation to the exclusion of the other.

As noted above, the jury was provided with a detailed, written charge, during their deliberations, that explained their role in deciding a federal regulatory taking claim pursuant to 42 USC §1983, and, in particular, the required balancing test enunciated in the Penn Central case. The charge repeatedly explained the primary significance of "the magnitude of the regulation's economic impact and the degree to which it interferes with legitimate property interests."

With respect to the first factor; that is, the economic impact of the regulation, Mr. Noghrey claims that the values of his properties were rendered practically valueless as a result of the rezoning. Mere diminution of the value of property, however serious, is insufficient to demonstrate a taking. A land use restriction is not rendered unconstitutional merely because it causes the property's value to be substantially reduced. You may consider the values of the properties immediately before and immediately after the rezoning.

Mr. Noghrey must prove by a preponderance of the evidence that the rezoning resulted in a reduction in value which was one step short of complete or left just a bare residue of value.

You may, in determining values after rezoning, consider evidence as to whether there were any willing buyers for the property. You may also consider whether or not the properties were suitable for the uses under the B-1 Residential zoning. You may also consider any other factors that you deem relevant from the evidence presented to you during this trial.

* * *

Now, put another way, you are to apply these three factors to determine whether or not they point to the conclusion that the change in zoning impacted Plaintiff's property or properties so much that it is equivalent to the government having taken away his properties from him.

There is little doubt that the "charge as a whole conveyed the correct legal principles" (*Manna v Dan Diego*, 261 AD2d 590, 591, 690 NYS2d 683 [2d Dept 1999]). As noted above, a jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*see Lolik v Big V Supermarkets, Inc.*, 86 NYS2d 744, *supra*). Where, as here, the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (*see Rubin v Pecoraro*, 141 AD2d 525, 526, 529 NYS2d 142 [2d Dept 1988]). Moreover, the record fails to establish the existence of substantial juror confusion, occasioned by the court's charge, that would warrant a new trial (*see Mattei v Figueroa*, 262 AD2d 459, 692 NYS2d 119 [2d Dept 1999]).

Additionally, the court rejects that branch of the motion seeking to set aside the verdict, as a matter of law, as not being supported by legally sufficient evidence. The court finds, based upon the record, that there is a valid line of reasoning and permissible inferences which would lead rational persons to the conclusions reached by the jury, particularly since the facts must be considered in a light most favorable to the plaintiff. The evidence supports the jury's conclusion that the rezoning values of the parcels were near the damage award found for each parcel and the jury found, in keeping with the charge, that the rezoning caused a total or near total loss, leaving just a bare residue of value. The jury was provided with a verdict sheet that made clear that before they address the issue of damages, the jury had to find that the plaintiff proved the necessary elements of the Penn Central test, including the economic impact of the rezoning, before concluding that the rezoning of plaintiff's property constituted a regulatory taking. In light of the charge, the court cannot set aside the verdict as a matter of law.

Moreover, defendants' application fails to grasp the distinction between general and special verdicts as set forth pursuant to CPLR 4111. It is within the sound discretion of the court whether to ask the jury for a general or special verdict (*see Johnson v Artkraft Strauss Sign Corp.*, 45 AD2d 482, 359 NYS2d 773 [1st Dept 1974]; *Oakes v Muka*, ___ AD3d ___, 2010 WL 184157 [3d Dept 2010]). As explained in *Matter of Natl. Equip. Corp. v Ruiz*, 19 AD3d 5, 794 NYS2d 2 (1st Dept 2005):

If a party is entitled to a jury and the court is asking the jury for a general verdict, CPLR 4111(a) applies rather than CPLR 4111(b). The better practice in today's varied and complex world of civil

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litigation is for the court to ask the jury for a general verdict but submit specific questions consistent with CPLR 4111(c), to enable it to render a general verdict that comports with the charge given. This practice does not convert the verdict to a special verdict wherein the jury decides only specific questions of fact prior to a judge rendering a verdict for either party (citations omitted).

In the instant case, the court submitted to the jury a general verdict in keeping with CPLR 4111(c), setting forth the Penn Central test and the issue of substantial factor, the necessary elements of a Section 1983 claim. Defendants sought to improperly convert the verdict sheet into a special verdict with damage questions delineating prezoning and post-zoning values. Here, the jury was called upon to render a general verdict and not to decide only specific questions of fact prior to a judge rendering a verdict. Affording plaintiff every inference which may properly be drawn from the facts presented, the general verdict can not be set aside as a matter of law.

Plaintiff's application is similarly denied. As for that branch of the motion which seeks an order "reinstating" the damages awarded by the jury in the prior trial in the amount of \$1,647,000.00, the decision of the Appellate Division clearly directed "a new trial on the plaintiff's partial regulatory taking claims asserted pursuant to 42 USC § 1983" (48 AD3d at 532, *supra*). As such, "[t]he parties are left in the same position as though there had been no trial" (*ATIFA v Shairzad*, 56 AD2d 703, 870 NYS2d 38 [2d Dept 2008]).

The court also denies that branch of the motion seeking a "Judgment NOV, setting aside the verdict on damages and directing that judgment be entered in the amount of \$3,572,000.00 or in an amount determined by the court," for the same reasons set forth above with regard to defendants' application. The court will not intrude into the credibility and weight of the evidence determinations made by the jury in arriving at its verdict.

Therefore, the motion and cross-motion are denied. This constitutes the decision and order of the court.

Dated

2/11/16



THOMAS F. WHELAN, J.S.C.