

Foldes v Dane

2011 NY Slip Op 33745(U)

February 25, 2011

Sup Ct, Queens County

Docket Number: 2936/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

ELVIRA A. FOLDES,

Plaintiff,

-against-

EDMUND M. DANE, ESQ., et al.,
Defendants.

Index No. 2936/08

Motion
Date November 16, 2010

Motion
Cal. No. 6

Motion
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Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant, Philip S. Milone, Esq. moves for an order pursuant to CPLR 4404(a) setting aside the verdict of the jury and directing that judgment be entered in favor of the defendant, Philip S. Milone, dismissing plaintiff's complaint, or in the alternative, for an order pursuant to CPLR 4404(a) setting aside the verdict of the jury as contrary to the weight of the evidence and ordering a new trial on the issue of liability. Defendant argues that the verdict should be set aside based upon the jury's finding that the negligence of defendant was a substantial factor in causing plaintiff's damages. Defendant's motion is denied for the following reasons:

I. PROCEDURAL HISTORY

Plaintiff commenced this action seeking to recover money damages allegedly suffered by the plaintiff as a result of the defendant's alleged commission of legal malpractice in his representation of plaintiff. This Court presided over a jury trial on this case that was conducted from September 15, 2010

through September 22, 2010 as a unified trial. On September 22, 2010, the jury rendered a verdict in favor of plaintiff. At the conclusion of the trial, the Court granted defendant's application to submit the instant motion within thirty (30) days of the jury's verdict.

II. DISCUSSION

The question of whether a jury verdict should be set aside as against the weight of the evidence pursuant to CPLR 4404(a) is essentially a discretionary and factual one (*Nicestro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]). Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (see, *Higbie Constr., Ltd. v. IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]). Plaintiff seeks to set aside the verdict as against the weight of the evidence pursuant to CPLR 4404. To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v. Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed with considerable caution, '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'" (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v. Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v. Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (*Siegel*, New York Practice § 406, at 687 [4th ed]).

On a motion to set aside a jury's verdict as against the weight of the evidence, the standard is whether the evidence "so

preponderated in favor of the other side that 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]; *Voiclis v. International Association of Machinist and Aerospace Workers*, 239 AD2d 339 [2d Dept 1997]). A verdict would not be against the weight of the evidence "unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion." (*Sperduti v. Mezger*, 283 AD2d 1018 [4th Dept 2001]).

A jury reviewing defendant's conduct, by a fair interpretation of the evidence could have found that defendant's negligence in failing to exercise that degree of care, skill and diligence commonly exercised by a member of the legal profession beginning January 10, 2007 when he was retained by plaintiff to represent her in a matrimonial action was a substantial factor in causing plaintiff's claimed damage.

Plaintiff's claim was adequately supported by witness testimony and exhibits. Specifically, plaintiff produced Maryann Aiello, Esq., as an expert witness in the field of matrimonial law and equitable distribution. Ms. Aiello testified that it was her opinion that the order of Justice Strauss dated December 9, 2004, should have been served on the Taxi & Limousine Commission, and that had service been made on the Taxi & Limousine Commission prior to the time plaintiff's husband sold the medallion on May 16, 2006, plaintiff would not have been damaged and, therefore, his failure to file the order was a substantial factor in plaintiff's damages. Ms. Aiello further testified that her opinion is based upon a review of all the documents she looked at and on her experience and expertise as a practicing attorney. Additionally, plaintiff presented the expert testimony of Stanton Shames, a closing examiner for the New York City Taxi & Limousine Commission. Mr. Shames testified, inter alia, that he represents the city in the transfer or sale of taxi medallions, that had the defendant filed a copy of Justice Strauss' order with the Taxi & Limousine Commission, he would have "flagged" the file, which would have prevented any sale or transfer of the medallion until the file was reviewed by the Taxi & Limousine Commission's general counsel. Defendant elicited evidence in rebuttal. The jury having considered the evidence of the parties, chose to accept plaintiff's view of the evidence. If a verdict for a plaintiff is based on a fair interpretation of the evidence, it should not be set aside as being against the weight of the evidence (*Brosnan v. Pratt*, 37 AD3d 388 [2d Dept 2007]). There were valid lines of necessary and permissible inferences that would had led a rational jury to have concluded that defendant was negligent and that defendant's negligence was a proximate

cause of plaintiff's damages. Here, the jury could have reached its verdict upon a fair interpretation of the evidence (*Kennedy v. New York City Health and Hosp. Corp.*, 300 AD2d 146 [1st Dept 2002]).

III. CONCLUSION

Accordingly, defendant's motion for an order pursuant to CPLR 4404(a) setting aside the jury verdict rendered on September 22, 2010 in favor of plaintiff is denied as the verdict was not contrary to the weight of the evidence.

The Court has considered the defendant's remaining arguments and finds them to be without merit.

The foregoing constitutes the decision and order of this Court.

Dated: February 25, 2011

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Howard G. Lane, J.S.C.