

Charleston v City of New York

2010 NY Slip Op 32817(U)

October 7, 2010

Sup Ct, NY County

Docket Number: 105513/04

Judge: Barbara Jaffe

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

BARBARA JAFFE

PRESENT: _____ J.S.C. Justice

PART 5

Charleston, ERIC

INDEX NO. 105513/04

MOTION DATE _____

- v -

CITY OF N.Y., ET AL

MOTION SEQ. NO. 003

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

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

FILED
OCT 12 2010
NEW YORK COUNTY CLERK'S OFFICE
DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 10-7-10
OCT 07 2010

[Signature]
BARBARA JAFFE J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

ERIC CHARLESTON,

Plaintiff,

-against-

CITY OF NEW YORK, *et al.*,

Defendants.

Index No. 105513/04

Subm.: 8/24/10

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated August 23, 2010, defendant Sutton Place Restaurant & Bar, Inc. (defendant) moves pursuant to CPLR 4404(a) for an order setting aside the jury verdict rendered in plaintiff's favor on the grounds that it is unsupported by the testimony and against the weight of the evidence, and granting a stay of enforcement of the judgment pending resolution of this motion. By notice of motion dated August 23, 2010, plaintiff moves pursuant to CPLR 4404(a) for an order setting aside the verdict to the extent he was found 60 percent comparatively negligent.

I. EVIDENCE AT TRIAL

In August 2003, plaintiff dislocated his left shoulder while diving to catch a softball and was conservatively treated for it. On November 16, 2003, while at defendant bar and upon

observing the bar's security personnel remove his friend from the premises by dragging him outside, placing him in a headlock, wrestling him to the ground, and choking and kneeling him, plaintiff attempted to intervene by yelling at the bouncers, from five to eight feet away, to stop. Upon being told to back away, plaintiff stood his ground and shouted that if they did not release the headlock, he would call the police. A bouncer told him not to call the police and plaintiff replied that he would call the police unless the headlock were released. A bouncer then grabbed plaintiff by the throat and punched him in the jaw, slammed him to the ground, and kned his left shoulder. A large group of patrons were outside. As a result, plaintiff's August injury was aggravated and he required two shoulder surgeries.

On June 25, 2010, a jury awarded him \$110,000 for past pain and suffering and found him 60 percent comparatively negligent.

II. CONTENTIONS

Defendant claims that the verdict must be set aside in the absence of evidence demonstrating a causal connection between his injury and the assault at the bar, and that such a finding depends on whether there was proof, within a reasonable degree of medical certainty, that the first surgery he underwent was necessitated by the assault at the bar. (Affirmation of Mark A. Taustine, Esq., dated Aug. 24, 2010).

In opposition, plaintiff argues that he adequately proved that the assault was a substantial factor in causing his injury, and moves to set aside the comparative negligence finding on the ground that it is against the weight of the evidence, claiming that no valid line of reasoning or permissible inference could have led a rational jury to conclude that he was comparatively negligent. (Affirmation of Bruce Povman, Esq., dated Aug. 23, 2010).

III. ANALYSIS

Pursuant to section 4404(a) of the CPLR:

After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and . . . order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . .

A. Defendant's motion

Having testified at the outset that all of his opinions were based on a reasonable degree of medical certainty, Dr. Jonathan Glashow's testimony, along with the other evidence in the case, constituted a sufficient basis upon which to find that the injury sustained by plaintiff was caused by the assault on him by bar security personnel. (*See Matott v Ward*, 48 NY2d 455 [1979]).

B. Plaintiff's motion

It is not only "well settled that instruction on the question of comparative negligence should be given to the jury where there is any valid line of reasoning or permissible inferences which could possibly lead rational individuals to the conclusion of negligence on the basis of the evidence presented at trial," but a plaintiff's comparative negligence "is almost invariably a question of fact and is for the jury to determine in all but the clearest cases" (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 516-517 [1980]; *MacDowall v Koehring Basis Constr. Equip.*, 49 NY2d 824, 827 [1980]; *DiCicco v Cattani*, 59 AD3d 660 [2d Dept 2009]; *Hazel v Nika*, 40 AD3d 430, 431 [1st Dept 2007]; *Shea v New York City Tr. Auth.*, 289 AD2d 558, 559 [2d Dept 2001]; *Permy v City of New York*, 156 AD2d 174 [1st Dept 1989]; *Williams v City of New York*, 101 AD2d 835 [2d Dept 1984]). What is required is a comparison of "conduct which, for whatever reason, the law deems blameworthy, in order to fix the relationship of each party's

conduct to the injury sustained and the damages to be paid by the one and received by the other as recompense for that injury” (*Arbegast v Bd. of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 168 [1985]).

In *Pisciotta v Perisi*, 155 AD2d 422 (2d Dept 1989), the plaintiff approached and attempted to pet a chained, barking dog while the son of the dog’s owner engaged in a loud altercation nearby, circumstances which, the court held, provided a rational basis for concluding that the plaintiff was negligent and that her negligence may have contributed to the injuries she sustained when the dog bit her. The court thus held that the trial court erred in failing to instruct the jury as to comparative negligence.

If attempting to pet a barking dog under the circumstances presented in *Pisciotta* warrants a finding that the plaintiff was comparatively negligent, then failing to heed the request of a bouncer who, with other bouncers on a crowded late night sidewalk in front of a bar, is in the midst of attempting to evict and disable an unruly patron provides a rational basis for the jury’s conclusion that plaintiff was negligent and that his negligence contributed to the injury he sustained. That plaintiff intended only to assist his friend whom he perceived to be in danger of physical injury is unavailing, having placed himself in “an area of danger which should have been obvious to a reasonably prudent observer.” (*Delemos v White*, 173 AD2d 353, 355 [1st Dept 1991]). While reasonable minds may differ as to the relative percentages of fault here, the jury’s determination is not so irrational as to require the relief sought by plaintiff.

IV. CONCLUSION

Accordingly, it is hereby

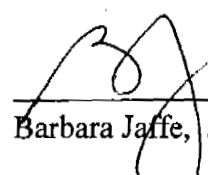
ORDERED, that the motion of defendant Sutton Place Restaurant & Bar, Inc. is denied;

and it is further

ORDERED, that the motion of plaintiff Eric Charleston is denied.

This constitutes the decision and order in this matter.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: October 7, 2010
New York, New York

OCT 07 2010

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE