Mantilla v Bartyzel
2016 NY Slip Op 30649(U)
April 15, 2016
Supreme Court, Queens County
Docket Number: 702046/13
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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CARMITA MANTILLA, as Mother and Natural Guardian of SEBASTIAN MANTILLA, an infant, and CARMITA MANTILLA, Individually,

Plaintiff(s),

- and -

PIOTR BARTYZEL,

Defendant(s).

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Index No.:702046/13

Motion Date:12/1/15

Motion Cal. No.: 88

Motion Seq. No: 3

The following papers numbered 1 - 8 read on this motion by the plaintiff for an order setting aside the verdict as to liability.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service........	1 - 4
Affirmation in Opposition--Service..................	5 - 6
Reply Affirmation--Service..........................	7 - 8

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by the infant-plaintiff on May 26, 2011. It is uncontested that, at the time of the accident, the infant-plaintiff was riding his bicycle on Central Avenue near its intersection with 64th Street in Glendale, New York. It is further uncontested that the infant-plaintiff was struck by the vehicle operated by defendant Piotr Bartyzel ("Bartyzel"). This action was commenced on June 4, 2013 by the electronic filing of a summons and complaint. From October 19, 2015 to October 23, 2015, a trial was held in this action.

The court's verdict sheet was drafted by the undersigned and discussed with counsel prior to being shown to the jury.

The verdict sheet consisted of five questions:

1. Was the defendant Piotr Bartyzel negligent on May 26, 2011?
2. Was the negligence of defendant Piotr Bartyzel a substantial factor in causing the accident on May 26, 2011?
3. Was the infant-plaintiff Sebastian Mantilla negligent on May 26, 2011?
4. Was the negligence of the infant-plaintiff Sebastian Mantilla a substantial factor in causing the accident on May 26, 2011?
5. What was the apportionment of fault between the defendant and the infant-plaintiff.

Following a charge conference with the undersigned, counsel for both plaintiff and defendant stated that they had no exceptions to the verdict sheet.

On October 22, 2015 the jury announced an inconsistent verdict. In its initial verdict, the jury answered "yes" to Question #1, but answered "no" to Question #2 on the verdict sheet. Thus, the jury found that, while the defendant was negligent, his negligence was not a substantial factor to plaintiff's injuries. According to the note contained on the verdict sheet, an answer of "no" to Question #2, should have caused the jury to stop deliberating and report their verdict to the court. While the jury's finding that the defendant's negligence was not a substantial factor in causing the accident was not internally inconsistent, the fact that the jury continued to deliberate rendered the verdict defective. Instead, the jurors continued to answer the remaining questions.

In its initial verdict, the jury also answered "yes" to Question #3, but answered "no" to Question #4 on the verdict sheet. Thus, the jury ruled that the infant-plaintiff was negligent, but that his negligence was also not a substantial factor in causing the subject accident. According to the note contained on the verdict sheet, such a finding should have caused the jury to stop and report their finding to the court. The jurors disregarded the directive contained on the verdict sheet and continued on to Question #5.

In Question #5, the jurors initially ruled that both the infant-plaintiff and the defendant were both equally liable for the accident. However, as they had previously ruled that the neither the negligence of the infant-plaintiff nor the negligence of the defendant were a substantial factor in causing the accident, this ruling was wholly inconsistent with their prior answers.

Where a jury renders a verdict that is internally inconsistent or defective, the trial court must either direct

reconsideration by the jury or order a mistrial (see, *CPLR §4441[c]; Cortes v. Edoo*, 228 AD2d 463 [2d Dept. 1996]; *Leal v. Simon*, 147 AD2d 198 [2d Dept. 1989]). Following the jury's announcement of a verdict, the jury was released for the day. After extensive conversation with counsel, this court ruled that the verdict was both defective and inconsistent. Counsel for both sides stipulated that, upon the jury's return on October 23, 2015, that portion of the jury charge which deals with proximate cause, concurrent causes and comparative negligence would be restated to the jury, as well as the charge on special verdicts.

On October 23, 2015, following the aforementioned re-instruction from this court, neither plaintiffs' counsel nor defendant's counsel took exception to the court's restatement of the charge. Subsequently, the jury returned with a verdict which stated that defendant Bartyzel was not negligent. Upon the request of plaintiffs' counsel, the jury was polled and affirmed their unanimous verdict. Thereafter, the verdict was duly recorded by this court.

Plaintiff now moves, pursuant to CPLR §4404, for an order setting aside the jury's verdict. With the instant motion, plaintiff asserts that the jury verdict should be set aside because the final verdict, in which the jury found no negligence on the part of the defendant, was inconsistent with the verdict that the jury attempted to submit the day before. A jury verdict will not be set aside as against the weight of the evidence unless the jury could not have reached the verdict upon any fair interpretation of the evidence (*see, Smith v. Houde*, 18 AD3d 734 [2d Dept., 2005]; *Sukhoo v. City of New York*, 1 A.D.3d 349 [2d Dept. 2003]; *Harris v. City of New York*, 2 A.D.3d 782 [2d Dept. 2003], *appeal dismissed* 2 N.Y.3d 758 [2004]; *Nicastro v. Park*, 113 A.D.2d 129 [2d Dept. 1985]). "Great deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses" (*Yau v. N.Y. City Transit Auth.*, 10 A.D.3d 654, 655 [2d Dept. 2004]; *Cicillini v. City of New York*, 15 A.D.3d 522 [2d Dept. 2005]).

In the instant action, a review of that portion of the trial transcript which reflects the proceedings held following the rendering of the first verdict, reveals that both attorneys stated that they believed that the jury's initial, inconsistent verdict evidenced the jury's confusion on the issue of substantial factor. At that time, this court stated its belief that the inconsistent verdict may also have been due to the jurors' failure to read or to follow the instructions contained in the note sections of the verdict sheet. In its discretion, this court chose to re-instruct the jury on the salient points of law. Although plaintiff now asserts that the second verdict further evidenced

the jury's confusion about the law, he offers no proof of this conclusion other than the fact that the second verdict contradicted the first. A jury's verdict can only be set aside due to continued confusion where a party has evidence that said confusion continued after the re-instruction on the law given by the court. Where a second verdict is internally consistent, and where the jury's findings could have been reached upon a fair interpretation of the evidence, the verdict should not be disregarded (see, *Palmer v. Walters*, 29 AD3d 552 [2d Dept. 2006]).

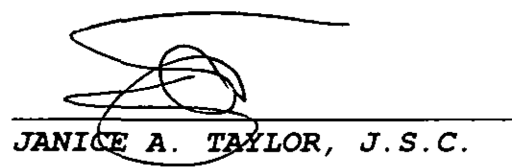
In the case of *Cortes v. Edoo*, 228 AD2d 463, *supra*, the Supreme Court Appellate Division, Second Department ("Second Department") ruled that a facially consistent verdict should be set aside because there existed evidence of the jury's continued confusion. In *Cortes*, the jury informed the court that it was deadlocked on the issue of substantial factor. In its initial verdict, the *Cortes* jury ruled that although both defendant-drivers were negligent, the negligence of one defendant-driver was not a substantial factor in causing the subject accident. However, despite this ruling, the jury apportioned 2% liability for the plaintiff's injuries to that defendant-driver. Without re-instructing the jury on the relevant law, the trial court directed the jury to reconsider their verdict and amended the verdict sheet to include the direction that, where a party's negligence is not found to be a substantial factor, no apportionment of fault should be found as to that party (see, *Cortes, supra,* at 465). Following further deliberation, the *Cortes* jury ruled that both defendant-drivers were negligent and that the negligence of both were substantial factors in causing plaintiff's injuries. On appeal, the Second Department held that, where no clarifying instructions, or reiteration of the law was given by the trial court, it can be inferred that the jury's second verdict was influenced by its confusion.

Unlike the jury in *Cortes*, the jury in the instant action did not state that they were having a problem reaching a verdict, that they were confused nor did they request a read-back of any portion of the jury charge. After the initial inconsistent verdict, it was counsel for both sides who requested that this court read-back the portion of the charge relating to substantial verdict. Additionally, unlike the trial court in *Cortes*, this court did re-read the relevant portion of the law to the jury and directed them to render a consistent verdict. New York courts have held that, only where a verdict has been rendered which indicates substantial confusion by the jury, should a new trial be ordered (see, *Kelly v. Greitzer*, 83 AD3D 901 [2D Dept. 2011; *Palmer v. Walters*, 29 AD3d 552, *supra)*.

Additionally, it is axiomatic that, until a jury verdict is recorded by the court, a jury may change its previously announced verdict and is not bound by the determinations previously

announced (see, *Warner v. New York Central Railroad Company,* 52 NY 437 [1893]; *Pam v. Emmanuel,* 305 AD2d 345 [2d Dept. 2006]; *Ryan v. Orange County Fair Speedway,* 227 AD2d 609 [2d Dept. 1996]). Thus, the fact that the second verdict contradicted the first verdict is not evidence of the jury's confusion. Accordingly, as the plaintiff has failed to demonstrate that the rendered verdict was against the weight of the evidence, or that it was rendered as a result of the jury's confusion, the instant motion to set aside the verdict is hereby denied.

Dated: March 15, 2016



JANICE A. TAYLOR, J.S.C.

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FILED
MAR 18 2016
COUNTY CLERK
QUEENS COUNTY