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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN PART 63

Justice

Index Number : 109263/2008
BLECHMAN, PAMELA
vs.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 002
TRIAL DE NOVO

FILED

MAR 24 2014

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 3/19/14

HON. ELLEN M. COIN J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
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PAMELA BLECHMAN,

Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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DECISION AND ORDER
Index No. 109263/08

COIN, J.:

Defendant New York City Transit Authority (the Transit Authority) moves, pursuant to CPLR 4404, for an order setting aside the verdict after a jury trial and directing a new trial. The Transit Authority bases its motion on alleged errors during the trial and on the allegedly excessive verdict.

FACTS

This action arose out of an accident that occurred at the 14th Street-Union Square subway station, on April 18, 2008. The Transit Authority did not provide any trial transcripts with its motion to support its version of the testimony or charge given at trial. It merely asserts facts in its affirmation, without providing any basis for that recitation of facts.

Defendant asserts that plaintiff Pamela Blechman testified that she entered the first door of the first car of a northbound express train. She allegedly testified that although the

platform and the train were crowded, they were not unusually crowded. She stepped into the train, and was jostled by the crowd, which caused her left foot to fall into the gap between the train and the platform. She fell up to mid-chest. She was helped out of the gap by some people on the train, and was helped to the stairway, where she sat down. Plaintiff estimated that the gap was approximately one foot wide. The Transit Authority introduced evidence that the pre-accident gap at the point where the first door of the first car should have stopped, measured in 2006, was six inches. The post-accident gap, measured in 2008, was seven inches. At the point eight feet past the 10 car marker, where plaintiff allegedly had told her expert witness that the train stopped, the gap was 11.5 inches. Both the platform conductor and the train operator allegedly testified that the train stopped at the 10 car marker. Plaintiff allegedly did not testify as to where the train stopped.

The Transit Authority raises the following grounds to support its motion to set aside the verdict:

1) The court added a confusing caveat to the charge regarding its duty to provide a safe place to get on and off, which, defendant claims, nullified the portion of the charge saying that plaintiff was required to prove that the gap was greater than necessary for the safe operation of the train.

2) The court permitted evidence of two prior incidents to be

introduced regarding falls at the first car, first door of the northbound express train at 14th Street-Union Square. Defendant objected based on a claim that the train involved here allegedly went eight feet past the normal stopping point, which makes those cases not similar to this accident.

3) It was error for the court to permit inquiry regarding remedial steps that were taken following the two prior incidents.

4) A mistrial should have been granted when a witness made a reference to a post-accident repair. Defense counsel declined a curative instruction because it would have made matters worse by highlighting that repair.

5) The jury's finding that plaintiff was negligent, but that her negligence was not a substantial factor in causing her injuries, is an inconsistent finding. Defendant argues that either plaintiff was not negligent, and the incident happened as she testified, or else she attempted to board a train that was too crowded, in which case her negligence caused her to fall.

6) The jury award of $350,000 was excessive considering that plaintiff's injury was fully healed a few months following the accident, and that she had no ongoing debilitating condition as a result.

Plaintiff allegedly sustained a fracture of the distal fibula, a/k/a the lateral malleolus. She underwent open reduction/internal fixation of the fracture two weeks after the

accident. Plaintiff lost two weeks from work. Subsequently, she was able to work from home at the job that she was starting. She went on vacation four months after the accident, at which time she was able to climb to the top of a volcano. She subsequently had to undergo a second surgical procedure to remove the hardware, which was causing her pain. She also testified to her fear while she was trapped between the platform and the train. The jury awarded her $350,000, which defendant asserts is grossly excessive based upon the injury.

DISCUSSION

Charge to the Jury

Defendant contends that the court's caveat to the charge so qualified the rule, that it is a plaintiff's burden to demonstrate that the gap was wider than necessary for safe operation of the train, as to render it meaningless. However, in its moving papers, defendant does not provide the court with the charge, so it is unclear exactly to what defendant objects. Thus, defendant's submission is defective. *Nakyeoung Seoung v Vicuna*, 38 AD3d 734, 735 (2d Dept 2007); *Tesciuba v Cataldo*, 189 AD2d 655, 655 (1st Dept 1993); *Ganaj v New York Health and Hosps. Corp.*, 2013 WL 1386801, *2 (Sup Ct, Bronx County 2013); *Rubio v New York City Transit Auth.*, 2010 WL 9552780, *1 (Sup Ct, New York County 2010); *McCarthy v 390 Tower Assoc., LLC*, 9 Misc 3d 219, 225-226 (Sup Ct, NY County 2005).

In its reply memorandum of law, the Transit Authority includes a copy of what it considers to be the relevant portion of the charge. However, this is inadequate. A party cannot produce evidence on reply which it should have brought in the moving papers. *Hawthorne v City of New York*, 44 AD3d 544, 544-545 (1st Dept 2007). In fact, in its reply, defendant acknowledges that in its original objection, it "mischaracterized" the way in which the charge was objectionable. This, obviously, does not permit plaintiff to respond to defendant's position, which makes it inappropriate for the court to consider this argument. In any event, defendant has included only a portion of the charge, so it is still impossible for the court to review whether the charge, as a whole, in any way shifted the burden of proof. *McCarthy v 390 Tower Assoc., LLC*, 9 Misc 3d at 225-226. Therefore, this portion of defendant's motion is denied.

Evidence of Prior Accidents

Defendant maintains that plaintiff told her expert witness that she fell at a point eight feet past the 10 car marker. At that point, the gap increased from six or seven inches to 11.5 or 12 inches. Therefore, it was a much more dangerous situation than a normal gap case. Defendant contends that the prior accidents included no evidence that the first car had passed the 10 car marker and thus should not have been introduced into

evidence. Defendant does not object in principle to the introduction of prior accidents under similar circumstances, but only on the basis that these did not constitute similar accidents.

Initially, the court notes that defendant's recitation of the facts states that there was evidence at trial that the train stopped at the 10 car marker. According to defendant, both the platform conductor and the train operator so testified. Defendant does not offer any basis, other than hearsay, to limit prior accidents to incidents involving trains that went eight feet past the 10 car marker. Further, defendant did not include any transcripts. Thus, it has not provided evidence on which to base any determination. *Id.* The court also notes that plaintiff's expert witness, Dr. Berkowitz, testified that while he was observing express trains at the station, all the trains that he observed stopped between two feet and six feet past the 10 car marker. Penson affirmation, exhibit 1 at 239.

In any event, the evidence of prior accidents that plaintiff was permitted to introduce involved falls into the gap between the subway platform and the subway car at the 14th Street-Union Square station, on the platform for the northbound express train, at the first door of the first car. Thus, the accidents occurred under substantially similar conditions, and there was nothing improper in permitting portions of the record of those accidents

into evidence. *Hyde v County of Rensselaer*, 51 NY2d 927, 929 (1980); *Kane v Triborough Bridge & Tunnel Auth.*, 64 AD3d 544, 545 (2d Dept 2009).

Questions Regarding Remedial Action

Defendant contends that it was error for the court to permit plaintiff to question defense witnesses regarding remedial action that was taken by defendant following the prior accidents. It argues that the mere happening of an accident did not support a finding that there was negligence, which would be assumed if remedial action was taken.

Again, defendant failed to include any transcripts, or to indicate in any way to what particular questions defendant objects. *McCarthy v 390 Tower Assoc., LLC*, 9 Misc 3d at 225-226. Further, defendant cites no law to support its position that plaintiff's questions were improper. Such questioning can be proper when there is evidence that there was a dangerous condition and that the defendant knew of the dangerous condition, because it is relevant to the issue of whether defendant was negligent in failing to act in a reasonable manner. *See* 1 NY PJI3d 2:10 at 215 (2014); *Johnson v New York City Tr. Auth.*, 7 Misc 3d 42, 45 (App Term, 2d Dept 2005).

Court's Failure to Grant a Mistrial

In its affirmation in support of its motion, but not in its memorandum of law, defendant maintains that a response of

plaintiff's engineering expert, Dr. Berkowitz, was prejudicial and that defendant should have been granted a mistrial. While plaintiff was questioning Dr. Berkowitz about the feasibility of adding rubbing boards to reduce the size of the gap, plaintiff asked Dr. Berkowitz what the width of the additional rubbing boards were. Dr. Berkowitz responded "The one that has been currently added recently?"

Once again, defendant has failed to include the transcript, which makes its submission defective. *McCarthy v 390 Tower Assoc., LLC*, 9 Misc 3d at 225-226. Plaintiff, however, did include the relevant transcript in her papers. Upon a review of the transcript, the court concludes that Dr. Berkowitz's inadvertent reference to a recent repair was not elicited by plaintiff, nor was it clear from Dr. Berkowitz's response that additional rubbing boards were added to the location where this accident occurred. There was previous testimony that the size of additional rubbing boards varied, and it is likely that the jury merely viewed his response as seeking to clarify whether plaintiff was asking about rubbing boards currently in use by the Transit Authority, rather than any that may have been used specifically at the northbound express platform at 14th Street-Union Square. Thus, Dr. Berkowitz's response is not grounds for a mistrial.

Amount of the Award of Damages for Conscious Pain and Suffering

Defendant maintains that the $350,000 awarded as damages was excessive, and points to cases in which an award was challenged on appeal.

"To warrant interference with the jury's assessment of damages, the excessiveness . . . of the award must be such as to shock the conscience of the court." *O'Connor v Roth*, 104 AD2d 933, 934 (2d Dept 1984).

The cases that defendant relies upon either increased awards or permitted awards to stand. In those cases where the awards were increased, the amount to which it was increased cannot be considered as the highest amount that would be considered appropriate. Rather, the appellate court increased it to a minimally acceptable amount. Thus, those cases have little relevance to the question of whether this verdict is excessive. Defendant did not cite to a single case where an award was found to be excessive. Thus, defendant failed to demonstrate that this award is excessive.

Plaintiff cites to several cases in which allegedly similar injuries resulted in awards that were in the same range as her award. She particularly notes that the jury did not award her anything for future pain and suffering even though her ankle is not completely back to what it was previously, and that the jury rightfully could have awarded her compensation for her terror when she was stuck, and feared that the train might start and

crush her to death. In addition, the parties agree that she underwent two surgeries: the first, an open reduction with internal fixation to repair a comminuted ankle fracture, and the second, to remove the hardware inserted on the first surgery, which had caused her pain.

The cases that plaintiff cites support her position that the award was not excessive. *See discussion in Wharton v New York City Tr. Auth.*, 2013 NY Slip Op 31125(U) (Sup Ct, NY County 2013); *see also Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079, 1081 (2d Dept 2009); *Kellner v Kaliber Fin., Inc.*, 2009 NY Slip Op 32119(U) (Sup Ct, Queens County 2009). Defendant points out differences between these cases and plaintiff's, but does not offer any law to demonstrate that this award is excessive. Having failed in its burden to demonstrate that the award is excessive, it cannot rely on weaknesses in comparing this injury to those in the cases that plaintiff cites. Further, in failing to provide transcripts, defendant has not provided any evidence to support its contentions as to the extent of plaintiff's injuries. Therefore, the record in insufficient to evaluate the appropriateness of the award. *McCarthy v 390 Tower Assoc., LLC*, 9 Misc 3d at 225-226.

Inconsistent Verdict

In its affirmation in support of the motion (although not in its memorandum of law), defendant maintains that the jury's

finding that plaintiff was negligent, but that her negligence was not a substantial factor in causing her injuries, is inconsistent with the record.

Once again, defendant has failed to provide the record on which to base this conclusion. *McCarthy v 390 Tower Assoc., LLC*, 9 Misc 3d at 225-226. However, using the information provided by the parties, it can be concluded that the verdict was not inconsistent. Defendant claims that plaintiff testified that she was well aware of the gap, and that there was adequate room in the subway car for her to enter, but that she was jostled and forced to step backward into the gap. Thus, defendant concludes that if the jury believed plaintiff, it could not have found that she was negligent.

In determining whether a verdict is inconsistent, the court must determine whether there is any fair interpretation of the evidence that would support the verdict. *Maskantz v Hayes*, 39 AD3d 211, 212 (1st Dept 2007); *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 (1st Dept 2004). "Where an apparent inconsisten[cy] . . . can be reconciled with a reasonable view of the evidence," the verdict should not be disturbed. *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1567 (4th Dept 2010) (internal quotation marks and citation omitted).

Defendant has omitted consideration of the testimony of the platform conductor that plaintiff ran on the platform toward the

train. Thus, the jury could have determined that plaintiff did run to the train, which was negligent, but that her running did not cause her subsequent accident. Thus, defendant has failed to demonstrate that there is no reasonable view of the evidence to support the jury's verdict.

Defendant also failed to include in its moving papers whether it moved to set aside the verdict as inconsistent before the jury was discharged. If it did not do so, this motion is untimely. *Echavarria v Cromwell Assoc.*, 232 AD2d 347, 348 (1st Dept 1996). Thus, for the foregoing reasons, the verdict will not be set aside as inconsistent.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant New York City Transit Authority's motion to set aside the verdict and direct a new trial is, in all respects, denied.

This is the decision and order of the Court.

Dated: March 19, 2014

ENTER:

A.J.S.C.