

<b>Swain v City of New York</b>
2015 NY Slip Op 30406(U)
February 4, 2015
Supreme Court, Bronx County
Docket Number: 303502/2010
Judge: Julia I. Rodriguez
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2/9/15

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 27

Dated: February 4, 2015

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**INDEX 303502/2010**

TRINA SWAIN,

Plaintiff(s),

**POST-TRIAL  
DECISION and ORDER**

-against-

THE CITY OF NEW YORK and NEW YORK  
CITY HOUSING AUTHORITY,

**Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice**

Defendant(s).

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Recitation, as required by CPLR 2219 (a), of the papers considered in review of Post-trial motion by Plaintiff:

<u>Papers Submitted</u>	<u>Numbered</u>
Post Trial Notice of Motion, Affirmation & Exhibits	1, 2, 3
Defendants' Affirmation in Opposition	4
Plaintiff's Reply Affirmation	5

Plaintiff commenced this action seeking damages for injuries sustained on March 22, 2009 when she tripped and fell on the sidewalk adjacent to the premises located at 365 East 183<sup>rd</sup> Street, Bronx County. Plaintiff alleged that she was caused to fall for the reason that the sidewalk was raised and uneven.

After a jury trial Plaintiff moves to set aside the Defendant's verdict on the ground that the verdict sheet submitted to the Jury was improperly worded, resulting in a substantial right of plaintiff being prejudiced, and consequently, requiring a new trial.

Defendant NYCHA submits that the verdict sheet was properly worded, that the verdict was supported by the credible evidence and that Plaintiff's request should be denied.

The first sentence on the Verdict Sheet read:

(1) Was Defendant New York City Housing Authority negligent on March 22, 2009 in its maintenance of the abutting sidewalk at 365 East 183<sup>rd</sup> Street?

The Jury answered "No", by a 6 to 0 vote, and therefore, stopped deliberations as directed, having reached the verdict in favor of Defendant. Plaintiff's counsel contends that the inclusion of the date of the accident in the first question, i.e., *March 22, 2009*, is contradictory of the PJI charge 2:90 which directs the Jury, "in determining whether the

defendant was negligent, must decide whether the defendant created the condition, **or either knew, or in the use of reasonable care, should have known, that the claimed condition existed** [¶8 of Moving Affirmation]. Counsel posits that PJI 2:90 “specifically states that the jury must decide” whether defendant was negligent in its maintenance of the abutting sidewalk, and that by inserting the date of March 22, 2009 the Court did “not allow the jury to consider the defendant’s actions prior to the date of the accident,” [¶8 of Moving Affirmation]. Counsel argues that the purpose of PJI 2:90 “is not to limit the consideration of the defendant’s negligence to the date of the subject accident,” and that Question 1 “as worded, essentially conveyed to the members of the jury that they should not consider any of the defendant’s actions prior to the date of the subject accident [[¶¶10 and 11 of Moving Affirmation].

\* \* \* \* \*

As an initial matter the Court disagrees with Moving Counsel that Question 1 of the verdict sheet is in “complete contradiction of the language in PJI 2:90,” and/or that it confused the jury in how they were to determine whether defendant was negligent in this case. Upon commencing deliberations and thereafter the Jury did not convey that it was confused or that its members were in disagreement as to any item; it did not request read-back or generate any note seeking further instruction as to any issue. Prior to deliberation, the jury was properly charged with PJI 2:10 defining common law negligence, and PJI 2:70 defining proximate cause, in addition to PJI 2:90 [Possessor’s Liability] as follows:

As you have heard, the plaintiff Trina Swain brings this action against the defendant NYC Housing Authority based on the claim that Defendant negligently maintained the adjacent sidewalk 365 East 183<sup>rd</sup> Street. The owner of a building has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable.

In order to recover, the plaintiff, must prove: (1) that the premises were not reasonably safe; (2) that the defendants were negligent in not keeping the premises in a reasonably safe condition; and (3) that Defendants’ negligence in

allowing the unsafe condition to exist was a substantial factor in causing Plaintiff's injury.

You must first consider whether the premises were reasonably safe. Plaintiff claims that the premises were not in a reasonably safe condition because the sidewalk was uneven and raised.

Defendant contends that the sidewalk was reasonably safe.

If you decide that the premises were reasonably safe, you will find for Defendant and proceed no further. If you decide that the premises were not reasonably safe, you will proceed to consider whether Defendant was negligent in permitting the unsafe condition to exist.

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent owner of a building would use under the same circumstances, taking into account the foreseeable risk of injury. In deciding whether Defendant was negligent, you must decide whether Defendant created the uneven and raised sidewalk, or either knew or, in the use of reasonable care, should have known, that the uneven and raised sidewalk existed.

If Defendant did not create the uneven and raised sidewalk, but knew or should have known about the uneven and raised sidewalk, you must decide whether Defendant had sufficient time before the accident to correct the uneven and raised sidewalk, provide reasonable safeguards or provide reasonable warning.

In order to find that Defendant's conduct was negligent, you must find that (a) Defendant created the uneven and raised sidewalk or, (b) if Defendant did not create the uneven and raised sidewalk, Defendant either knew of the unsafe condition long enough before Plaintiff's injury to have permitted Defendant in the use of reasonable care to have it corrected or to take other suitable

[\* 4]

precautions and did not do so; or Defendant did not know of the condition but in the use of reasonable care should have known of it and corrected it.

Clearly, the language as above-quoted did not prohibit or discourage the jury from considering whether Defendant was negligent prior to the date of the accident. Notably, the claimed defective condition at issue, *to wit*: an uneven and raised sidewalk, was not a condition that could have arisen overnight; therefore, logic dictates that in determining whether defendant was negligent on March 22, 2009 the evaluation of such negligence must encompass actions before March 22, 2009. The insertion of the date in Question 1 of the verdict sheet was proper because that is the date of accident's accident and therefore, the jury was properly directed to a time frame parameter.

In deciding a post-trial motion under CPLR §4404(a), the rule is that a court should set aside a jury verdict "only if there was no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented." *Cedano v. City of New York*, 35 Misc.3d 1223(A), 2009 WL 8604421 (Sup. Ct. Bx. Co. 2009), quoting *Lolik v. Big v. Supermarkets, Inc.* 86 N.Y.2d 744 (1995). After consideration of the evidence presented in this trial, the court declines to set aside the jury verdict as "it cannot be said that there existed no valid line of reasonable or permissible inferences which could have led rational jurors to conclude" that Defendant was not negligent and/or the proximate cause of Plaintiff's fall. Cf. *James v. Farhood*, 96 A.D.3d 503, 947 N.Y.S.2d 11, 13 (1<sup>st</sup> Dep't 2012), (*cites omitted*) (where there are numerous inconsistencies as to how an accident occurred, it is the jury which is in the best position to evaluate credibility of the witnesses).

For the foregoing reasons, Plaintiff's post-trial motion is **denied** in its entirety.

Dated: Bronx, New York  
February 4, 2015

  
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Hon. Julia I. Rodriguez, J.S.C.