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

PRESENT: FRIEDMAN Justice PART 57

CHAPPOTIN, ANDRE P.

-v-

CITY OF NEW YORK, ET AL.

INDEX NO. 107593/04

MOTION DATE

MOTION SEQ. NO. 04

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits Memo of Law M1, M2	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined as per decision/order dated 7-9-10

FILED
JUL 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7-9-10

J.S.C.
MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

ANDRE P. CHAPPOTIN,

Plaintiff,

- against -

CITY OF NEW YORK and CONSOLIDATED EDISON COMPANIES,

Defendants.

Index No.: 107593/04

DECISION/ORDER

This personal injury action was tried before a jury which rendered a verdict for defendant Consolidated Edison Companies (Con Edison). Defendant conceded negligence. The jury found, in response to the first interrogatory on the verdict sheet, that defendant's negligence was not a substantial factor in causing plaintiff's injury. Plaintiff now moves to set aside the verdict.

As a threshold matter, the court holds that the verdict was not against the weight of the evidence. 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." (Lolik v Big v Supermarkets, Inc., 86 NY2d 744, 746 [1995] [internal quotation marks and citations omitted].) The determination of whether a jury verdict is against the weight of the evidence involves a "discretionary power"which "must be exercised with considerable caution." (Yalkut v City of New York, 162 AD2d 185, 188 [1st Dept 1990]; Nicastro v Park, 113 AD2d 129 [2d Dept 1985]. See also Piazza v Corporate Bldrs. Group, Inc., 73 AD3d 1006 [2d Dept 2010].)

Here, plaintiff testified that while riding a bicycle in the roadway, he hit a raised cover on

a gas valve that was owned and maintained by Con Edison, and was thrown from the bicycle, sustaining injuries. As noted above, Con Edison admitted that the gas cover was negligently maintained but contended that plaintiff's accident did not occur at the location of the gas valve cover, and that plaintiff fabricated his testimony about where the accident occurred. According to plaintiff, by the time emergency medical service (EMS) technicians arrived to assist him after the accident, he had made his way to the sidewalk. There were no witnesses to the accident.

Con Edison's defense to liability was to challenge plaintiff's credibility. In this regard, Con Edison pointed to asserted inconsistencies in plaintiff's trial testimony and testimony at a pre-trial "50-H hearing" about how the accident occurred, and emphasized omissions from the medical records – specifically, plaintiff's statement to EMS technicians that he fell off his bicycle, and his omission to state that he hit the gas valve cover before he fell. Defense counsel also commented extensively during summation on plaintiff's untruthfulness and the lack of credibility of his witnesses.

The jury was at liberty to disbelieve plaintiff's testimony about how or where his accident occurred, notwithstanding that his testimony was not otherwise contradicted. Under these circumstances involving an unwitnessed accident, the court cannot find that the verdict was against the weight of the evidence. However, the fact that the accident was unwitnessed highlights the critical extent to which the jury's verdict was based on its determination as to plaintiff's credibility. Indeed, defense counsel acknowledges, on this motion, that "[p]laintiff's case was entirely dependent on his credibility." (Aff. In Opp., ¶ 4.) The court accordingly turns to plaintiff's further claim that defense counsel's remarks during his summation, attacking plaintiff's credibility, were so inflammatory and prejudicial as to have deprived plaintiff of a fair trial.

A verdict will not be set aside based on a counsel's purportedly offensive comments unless the comments "so contaminated the proceedings as to deprive the plaintiff of a fair trial." (McArdle v Hurley, 51 AD3d 741, 743 [2d Dept 2008]; Brooks v Judlau Contr., Inc., 39 AD3d 447 [2d Dept 2007], revd on other grounds 11 NY3d 204 [2008]; Duran v Ardee Assocs., 290 AD2d 366, 367 [1st Dept 2002] [internal quotation marks and citation omitted].)

During his summation, defense counsel repeatedly challenged plaintiff's veracity. After briefly summarizing the evidence, he commented: "Now, this is a man who has played the system going on 15 years. He has been out on disability since 1995. . . . Here's someone who doesn't have a concern about getting medical care. He doesn't have a concern about working." (Trial Transcript [Tr.] at 533-534.) These comments were made over objections which were sustained. Plaintiff also made a request for a limiting instruction, in response to which the court directed defense counsel to refrain from any such further comments. (Tr. at 534.) The comments, however, continued, and included the following: "This is someone who understands how to make his way in the world. He has come here with a story about falling here." (Tr. at 534-535.) "I submit to you that the truth that you heard from Mr. Chappotin stopped by the time he was picked up on the corner of 112th Street and Third Avenue. And that everything from that time forward has been designed to create and advance a lawsuit. Money is a huge motivator. Now, Lord knows it's true, that he is looking for my money. And I don't want to give it. And you shouldn't want to give it when you really evaluate how this case has come to you." (Tr. at 538.) "This is a classic case. You have been lied to by the plaintiff. There is no nice way to say this. You have been lied to by the plaintiff and his goal is to obtain money." (Tr. at 539.)

These comments by defense counsel were highly improper. As the Appellate Division of this Department has noted, "wide latitude is allowed to counsel" in characterizing the veracity of

witnesses. "But there is some line to be drawn." (Caraballo v City of New York, 86 AD2d 580, 581 [1st Dept 1982].) Here, that line was crossed by defense counsel's suggestion that plaintiff's receipt of disability benefits was a means by which plaintiff has "played the system," his gratuitous references to plaintiff's lack of concern about working, and his further suggestion that plaintiff's claim in this action is another means by which plaintiff has played the system. (See McArdle v Hurley, 51 AD3d 741, 743 [2d Dept 2008] [verdict reversed based on inflammatory summation by defense counsel, which included comments that plaintiff had "maxed out" a public pension system as her husband had a disability pension, and that plaintiff's claims were "all designed for her to max out in the civil justice system."]; Rodriguez v City of New York, 67 AD3d 884, 885 [2d Dept 2009] [inflammatory comments included defense counsel's statement: "It's not a lottery. It's not a game. It's not 'here's the American dream, come over here, fall off a scaffold, get a million dollars.'"] See generally Vassura v Taylor, 117 AD2d 798 [2d Dept 1986], appeal dismissed 68 NY2d 643 [noting that '[r]eferences to the financial status of parties have been universally condemned by the courts of this State."].)

It is also well settled that it is improper for an attorney, during summation, to "vouch[] for his and his client's credibility." (Valenzuela v City of New York, 59 AD3d 40 [1st Dept 2008].) A lawyer also may not put his or her own credibility on the side of the client. (Sanchez v Manhattan & Bronx Surface Tr. Operating Auth., 170 AD2d 402, 405 [1st Dept 1991] [holding that counsel "placed her own credibility on the side of her client and made herself an unsworn witness" where she referred to client as "we" and "us," and referred to defendant's case as "my side of the story."].) Similarly, in the instant case, defense counsel improperly repeatedly identified himself with Con Edison. Thus, in arguing that the accident did not happen the way plaintiff said it did, counsel stated: "It did not involve me." (Tr. at 543.) In discussing damages,

counsel stated: "If somehow you find yourself considering a damage award for this plaintiff, that means that you have decided that I am the proximate cause." (Tr. at 544.) Counsel also insinuated his own view of plaintiff's claim into the case, charging, as noted above, that plaintiff "is looking for my money. And I don't want to give it." (Tr. at 538.)

Defense counsel improperly referred to plaintiff's expert's witnesses, his engineer and doctor, as interested witnesses (Tr. at 539), and remarked that plaintiff's doctor's testimony "is tailored for the lawsuit." (Tr. at 541.) He also expressed his personal view of the doctor's credibility, stating "I've never seen a professional person flee so much from the idea of the scientific method. . . ." (Tr. at 541.) Defense counsel thus improperly asserted a personal opinion as to the credibility of a witness. (See Valenzuela, 59 AD3d at 44; Rules of Professional Conduct [22 NYCRR 1200.26[d][3]] rule 3.4[a][d][3], at the time of trial Code of Professional Responsibility [22 NYCRR 1200.37] DR 7-106[C][4].)

"[A]n isolated improper remark [may] be deemed harmless in the face of overwhelming evidence" in the opposing party's favor. (Vassura, 117 AD2d at 800. See Calzado v New York City Tr. Auth., 304 AD2d 385 [1st Dept 2003].) However, this is not such a case, as defendant's defense was based on plaintiff's asserted lack of credibility. Moreover, defense counsel's entire summation was suffused with improper and highly prejudicial remarks. The references to plaintiff's "playing the system" and being on disability benefits can have had no purpose other than to prejudice the jury against plaintiff. The court accordingly finds that defense counsel's "conduct did not consist of an isolated remark . . . but a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined." (Clarke v New York City Tr. Auth., 174 AD2d 268, 278 [1st Dept 1992] [internal quotation marks and citation omitted].) This conduct cannot be dismissed as inadvertent or harmless. (Id.)

For the above reasons, the court holds that the verdict should be set aside. In view of this holding, the court does not reach plaintiff's further claim that the verdict should be set aside based on juror misconduct.[1]

It is accordingly hereby ORDERED that plaintiff's motion is granted to the extent of setting aside the verdict, and directing plaintiff to restore this action to the trial calendar. Plaintiff shall forthwith serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office.

This constitutes the decision and order of the court.

Dated: New York, New York
July 9, 2010

MARCY FRIEDMAN, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

[1]As reflected in a transcript of an appearance scheduled by the court after the verdict was reached, the court notified counsel that it had received information, after the verdict, indicating that two of the jurors heard a juror make a comment, prior to deliberations, to the effect that she had made up her mind from day one. Had this information been properly brought to the court's attention prior to deliberations, an investigation would have been warranted, and concerns about interference with the privacy of deliberations would not have been implicated. (See generally People v Rukaj, 123 AD2d 277 [1st Dept 1986].) Fortunately, it does not appear that the juror's statement caused prejudice. Plaintiff's counsel has apprised the court that he spoke with some of the jurors after the verdict and was told that at the beginning of the deliberations, the jurors voted 3 to 3 and there was "heated debate." (Post-Verdict Conference Transcript at 5.) The jury deliberated for two hours, a reasonable period of time given the short length of the trial.

The court also notes parenthetically that while the juror's statement involves a violation of the court's directive not to discuss the case prior to deliberations, a verdict may be impeached by jurors' post-verdict affidavits or testimony only on the basis of serious misconduct such as outside influences on the jury (see People v DeLucia, 20 NY2d 275 [1967]; People v Redd, 164 AD2d 34, 36 [1st Dept 1990]); disqualifying bias based on an invidious classification such as race (People v Rukaj, 123 AD2d 277, supra; People v Leonti, 262 NY 256 [1933]); or prejudice against a particular party or predetermination of a specific issue. (See e.g. People v Rivera, 304 AD2d 841, 842 [2d Dept 2003]; Narvaez v Piccone, 16 AD3d 641 [2d Dept 2005]; French v Schiavo, 300 AD2d 119 [1st Dept 2002].) In view of the above disposition, the court makes no determination as to whether the juror's statement meets this high standard for setting aside a verdict.