

Kelly v Guigliano

2014 NY Slip Op 32446(U)

September 12, 2014

Sup Ct, Suffolk County

Docket Number: 15426-2006

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-12-13
ADJ. DATE 11-19-13
Mot. Seq. # 012- MD

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STEPHEN S. KELLY and SUSAN M. KELLY, :
 :
 :
 Plaintiff(s), :
 :
 - against - :
 :
 JAMES GUIGLIANO, M.D., 24/7 EMERGENCY :
 CARE, P.C., MITCHELL A. CAPLIN, M.D. and :
 LAWRENCE RUBIN, P.A., :
 :
 Defendant(s). :
 :
 SOUTHAMPTON HOSPITAL, SOUTHAMPTON :
 HOSPITAL ASSOCIATION, INC. and/or t/a and :
 d/b/a SOUTHAMPTON HOSPITAL and M. :
 NGUYEN a/k/a MINDY-TRAN HOANG :
 NGUYEN, R.N., :
 :
 Dismissed Defendants. :
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated October 8, 2013. and supporting papers; (2) Affirmation in Opposition by the defendant Guigliano, dated October 23, 2013, and supporting papers; (3) Affirmation in Opposition by the defendants 24/7 Emergency Care, Caplin and Rubin, dated October 21, 2013. and supporting papers; (4) Reply Affirmation by the plaintiff, dated November 12, 2014, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the plaintiff's motion to set aside the verdict pursuant to CPLR § 4404a is decided as follows:

The plaintiffs, Stephen and Susan Kelly bring this application to set aside the verdict pursuant to CPLR 4404 (a). Specifically, the plaintiffs seek an order setting aside the verdict in favor of the defendants as it is against the weight of the evidence "and/or is based upon insufficient evidence on the issues of the defendants departures from acceptable medical practices and liability to the plaintiffs as set forth in the verdict sheet." The plaintiffs further argue that the verdict sheet itself is inconsistent by finding a departure by the defendant Guigliano but also finding that such departure was not the proximate cause of any injury. They seek a new trial on all issues of liability and on the limited issue of causation as it relates to the departure that the jury found as against Dr. Guigliano.

The plaintiffs also argue that the verdict should be set aside in the interest of justice because "substantial justice was not done due to trial court errors prejudicial to the plaintiffs case and because improper conduct on the part of the trial Justice which prejudiced the jurors against the plaintiffs case."

CPLR 4404(a) states in pertinent part "

After a trial of a cause of action...the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action ...where the verdict is contrary to the weight of the evidence, in the interest of justice... The remedy for setting aside a verdict as contrary to the weight of the evidence is to remand the matter for a new trial.

The claim against the defendants in the case concerned an allegation that the emergency room Dr. Mitchell Caplan, emergency room P.A. Lawrence Rubin and the plaintiff's family practitioner James Guigliano M.D., failed to diagnose plaintiff with Guillaume Barre Syndrome (GBS), a rare neurological disorder on Jan. 5, 2005 when he entered the Southampton Hospital emergency room with certain symptoms. They also claim that by failing to properly diagnose GBS or to have it within their differential diagnosis, the hospital executed its policy of giving everyone admitted a flu shot, a procedure that was claimed to be contraindicated if a person has or has had GBS.

Stephen Kelly, was 60 years old when he was taken by ambulance to Southampton Hospital on January 5, 2005 at about 11:55 am. He had a history of hypertension for which he was medicated which consisted of 3 different medications. He had a history of COPD. At the hospital Mr. Kelly disclosed that besides a recent cold, he was in good health until the previous morning when he awoke with numbness of the hands and feet. He stated it worsened overnight and he now had difficulty walking. His blood pressure was 158/110 and pulse and respiration were normal. He was examined by P.A. Rubin who noted weakness in the right arm and some lack of muscle coordination. His workup included a brain CT scan, numerous blood studies, EKG, urinalysis, and chest x-ray. All test results were negative. Mr. Kelly's blood pressure rose to 208/99 and gradually lowered by use of medication. P.A. Rubin made a differential diagnosis of stroke and hypertensive crisis. Dr. Caplan did not see the patient but reviewed the treatment and plan with P.A. Rubin and agreed with it. The plan was to admit Mr. Kelly and Dr. Guigliano was contacted who

issued admission orders.

The defense claims in the case were that GBS was not diagnosable on January 5 as the signs for such diagnosis were not present on said date. The treatment for GBS involves administration of IVIG therapy. This was not done, according to the defense, as the symptoms were not present for such diagnosis. GBS was eventually diagnosed on the afternoon of January 6 when the symptoms consistent with GBS first appeared after receiving a flu shot at about 6:00 am. The defense produced evidence that there was no association between GBS and the flu shot. The only reason, claimed the defense, that the flu vaccine was in issue was because in 1976 there was evidence that the vaccine against the swine flu caused GBS in one out of 100,000 recipients. No further association was evident every year after with all flu shots up to and including 2005.

The jury was given 5 departure questions as to the defendant James Guigliano, albeit one was conditional upon answering a previous departure question in the affirmative. The jury was given 4 departure questions as to Dr. Caplin with one being contingent upon a yes answer to a previous departure question. There were 3 departure questions submitted as to defendant P.A. Lawrence Rubin.

The jury returned defense verdicts as to all defendants. As to Dr. Guigliano the jury found that he departed from good and accepted medical practice in failing to obtain a neurological consult on January 5, 2005 but found that such departure was not the proximate cause of any injury.

The power to set aside a jury verdict and order a new trial is an inherent one, which is codified in CPLR. Sec. 4404(a)(see *McCarthy v Port of N.Y. Authority*, 21 AD2d 125, 127, 248 NYS2d 713; *Siegel NY Practice*, Sec. 406). The statute provides that a Court may order a new trial "when the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree."

Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination(*Nicastro v Park* 113 AD2d 129, 495 NYS2d 184). This question is distinguished from the assessment of whether a jury verdict, as a matter of law, is supported by sufficient evidence. (*Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, accord, *Dominguez v Manhattan & Bronx Surface Tr. Operating Authority*, 46 NY2d 528, 415 NYS2d 634). To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational fact finders to the conclusion reached by the jury on the basis of the evidence presented at trial (*Cohen v Hallmark Cards*, *supra*). The result of such a determination leads to a directed verdict in favor of the movant. The Court notes that the plaintiff has not sought a directed verdict, but rather seeks an order setting aside the verdict and ordering a new trial on the issues outlined hereinabove.

The criteria to set aside a jury verdict as against the weight of the evidence is less stringent than a directed verdict as such a determination results in a new trial and does not deprive the parties of their right to ultimately have all disputed facts resolved by a jury. Setting aside a verdict as against the weight of the evidence requires a discretionary balancing of many factors(*Cohen v Hallmark Cards*, *supra* at 499). The discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution as a successful litigant is entitled to the benefits of a favorable verdict. Fact finding is, in general,

the province of the jury, not the trial court. (*Nicastro v Park, supra; Ellis v Hoelzel*, 57 AD2d 968, 394 NYS2d 91).

Particular deference has traditionally been accorded to jury verdicts in favor of defendants in tort cases because the jury need not necessarily find that a defendant has prevailed by a preponderance of the evidence but rather may simply conclude that the plaintiff has failed to meet the burden of proof required (*Nicastro v Park, supra; Siegel, NY Practice, Sec. 406*). Thus, it has been said that a jury verdict in favor of a defendant should not be set aside unless “the jury could not have reached the verdict on any fair interpretation of the evidence.” (*Tripoli v Tripoli*, 83 AD2d 764, *aff’d* 56 NY2d 684; *Cubeta v York international* 30 AD3d 557, 818 NYS2d 136).

The Court finds that the verdict cannot be said to be against the weight of the evidence contained in the trial record. Many issues of fact were in dispute during the trial and the credibility of all witnesses was hotly contested. The credibility of witnesses is a matter left to the fact finders.(See PJI 1:41, *Lucks v Lakeside MFG. Inc.* 37 AD3d 666, [2nd Dept 2007]).

There was ample evidence to support the finding of the jury that Dr. Guigliano departed from good and accepted practice by not obtaining a neurological consult on Jan. 5, 2005 but that such departure was not the proximate cause of any injury. The record contained evidence that on Jan. 5, 2005 the patient was not manifesting any symptoms consistent with GBS, evidence which the jury was entitled to accept. Therefore, it was logical for the jury to infer that any neurologist that saw the patient on Jan. 5, 2005 would not have considered GBS in their assessment of the patient.

Moreover, to find that the failure to order a consult with a neurologist resulted in injury would require the fact finders to conclude that a neurologist would have diagnosed or differentially diagnosed GBS, ordered the administration of IVIG therapy, and/or issued further orders countermanning any hospital policy that mandated flu shots. Based on the trial record, such a finding would have consisted of speculation as to what any neurologist would have done, particularly in light of the fact that there was trial evidence that there was no association of the flu shot with GBS other than the swine flu shot given in the late 70's. Thus, the jury's finding was consistent with a fair assessment of the trial evidence and not against the weight thereof.

Further, the Court finds that most, if not all, of the plaintiff's arguments in support of the motion are not supported by the trial record. Many of the issues raised by counsel concerning rulings on matters of evidence, the interrogatories on the verdict sheet, and/or dissatisfaction with the Court are unsupported by the trial record and are thus without merit.

The items for which objection was taken which resulted in adverse rulings are matters of evidence and/or applications of principles of law and, the Court finds, do not provide a foundation for the relief sought. The balance of movant's arguments are without merit.

For these reasons, the court concludes that the verdict as reported fairly reflects an evaluation of the evidence and is not against the weight thereof.

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Accordingly, the motion is denied.

This constitutes the decision and order of the Court.

Dated: September 12, 2014



PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION