

Galerie Rienzo LTD. v Lobacz
2010 NY Slip Op 30579(U)
March 9, 2010
Supreme Court, New York County
Docket Number: 111701/06
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

GALERIE RIENZO LTD.,
Plaintiff,
-v-
FRANK M. LOBACZ, M.D.,
Defendant.

INDEX No. 111701/06
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion to set aside verdict.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1</u>
Answering Affidavits- Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>
CROSS-MOTION: _____ YES <input checked="" type="checkbox"/> NO	

Upon the foregoing papers, it is ordered:

SEE ATTACHED DECISION

Dated: 3/9/10

FILED
MAR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE
Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 58

-----x

GALERIE RIENZO LTD.,

Plaintiff,

-against-

INDEX 111701/2006

DECISION

FRANK M. LOBACZ, M.D.

Defendant.

-----x

DONNA M. MILLS, J.S.C.

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The defendant has requested an order pursuant to CPLR § 4404 seeking a judgment in his favor as a matter of law, or in the alternative, a new trial because the verdict was contrary to the weight of the evidence, or a new trial based on juror misconduct. For the following reasons these requests must be denied.

The defendant Frank Lobacz, M.D. claims he paid \$80,000 for the plaintiff, Galerie Rienzo to sell a painting named "Lauriers Rose" to him: \$40,000 in checks and 100 ounces of gold. The defendant also claims he paid \$72,000 in cash and 250 gold coins as collateral for the painting "Le Thomer." Dr. Lobacz claims he did not obtain receipts for any of these transactions. His explanation for the lack of documentation is the history of transactions with the plaintiff where lack of receipts (in the "traditional sense of the word") is normal. It is undisputed that the

defendant had purchased other paintings from the plaintiff and the two had a long history of cash transactions. At trial, the defendant offered evidence of the value of his gold coins with appraisals from Whitman Coin and Jewelry, Inc., his own testimony and testimony from his office manager to prove delivery of cash and coins to the plaintiff as payment for the paintings.

Galerie Rienzo LTD. claims that while the defendant did pay \$40,000 in checks for the "Lauriers Rose" painting, Dr. Lobacz did not pay the remaining \$40,000 he owed and never paid any money for the "Le Thomer" painting. At trial, the plaintiff relied on copies of demand letters sent to the defendant requesting payment for both paintings, the plaintiff's testimony and the cross-examination of the defendant and the defendant's witness.

A judgment as a matter of law can be ordered "[i]f there is simply no valid line of reasoning that could possibly lead rational men or women to the conclusion reached by the jury on the basis of the evidence presented at trial. The evidence has to be sufficient to raise a question of fact for the jury." *Dominiguez v Manhattan and Bronx Surface Transit Operating Authority*, 47 N.Y.2d 528 (1979). "The court must determine whether any rational basis exists for the conclusion reached by the jury [...] The test is not whether the jury erred in weighing the evidence presented, but whether any viable evidence exists to support the verdict." *Diversified Fuel Carriers Corp. v Coastal Oil NY, Inc.*, 280 A.D.2d 448 (2nd Dept. 2001); *Cohen v Hallmark Cards*, 45 N.Y.2d 493 (N.Y. 1978).

In this case, the plaintiff sufficiently raised a question of fact for the jury to decide. It is the jury's duty as fact-finder to assess testimony for credibility. That the jury did not find the defendant's testimony or other evidence that Dr. Lobacz paid for the paintings credible is within

the jury's discretion. Neither the plaintiff's nor the defendant's theories rise to the level of irrationality that it would take for the jury's verdict to be overturned. There is a valid line of reasoning that could lead the jury to its conclusion that the plaintiff not only recover the paintings and return defendant's \$40,000, but also that no gold coins be returned to the defendant on the basis of the evidence presented at trial. Accordingly, the defendant's request for judgment as a matter of law is denied.

A verdict may not be set aside as against the weight of the evidence unless the preponderance of the evidence in the losing party's favor is so great that the verdict could not have been reached on any fair interpretation of the evidence. CPLR § 4404 (a) Whether a jury verdict should be set aside as contrary to the weight of the evidence "requires a discretionary balancing of many factors." *Ruscito v Early*, 253 A.D.2d 461 (2nd Dep't 1998). "[Judicial] discretion is at its broadest when it appears that the successful litigant's evidentiary position was particularly strong when compared to that of the victor." *Nicastro v Park* 113 A.D.2d 129 (2nd Dep't 1985). In this case, there was no evidentiary position that was particularly strong when compared to the other side. Both the plaintiff and the defendant pretended evidence to prove their cases and to rebut the other's position. It was not unfair for the jury to conclude that the defendant and his witness's testimony were incredible, just as it would not have been unfair for the jury to conclude, based on the evidence, that the plaintiff received payment for both paintings. Because there are valid interpretations of evidence that would result in rulings for either the plaintiff or the defendant, the jury's verdict will be given deference. Therefore, the motion to set aside the verdict as contrary to the weight of the evidence is denied.

It is settled that "the jury must reach its verdict solely on evidence received in open court,

not from outside sources.” *People v Arnold*, 96 N.Y.2d 358 (2001). Nevertheless, the question of whether the jury in this case had received information outside of court does not have to be reached. The defense argues that a new trial should be ordered because of alleged jury misconduct. Defense counsel states upon his “information and belief” that certain jurors have gained access to damaging facts about Dr. Lobacz via the internet. Counsel’s belief stems from his observation of jurors with open laptops after jury selection, the present of Dr. Lobacz’s court history on the internet (this history is marked as Exhibit G and is referred to as the “Google report”) and the jury foreperson’s prior occupation as an investigator. The defense also observed members of the jury with open laptops directly after jury selection. Defense counsel neither requested a limiting jury instruction nor objected to the lack of instructions regarding the internet’s use to investigate facts not in evidence. This is similar to *People v Liggan*, 62 A.D.3d 523 (1st Dep’t 2009) where the court denied defendant’s motion to set aside the verdict on jury misconduct grounds. In *Liggan*, the defense became aware of the presence of news articles that he believed would prove prejudicial to his client. The defendant rejected an additional jury instruction regarding outside information. “Since counsel was aware, during the trial, of a potential danger of exposure of jurors to this information, but declined a remedy that would have obviated the need for post-verdict proceedings or a new trial, the post-verdict disclosure was not a basis for setting aside the verdict.”

Defendant’s “information and belief” is not a statement of fact strong enough to overcome the deference the jury is owed in its fact-finding capacity. As stated in *People v Johnson*, 54 A.D.3d 636 (1st Dep’t 2008), “[t]he moving papers did not contain sworn allegations of all facts essential to the motion, and defendants were not entitled to a hearing based on

expressions of hope that might reveal the essential facts." Defense counsel did not seek to cure what he believed to be the potential for misconduct when observed them during trial. Thus, defense counsel cannot now, at this late date avail himself of a juror examination to counter a negative verdict. Consequently, the motion to set aside the verdict based on juror misconduct is denied.

Based on the foregoing, it is hereby

ORDERED that defendant's motion for a new trial or to set aside the verdict is denied.

Date 3/9/10



J.S.C

FILE
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