

Marceca v 4947 Assoc., L.P.

2010 NY Slip Op 30847(U)

April 7, 2010

Supreme Court, New York County

Docket Number: 105254/06

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

SYLVANA MARCECA,

Petitioner,

-v-

4947 ASSOCIATES, L.P. and WESTERN
MANAGEMENT CORP.,

Defendants.

INDEX No. 105254/06

MOTION DATE _____

MOTION SEQ. No. 003

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion to set aside verdict.

PAPERS NUMBERED

1

2

3

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 is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-7-10

Donna M. Mills
J.S.C.
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

SILVANA MARCECA,

Plaintiff,

-against-

INDEX 105254/2006

DECISION

4947 ASSOCIATES, L.P. and

WESTERN MANAGEMENT CORP.,

Defendants.

-----X

DONNA M. MILLS, J.S.C.

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

The plaintiff has requested an order pursuant to CPLR §4404 to set aside the verdict and grant her judgment on the issue of liability or in the alternative, to grant a new trial on the issue of liability. For the following reasons, these requests must be denied.

On May 3, 2004, Silvana Marceca was walking with her daughter-in-law, Claudia Marcea, at the Jewelry Exchange at 55 West 47th Street. The plaintiff claims that while walking with her daughter-in-law, near the back of the store she slipped and fell. Claudia Marceca did not see the plaintiff fall but saw her immediately after the fact. Both the plaintiff and her daughter-in-law claim that there were neither mats nor wet floor signs put

out by anyone. They further claim that it was a rainy day and they did not see anyone mopping the wet floor. Because of weather conditions, the workers' perceived lack of care, and the fact that the plaintiff became covered in water and mud after falling, Silvana and Claudia Marceca believe that the only reason for the fall was the wet floor. The plaintiff further states that after the fall she saw Michael Wassily on the staircase and spoke to him briefly about the accident although she did not specify where or how she fell. The plaintiff then initiated a claim against the owners of the Jewelry Exchange. The jury found that the defendant's premises were not reasonably safe and that the defendant's were negligent in not keeping the premises in a reasonably safe condition. However, the jury also found that the defendant's negligence was not a substantial factor in causing the plaintiff's accident. Plaintiff's counsel believes that a finding of negligence without proximate cause is inconsistent. Counsel also believes the verdict was based on jury speculation and guesswork; because all the evidence concerning the accident came from the plaintiff the jury must have disregarded it for that reason alone. It is the plaintiff's contention that the jury cannot reject the plaintiff's testimony where it was not contradicted by direct evidence or by legitimate inferences from the evidence.

The defendants own and operate the Jewelry Exchange at 55 West 47th Street. The defendants claim that the plaintiff's incredibility, established via impeachment during cross-examination is the reason for the jury's doubts about the plaintiff's veracity. The defendants point to several inconsistent and false statements that the plaintiff made during the trial. The defendants also believe the plaintiff's assertion (that negligence without proximate cause is inconsistent) is erroneous.

The plaintiff argues that the finding of negligence without proximate cause is

irreconcilably inconsistent. To support this claim the plaintiff discusses nine cases. The cases cited are misinterpreted and do not support the claim. For example, *Dedes v. Cambria*, 258 A.D.2d 495 (2nd Dep't 1999) is cited as an example of a case in which the jury's verdict of proximate cause without a finding of negligence was inconsistent. In this case, the plaintiff fell from a poorly maintained ladder. The plaintiff brought the action under the Scaffold Law. The jury found that the defendant violated the Scaffold Law but that the violation was not the proximate cause of the plaintiff's injuries. The defendant was not merely found negligent in "failing to provide a safe ladder" as the plaintiff contends. Once the jury found that the Labor Law had been violated, there was no evidence upon which they could conclude that the *violation of the Labor Law* was not the proximate cause of the plaintiff's injuries. While in *Dedes* it was the labor law that created inconsistency in finding negligence without proximate cause, the facts of this case create no such inconsistency.

The plaintiff also claims that the jury cannot reject plaintiff's testimony where it was not contradicted by direct evidence or by legitimate inferences from the evidence. The plaintiff quotes *Hull v Littauer* 162 N.Y. 569, and concludes that because the plaintiff's testimony and that of the plaintiff's other witnesses was neither contradicted by direct evidence nor by inferences made by evidence, that the jury must have incorrectly rejected plaintiff's testimony. The plaintiff's testimony at trial differed from her testimony in the May 21, 2007 and March 24, 2009 depositions, and sometimes varied from direct to cross-examination. This may be construed as contradictory direct evidence and rejected by the jury. *Hull v Littauer (id)* allows the jury to reject contradictory direct evidence and evidence that is also "in its nature surprising or suspicious." There can be no doubt that contradictory testimony, whether from the plaintiff or her witnesses, may be be

interpreted by the jury as suspicious in nature.

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(*see* CPLR § 4404 (a)). It was not unfair for the jury to conclude that the plaintiff and her witness's testimony were incredible, just as it would not have been unfair for the jury to conclude, based on the evidence that the defendant's negligent conduct was the proximate cause of the plaintiff's injuries. Because there are valid interpretations of evidence that could 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 is denied.

Based on the foregoing, it is hereby

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



DONNA M. MILLS, J.S.C.

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

HON. CAROL EDMEAD

PRESENT: _____
Justice

PART 35

VASQUEZ, CARLOS

INDEX NO. 106958/2008

- v -

MOTION DATE _____

MOTION SEQ. NO. 002

LAM, CHUN CHEUK

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

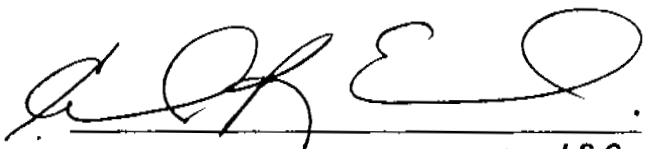
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion
is moot. Case settled in Mediation.

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

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 06 2010



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE