SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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BRENT COSCIA,

Plaintiff,

against-

Index No: 60236/2011

SAMMY EL JAMAL and BRYAN ORSER,

Defendants.

----------X

DECISION AND ORDER WITH NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that annexed hereto is a true copy of the Decision and Order signed by Hon. Francesca E. Connolly on April 1, 2015 and entered in the office of the Westchester County Clerk on April 1, 2015.

Dated: White Plains, New York
April 1, 2015

Yours, etc.

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

BRENT COSCIA,

Plaintiff,

-against-

SAMMY ELJAMAL and BRIAN ORSER,

Defendants.

----------x

DECISION and ORDER
Sequence No. 6
Index No. 60236/2011

CONNOLLY, J.

The following papers were considered in connection with the defendant Sammy Eljamal's motion to set aside the verdict pursuant to CPLR 4404 (a):

Eljamal's order to show cause, affidavit, exhibits, memo of law	1-9
Orser's affidavit in support	10
Plaintiff's affirmation in opposition, memorandum of law	11-12
Reply affirmation, exhibit, memo of law	13-15
Trial Transcript[1]	16
Eljamal's memorandum of law filed March 31, 2015	Not Considered[2]

This action was tried before the Hon. Lester B. Adler, J.S.C.,[3] resulting in a jury verdict in favor of the plaintiff and against the defendant Sammy Eljamal in the principal sum of $4,785,000.00, and against the defendant Brian Orser in the principal sum of $225,260.00. Eljamal moves to set aside the verdict pursuant to CPLR 4404 (a) raising three grounds: (1) that Justice Adler erred in denying his request to represent himself made after the trial had commenced; (2) that Justice

[1] Since the Undersigned did not preside over the trial, by order dated January 22, 2015, the Court held the motion in abeyance and directed the defendant to file a complete copy of the trial transcript (*see McPherson v City of New York*, 122 AD3d 809, 810 [2d Dept 2014]).

[2] On March 31, 2015, *months* after the instant motion was marked fully submitted, Eljamal's newly-retained counsel, Farrauto, Berman & Slater, filed a "Memorandum of Law on Excessiveness of the Jury Verdict." The Court declines, in its discretion, to consider this excessively late filing.

[3] After the instant motion was fully submitted, Justice Adler recused and the action was randomly reassigned to this Court.

Adler erred in failing to instruct the jury that the standard of proof for an award of punitive damages is "clear and convincing evidence"; and (3) that Justice Adler erred by refusing to discharge a juror who claimed she could not be impartial until late in the trial, and failed to question the other jurors as to whether they had any discussions with her regarding her bias. Orser submits an affidavit in which he joins in Eljamal's motion. The plaintiff opposes the motion.

The motion is denied. Pursuant to CPLR 4404 (a), a trial court may set aside a verdict on limited grounds:

> 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 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 or separable issue where the verdict is contrary to the weight of the evidence, *in the interest of justice* or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

(CPLR 4404 [a] [emphasis added]). Since Eljamal does not argue that the verdict was not supported by legally sufficient evidence or that the verdict was against the weight of the evidence, it must be assumed that he is seeking to set aside the verdict in the interest of justice. "A motion for a new trial under CPLR 4404 (subd. [a]), on the ground of being in the interest of justice, encompasses errors in rulings on admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence and surprise, the question the Trial Judge must decide being whether substantial justice has been done—i.e., whether it is likely that the verdict has been affected" (*Matter of Estate of De Lano*, 34 AD2d 1031, 1032 [3d Dept 1970], *aff'd* 28 NY2d 587 [1971]). "A new trial should be granted in the interests of justice only if there is evidence that substantial justice has not been done, as would occur, for example, where the trial court erred in ruling on the admissibility of evidence, there is newly-discovered evidence, or there has been misconduct on the part of the attorneys or jurors" (*Gomez v Park Donuts, Inc.*, 249 AD2d 266, 267 [2d Dept 1998]).

Here, the Court finds that none of Eljamal's contentions, either standing alone or together in the aggregate, constitute a denial of substantial justice warranting a new trial.

With respect to his claim that the Court should have granted his belated request to proceed pro se, the record demonstrates that Eljamal's volatile demeanor (for example, openly crying in the courtroom) would have presented a distraction to the jury and unnecessarily prolonged the trial (*see Melnitzky v City of New York*, 1 AD3d 222 [1st Dept 2003] ["Plaintiff did not request to represent himself until midtrial and the record demonstrates that permitting plaintiff, whose courtroom demeanor had been volatile and on occasion irrational, to immediately take over the representational responsibilities until then competently discharged by his attorney would have unnecessarily prolonged the trial and introduced a prohibitive risk of jury confusion and mistrial"]).

With respect to his claim that Justice Adler erred in instructing the jurors as to the burden of

proof for punitive damages,[4] the Court can find no indication that Eljamal objected to the Court's charge and, accordingly, declines to exercise its discretion to grant a new trial on that ground. However, the Court notes that Justice Adler instructed the jurors in his preliminary instructions prior to the very brief punitive damages phase of trial that any award must be "by clear and convincing evidence" (Tr. May 14, 2014 at 5). Under these circumstances, the Court cannot say that Eljamal was denied substantial justice.[5]

Finally, with respect to Eljamal's claim that the Court should have questioned the jury as to whether one juror, who was excused, had spoken to any of them about her bias toward the defendants, the Court notes that the excused juror explicitly stated that she had not spoken to any other jurors (Tr. at 1098). Moreover, Eljamal has not submitted any proof to substantiate his claim that the excused juror had tainted the other jurors. It was reasonable for Justice Adler to decline to question the entire jury, as there was no reason for him to believe the excused juror had spoken to the other jurors and, by raising the issue, it might have caused the remaining jurors to speculate as to the reason for the juror's removal. Under these circumstances, the Court cannot say that Eljamal was deprived of substantial justice.

Accordingly, Eljamal's motion to set aside the verdict is denied and, to the extent that Orser joins in Eljamal's motion, his application to set aside the verdict is also denied.

Based upon the foregoing, it is hereby,

ORDERED that the defendant Sammy Eljamal's motion to set aside the verdict pursuant to CPLR 4404 (a) is denied; and it is further

ORDERED that all other relief requested and not decided herein is denied.

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[4] The Second Department requires that awards of punitive damages be made by "clear and convincing evidence" (*see Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 86 [2d Dept 2007]; *but see Matter of Seventh Judicial Dist. Asbestos Litigation*, 190 AD2d 1068, 1069 [4th Dept1993] ["The trial court properly instructed the jury that the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence, not clear and convincing evidence"]).

[5] Eljamal's cursory claim that the awards of compensatory damages were redundant (*see* Eljamal Memo of Law at 5) was not preserved for review since he failed to object to the verdict sheet, which provided a separate line for compensatory damages for each cause of action (*see Myers v S. Schaffer Grocery Corp.*, 281 AD2d 156, 157 [1st Dept 2001] ["Defendant's claim that the award for past medical expenses incurred by plaintiff's wife is duplicative of the award for plaintiff's past loss of earnings is not preserved for appellate review, since defendant did not object to the charge on lost wages or to the verdict sheet that listed as separate damage items plaintiff's lost wages and his wife's medical expenses"]; *see also Jing Xue Jiang v Dollar Rent a Car, Inc.*, 91 AD3d 603, 604 [2d Dept 2012] ["The challenges made by the defendants Dollar Rent A Car, Inc., and Rental Car Finance Corp. to the jury charge and verdict sheet are unpreserved for appellate review. The defendants consented to the jury charge and verdict sheet as given to the jury"]), and the Court, in its discretion, declines to reach this contention in the interest of justice. The Court additionally notes that Eljamal has not asked the Court to reduce the verdict as excessive (i.e., impose a remittitur).

This constitutes the decision and order of the Court.

Dated: White Plains, New York
April 1, 2015

HON. FRANCESCA E. CONNOLLY, J.S.C.

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