Smith v Rudolph
2015 NY Slip Op 32687(U)
March 26, 2015
Supreme Court, Bronx County
Docket Number: 302983/09
Judge: Edgar G. Walker

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Tynia Smith,

Plaintiff,

-against-

Francis V. Rudolph, New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority,

Defendants.

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Hon. Edgar G. Walker
PART: IA 26

Index No. 302983/09

Plaintiff commenced this action to recover damages for personal injuries sustained when she was struck by a New York City Transit Bus on December 3, 2008. The trial proceeded before this Court from November 14, 2013 to December 11, 2013. Following the trial, the jury awarded plaintiff $325,000.00 in damages as follows: (1) $100,000 for pain and suffering, (2) $75,000.00 for past earnings lost, and $150,000.00 for past medical expenses. Additionally, the jury found the plaintiff 30% at fault on the issue of comparative negligence.

Plaintiff now moves for an order pursuant to CPLR 4404 (a) setting aside the jury verdict and granting a new trial, on the ground, *inter alia*, that the repeated misconduct of defense counsel deprived plaintiff of a fair trial.

Defendant initially argues that plaintiff failed to preserve the issue of defense counsel's conduct by failing to move for a mistrial during the trial. This ignores the fact that plaintiff's counsel vehemently objected to defense counsel's conduct throughout the trial, that the court admonished defense counsel countless times, both on and off the record, to cease his improper conduct and that defense counsel persisted in such conduct in defiance of the court's direction.

Furthermore, defense counsel's conduct was so extreme and pervasive as to make it inconceivable that it did not substantially affect the fairness of the trial. *See Smith v Au*, 8 AD3d 1. Unlike *Smith*, the pervasive conduct occurred in front of the jury, created a hostile atmosphere and persisted despite the court threatening to impose sanctions and to hold counsel in contempt.

As in *Mercurio v Dunlop*, 77 AD2d 647, "[t]he record quite palpably reveals that the behavior of defense counsel during the trial created an atmosphere which deprived plaintiffs of a fair trial. What was involved was not an isolated remark during questioning or summation, but a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined." 77 AD2d at 647.

One area of misconduct was defense counsel's frequent assertion of personal knowledge of facts in issue in violation of Rules of Professional Conduct, Rule 3.4(d)(2). *See Weinberger v City Of New York*, 97 AD2d 819. The most serious instance involved the examination of his own witness, P.O. Fundaro, where, in the guise of questioning the witness and in direct defiance of the court's direction not to do so, asserted facts which contradicted P.O. Fundaro's testimony that he was not asked to bring his memo book to court:

> Q. Okay. When I had spoken to you on the phone a few times, did I ask you to search for --
> MS. BARBATO: Objection.
> THE COURT: Objection sustained.
> Q. Did I ever ask you to search for any documents?
> THE COURT: Objection is sustained, Mr. McHugh, as to what you said to him.
> MR. McHUGH: It came up on cross-examination what I said to him.
> THE COURT: Come inside. Come inside.

> (Whereupon, there is a discussion held off the record, in the robing room, among the Court and counsel.) (Tr. P.937, L.18-P.938, L.4)

In the robing room I reiterated to defense counsel that he was not permitted to testify by asking questions in that manner. Yet, within minutes of resuming his examination of P.O. Fundaro, defense counsel again returned to the same line of questioning. This time specifically mentioning the memo book.

> Q. Officer, did I ever tell you not to bring your memo book?
> MS. BARBATO: Objection.
> THE COURT: Sustained.
> Q. Did I ever ask you to bring your memo book?
> MS. BARBATO: Objection.
> THE COURT: Sustained. Mr. McHugh, [we] went over this inside. I don't understand. (Tr. P. 944, L.7-14)

Far more extensive, was defense counsel's persisting in making speaking objections and, after the court's ruling, continuing to argue, in two instances for a mistrial, in front of the jury. During one speaking objection, defense counsel flagrantly misstated the law concerning a crucial issue in the case.

> MR. McHUGH: I'm going to object. If there is no lines, then it's not a crosswalk. (Tr. P.132, L.13-14)

Directly applicable to this case was VTL §1111 (a) (3):

> "Unless otherwise directed by a pedestrian-control signal as provided in section eleven hundred twelve pedestrians facing any steady green signal, except when the sole green signal is a turn

> arrow, may proceed across the roadway within any marked or *unmarked* crosswalk." (Emphasis supplied.)

It was undisputed that plaintiff was directly facing such a pedestrian control signal at the time of the accident.

In addition, defense counsel unfairly and falsely denigrated Dr. Davy, one of plaintiff's treating doctors who performed a surgical procedure on the plaintiff, by arguing that he is not a surgeon, based solely on the fact that the word "surgeon" does not appear on his letterhead. This, despite the fact that it was undisputed that Dr. Davy is licensed to perform surgery, actually performs surgery and teaches other doctors to perform the same type of surgery he performed on plaintiff. Furthermore, he referred to Dr. Lattuga, who did not perform any surgery on plaintiff and did not testify at trial as an "actual real surgeon." (Tr. P.1605, L.9-10).

While the record does not reflect the sneering, denigrating tone defense counsel used during his cross-examination of Dr. Davy–as well as almost all of plaintiff's witnesses–the record does contain the following exchange:

> A. I didn't charge her an office visit when I did the discogram even though I evaluated her. I did not do that. I just charged for the discogram, so --
> Q. God bless you, sir. (Tr. P. 326, L.10-13).

Defense counsel displayed the same attitude toward Dr. Guy, plaintiff's other treating physician called to testify:

> Q. Is there something why you didn't mention for like five months in a row, sir?
> A. Yeah, there is a very good reason. Would you like to

know, sir?
Q. I could care less. (Tr. P.1324, L. 22-P.1325, L.1).

Because the nature and extent of the plaintiff's injuries were in significant dispute, these improper comments cannot be deemed to have been harmless. *See Weinberger, supra.*

The degree to which defense counsel sought to disrupt the trial is further reflected in the following exchange:

Q. You may want to step down, Dr. Davy, if that assists you because it's hard for everyone to see, and your Honor would you like to see it, too, so I will put it over here.
THE COURT: It's most important the jury see it.
MS. BARBATO: Thank you, your Honor. I just want to make sure. Just want to make sure everybody sees it.
MR. McHUGH: Not me.
THE COURT: Well, you may move, Mr. McHugh?
MR. McHUGH: Where?
THE COURT: To a point where you could see it.
MR. McHUGH: Perhaps it could be pulled back to a point where I can see it. I have all my notes over here.
MS. BARBATO: I'm still going to have to face to the jury, so may be you want to come --
THE COURT: Mr. McHugh, stand in the corner here.
MR. McHUGH: No. I want to stay where my notes.
THE COURT: Well, you are going to have to move Mr. McHugh.
MR. McHUGH: Perhaps if the chart is over here --
THE COURT: Mr. McHugh, you are going to have to move.
MR. McHUGH: Well, if Plaintiff's counsel could--
MS. BARBATO: You could have a seat right over

here. I will move these items for you? How is that?
MR. McHUGH: Perhaps the board could be moved a little bit.
THE COURT: Ladies and gentlemen, please step out. Just step out.
COURT OFFICER: Jury exiting.
(Jurors leave the courtroom.)
THE COURT: I have never seen conduct like this before, Mr. McHugh, where counsel has refused to move from counsel table so that they can view something that is being shown to the jury. That has never in my experience happened.
You could take your note pad with you and stand over there where you can see and take notes to your heart's content. I don't know why everything is an issue with you in this case. Never have I seen --
MR. McHUGH: I asked if I could sit over here so the board could move back a couple feet from where I was sitting.
THE COURT: Where the jury will not be able to see it.
Now, do what you want, Mr. McHugh, but, this is just unique in my experience that counsel refuses to move to a position where counsel can see simultaneously with the jury. I don't know why you need to sit at counsel's table to take notes. Now --
MR. McHUGH: Plaintiff's counsel said I could sit in her seat, I did and I said if you could move it two feet, I will be able to see.
THE COURT: In this courtroom, opposing counsel uniformly stands in this corner. They pick it. I've never told them where to stand, but --

> MR. McHUGH: If I could stay here --
> THE COURT: With[out] exception, they have stood in one corner or the other at the end of the jury box, either at one end of the jury box or the other end of the jury box without my prompting, without my saying anything, without anybody complaining. You are the first in all of my years here who has complained about having to get up from counsel table in order to see what is being shown to the jury. (Tr. P. 278, L. 5-P.280, L.1-17).

As previously noted, the cold record does not reflect defense counsel's tone of voice directed at plaintiff's counsel, witnesses and the court, nor the volume of his voice. On several occasions the court had to admonish defense counsel not to scream. Also, not fully reflected in the minutes is the extent to which defense counsel continued after being directed to stop. Where the record shows the court saying "stop" or "overruled" multiple times in succession, it is because defense counsel has continued to speak despite the court's direction. When two people are talking at the same time, the court reporter, as is proper, only records what the court is saying.

After the court admonished defense counsel countless times, off the record in the robing room, it became necessary to excuse the jury and put the following on the record:

> THE COURT: Mr. McHugh, I don't know how many times I have directed you not to make comments, not to make arguments, not to make statements, not to do anything in front of the jury which is not appropriate. If you have an objection, you say objection. If you need to explain, whenever you've asked to come to a sidebar, I've allowed you to come to a sidebar. When I tell you to stop talking, that's a direction to you to stop talking and it's a direction that you are obliged to obey, whether you think it's fair or

> unfair or not.
> What is not appropriate, for you to go on talking in front of the jury when I tell you time and time and time and time again not to. Now if you continue, when I've told you that off the record many times, I will have to take further action to make sure that you don't continue to defy my directions intentionally. And it's clear that it's intentionally. It's clear you want to get out in front of the jury whatever it is that you want to get out in front of the jury despite my direction to you to stop.
> Now this isn't inadvertent. This isn't, you know, one or two words after I tell you to stop. This is I have to say stop three, four, five times before you've completed saying whatever it is that you want to say in front of the jury despite my direction to you to stop. It is clearly intentional. It is clearly disrupting the proceedings here and it cannot continue. Do you understand me, Mr. McHugh?
> MR. MCHUGH: Yes, Your Honor. (Tr. P.1259, L.10-P.1260, L.11).

Yet the misconduct persisted unabated throughout the remainder of the trial. This is not a case where there was overwhelming evidence in favor of defendant and an isolated improper remark could be deemed harmless. *See Vassura v Taylor,* 117 AD2d 798. This case more closely resembles the situation in *Kohlmann v City of New York,* 8 AD2d 598, involving the conduct of plaintiffs' counsel:

> "Trial tactics of plaintiffs' counsel in the manner and content of his cross-examination, his comments and the expression of his personal views, exceeded the bounds of propriety and evinced a determination to convey to the jury his own characterization and appraisal of the witnesses for the defendant. His conduct appears to have been calculated to influence the jury by considerations which were not legitimately before them, and cannot be dismissed as inadvertent, thoughtless or harmless. Parties to a trial, civil or criminal, have a right to have the case determined on the facts and the law applicable thereto. When misconduct of counsel in interrogation or summation so violates the rights of the other

party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned." 8 AD2d at 598.

As observed by the court in *Cherry Creek National Bank v The Fidelity and Casualty Company of New York*, 207 AD 787, more than 90 years ago:

"It is time that the bar should realize that when counsel in a close case resort to such practice to win a verdict, they imperil the very verdict which they thus seek." 207 AD at 791.

Regrettably, after all these years, at least in this case, that court's hope has not yet been realized. A new trial is ordered in the interest of justice.

In light of the above, the court need not address plaintiff's other contentions and defendant's motion to dismiss is denied.

Dated : 3/26/15

Hon. Edgar G. Walker, J.S.C.