

Gilliam v City of New York
2016 NY Slip Op 32070(U)
May 26, 2016
Supreme Court, Queens County
Docket Number: 1606/13
Judge: Howard G. Lane
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violation of the Section 28-105.1 of the Administrative Code of the City of New York (hereinafter Administrative Code), and under a theory of common-law negligence.

On September 13, 2012, plaintiff, a New York City firefighter, responded to a fire at 463 Beach 43rd Street, Far Rockaway, New York. His position was the "outside vent man". Upon arrival, he proceeded to the alleyway between the houses at 461 Beach 43rd Street and 463 Beach 43rd Street in order to search for people at the side or back of the house. He testified he could smell fire and saw smoke in the house. He said as he walked down the alleyway he observed that the alleyway was filled with debris, large black garbage bags, and construction that extended the entire width of the alleyway. He further testified that while walking through the alleyway, he stumbled on the bags and fell. He then regained his footing and continued to go halfway down the alleyway until he arrived at door to the house. There, he placed his halogen in the door and pried it open. While he was prying the door, he was standing on "garbage" and fell through the door as it opened and he fell and hit the ground. He completed an accident report known as a CD-72. In the CD-72 report he stated that "While advancing down a tight rubbish filled alley member accidentally fell down unforeseen basement stairwell..."

Defendant Robert Voulo testified that on September 13, 2012, he was the owner of 461 Beach 43rd Street, Far Rockaway, New York and he owned approximately half of the shared alleyway between 461 Beach 43rd Street and 463 Beach 43rd Street.

Defendant Muhamed Lutfur Rahman testified that on September 13, 2012, he was the owner of 463 Beach 43rd Street, Far Rockaway, New York and he owned approximately half of the shared alleyway between 461 Beach 43rd Street and 463 Beach 43rd Street. He admitted that he commenced renovations on September 12, 2012, the day prior to accident and that there was roof work causing shingles to fall on the date of the accident. He testified that these shingles and sheetrock, at times, were loaded into big black construction bags and placed into a dumpster. He admitted that at the time of the fire, there were two (2) bags in the alleyway.

Plaintiff admitted into evidence as Plaintiff's Exhibit 7, a Notice of Violation wherein the Commissioner of the Department of Buildings of the City of New York, as petitioner, charged Robert J. Voulo, as respondent, with an infraction of B201 in

violation of 28-105.1 of the Administrative Code. The Notice of Violation alleges that on September 13, 2012 at 463 Beach 43rd Street, the issuing officer personally observed "work without a permit" and noted "Found interior demolition at basement and 1st floor of existing building including removal of sheetrock wall and electrical box cables interior demolition work is 80% complete. No new walls(s) observed. Stop all work as per A/C 28-207.2 and SWO posted." The Notice of Violation further states: "Remedy: Stop all work, make safe, obtain all necessary permits(s) & contact DOB," and a hearing date of October 30, 2012. Defendant Rahman answered the Notice of Violation, paid the fine and obtained a building permit.

It should be noted that during the trial, the plaintiff's counsel withdrew plaintiff's negligence cause of action.

At trial, in response to the interrogatories, the jury answered the questions as follows:

Question 1: Did defendant Robert J. Voulo violate Section 28-303.1 of the Building Code. The jury answered "no" -- six out of six.

Question 3: Did defendant Muhamed Lutfur Rahman violate Section 28-303.1 of the Building Code. The jury answered "no" -- six out of six.

Question 5: Did defendant Muhamed Lutfur Rahman violate Section 28-105.1 of the Building Code. The jury answered "yes" -- six out of six.

Question 6: Did that violation directly or indirectly bring about the accident with Thomas Gilliam. The jury answered "no" -- six out of six.

II. THE LAW

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (see *Higbie Constr., Ltd. v IPI*

Indus., 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]). Plaintiff seeks to set aside the verdict as against the weight of the evidence pursuant to CPLR 4404. To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed with considerable caution, 'for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict'" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v Park*, 113 AD2d 129 at 133).

Moreover, the court must cautiously balance " 'the great deference to be accorded to the jury's conclusion' . . . against the court's own obligation to assure that the verdict is fair" (*Fontana v Kurian*, 214 AD2d 832, 833 [1995] [citations omitted], *lv denied* 86 NY2d 707 [1995]), and the court may not employ its discretion simply because it disagrees with a verdict, as this would " 'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty' " (*Pena v New York City Tr. Auth.*, 185 AD2d 794, 795 [1992], quoting *Ellis v Hoelzel*, 57 AD2d 968, 969 [1977]). Furthermore, it is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (*Siegel*, *New York Practice* § 406, at 687 [4th ed]).

Viewing the record here in this light, the court concludes that the plaintiff did not meet his burden.

III. DISCUSSION

POINT 1: The jury verdict was not against the weight of the credible evidence.

General Municipal Law § 205-a establishes a statutory cause of action for firefighters who suffer injuries in the line of duty "as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the . . . city governments" (General Municipal Law § 205-a[1]; see *Cusumano v City of New York*, 15 NY3d 319, 910 NYS2d 410, 937 NE2d 74).

In this case, plaintiff claimed that defendants violated section 28-105.1 of the Administrative Code. Administrative Code: Section 28-105.1 provides in relevant part:

General. It shall be unlawful to construct, enlarge, alter, repair, move, demolish, remove or change the use or occupancy of any building or structure in the city, or to erect, install, alter, repair or use or operate any sign or service equipment ... or to cause any such work to be done unless and until a written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code, subject to such exceptions and exemptions as may be provided in section 28-105.4.

In order to establish a prima facie case under General Municipal Law § 205-a, a plaintiff must establish that there was a violation of a statute, a regulation, that directly or indirectly caused an accident. In order for a defendant to defeat a claim for negligent failure to comply with a statute, rule or regulation that directly or indirectly caused an accident, defendant was required to establish either that defendant did not negligently violate any relevant government provision, or that, if defendant did, the violation did not directly or indirectly cause plaintiff's injuries (*Donna Prince L. v Waters*, 48 AD3d 1137 [4th Dept 2008]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 82, 760 NYS2d 397, 790 NE2d 772).

Section 28-105.1 of the New York Administrative Code (N.Y. Adm. Code) makes it unlawful to construct a building in New York City without first obtaining a written permit. Here, defendant presented sufficient evidence to show that although the defendant did violate a section 28-105.1 of the Administrative Code such governmental provision was not relevant to the plaintiff's accident, and even if section 28-105 was relevant, the violation did not directly or indirectly cause plaintiff's injuries/accident (see *Anderson v Columbari*, 79 AD3d 679 [2010], 913 NYS2d 687, 2010 NY Slip Op 09095 [where court held that the premises either did not contain any defects which constituted a violation of the sections of the Administrative Code which the defendant was alleged to have violated or that those sections were not applicable to the subject premises]). Hence, the plaintiff was required to "set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter" (*Giuffrida v Citibank Corp.*, 100 NY2d at 79, 760 NYS2d 397, 790 NE2d 772,

quoting *Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441, 626 NYS2d 23, 649 N.2d 1167).

In this case by the jury answering "YES" to Question 5, the jury decided that the defendant Muhamed Lutfur Rahman violated Administrative Code § 28-105.1, in that he caused work to be performed at the premises without a work permit. However, the jury, relying principally upon the plaintiff's testimony describing the happening of the accident, including his testimony that, at the time of the accident, the alleyway was filled with debris and large black garbage bags, and the CD-72 Report in which plaintiff stated that he was "advancing down a tight filled alley [he] accidentally fell down unforeseen basement stairwell," answered Question "6" "NO", finding that the aforesaid violation did not directly or indirectly contribute to the plaintiff's accident/injuries.

The Court finds that upon a fair interpretation of the evidence the jury could have reached it's verdict upon one or more of the following theories of the case advanced by defendants: (1) violation of section 28-105.1 of the Administrative Code was not relevant and did not form an appropriate predicate for liability for the facts in this case; (2) plaintiff failed to prove to the juries satisfaction that the violation of section 28-105.1 of the New York Administrative Code did directly or indirectly cause plaintiff's accident/injury; and/or (3) no accident and/or no injury at the time and place of the alleged incident.

A. Section 28-105.1 of the New York Administrative Code not relevant

The jury could have reached the verdict on a fair interpretation of the credible evidence, that the violation of section 28-105.1 of the New York Administrative Code did not form a predicate for liability under General Municipal Law § 205-a[1] (see *Terranova v New York City Tr. Auth.*, 49 AD3d 10, 17, 850 NYS2d 123; *Farrington v. City of New York*, 240 AD2d 697, 698, 659 NYS2d 318).

B. Violation of Section 28-105.1 of the New York Administrative Code not a direct or indirect cause of plaintiff's accident/injuries.

Although it is well recognized that to make out a claim under section 205-a, a plaintiff is not required to show the same

degree of proximate cause as is required in a common-law negligence action, a plaintiff still needs to establish a "practical or reasonable connection between the statutory or regulatory violation and the claimed injury (*Giuffrida v Citibank Corp., et al.*, 760 NYS2d 397, 403 [2003]).

Furthermore, even if the jury found that a violation of Administrative Code §§ 28-105.1 was relevant, the jury could have reached the verdict on a fair interpretation of the evidence that to the extent that the plaintiff claimed that defendant not having a work/building permit for construction/demolition for work performed in the interior of the subject building (see *Cusumano v City of New York*, 63 AD3d 5, 8, 877 NYS2d 153, revd 15 NY3d 319, 910 NYS2d 410, 937 NE2d 74), the plaintiff failed to present any evidence to support the conclusion that the absence of a work permit contributed to the plaintiff's accident/injuries that allegedly occurred in the alleyway on the exterior of the building. The plaintiff offered no proof, expert or otherwise, from which it could be inferred that the violation "made the [occurrence of a] fire more likely or firefighting operations more dangerous, or that the alleged violations were otherwise a direct, indirect or proximate cause of" the plaintiff's injuries (*Downey v Beatrice Epstein Family Partnership, L.P.*, 48 AD3d 616, 618, 853 NYS2d 108 [expert testimony as to nexus between violation and plaintiff's injuries was speculative and attenuated]; cf. *Foiles v L.J. Constr. Corp.*, 17 AD3d 297, 300, 794 NYS2d 27 [architect's report provided record evidence that the lack of satisfactory ventilation due to code violations contributed to the poor visibility encountered by the plaintiff]). Without such proof, such conclusion would be purely speculative (see *Plowden v Stevens Partners, LLC*, 45 AD3d 659, 660-661, 846 NYS2d 238; *Denicola v Costello*, 44 AD3d 990, 990-991, 844 NYS2d 438; cf. *Antonia v Srour*, 69 AD3d 666, 893 NYS2d 186; *Palmer v 165 E. 72nd Apt. Corp.*, 32 AD3d 382, 819 NYS2d 105; *Scala v Scala*, 31 AD3d 423, 424, 818 NYS2d 151; *Asaro v Montalvo*, 26 AD3d 306, 307, 812 NYS2d 558; *Viscusi v Fenner*, 10 AD3d 361, 362, 781 NYS2d 121).

The violation issued to defendant Muhamed Lutfur Rahman by the DOB on September 12, 2013 related to "interior demolition at basement and 1st floor of existing building..." The defendant argues and the jury could have found that the violation for the interior of the building did not directly or indirectly relate to an accident that occurred in the exterior alleyway of the building.

By a fair interpretation of the evidence, the jury may have determined that the plaintiff presented no evidence that the alleged accident that occurred on September 13, 2012 at the subject premises was a direct or indirect consequence of defendant's violation of Sections 28-105.1 of the Building Code.

It is well established that if there were several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of a cause for which the defendant was not responsible, the plaintiff has failed to establish causation (see *Kallenberg v Beth Israel Hospital*, 45 AD2d 177 [1st Dept 1974], *affd* 37 NY2d 79 [1975]).

At trial, by answering the question No. 5 "YES" and question No. 6 "NO", the jury rejected plaintiff's claims that defendant Muhamed Lutfur Rahman's violation of section 28-105.1 of the Building Code was a direct or indirect cause of plaintiff's accident.

C. The Jury may not have credited the testimony of plaintiff Thomas Gilliam.

By a fair interpretation of the evidence, the jury may not have credited the testimony of plaintiff Thomas Gilliam. In order for the plaintiff to succeed in this case, the jury had to believe his testimony concerning how the accident occurred. It is undisputed that there were no witnesses to the alleged accident. Issues of credibility are for the jury to decide. It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, *New York Practice* § 406, at 687 [4th ed]).

POINT 2: The Court did not error by charging PJI 2:29, PJI 2:10 and PJI 2:70 where there was no cause of action for negligence before the jury.

After the initial charge conference and after summations, the Court advised counsel that the Court was adding the following jury charges: PJI 2:10 Negligence Defined; PJI 2:29 Statutory Standard of Care and PJI 2:70 Proximate Cause Defined. The trial transcript reflects the following exchange between plaintiff's counsel and the Court on the record:

THE COURT: Counselors, I have been going over the request to charge that I ruled on, and I am set to make

a few additions. And I will tell you what they are, and you can tell me your objections or anything else you want to place on the record.

You have asked for -- on the questions regarding the violation of the building code and the violation of the Administrative Code and the violation of the General Municipal Law. Before I go into any of those with the jury, I am going to charge the statutory standard of care, ordinances, or regulations 2:29, which talks about the claim that they violated - that the defendants violated the Administrative Code and Building Code, and it goes on to talk that you may consider the violation as some evidence of negligence along with the other evidence in the case, provided that such violation was a substantial factor in bringing about the occurrence.

That introduction uses the word -- the words negligence and substantial factor; and therefore, I am going to tell the jury exactly what those words mean and give 2:10, the negligence definition, and 2:70, the proximate cause definition.

In addition, the section with regard to the General Municipal Law also talks about in addition to any other right of action, et cetera, in the event of an accident occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person, since that's statute again uses the word negligence, I am going to define negligence for the jury.

I have one question for both of you, though. Both Sections 225 and Section 229 talk about the statutory standard of care, and there is generally a paragraph after charging what the sections are and what the jury should find or should not find. There is a paragraph that says, you cannot disregard a violation of the statute and substitute some standard of care other than that set forth in the statute, and I intend to tell that to the jury.

And I will hear any and all of you on those inclusions that I plan to charge the jury on. And I know that you do not have a cause of action for negligence. You have

withdrawn that.

MR. McMANUS: Yes, your Honor.

THE COURT: But if the statute, my argument is, and you can tell me where I am wrong, if the statute talks about it, I think I have to tell the jury exactly what negligence is.

MR. McMANUS: Well, I think that under 205 -- my first objection is just what you Honor said, and I take an exception to that.

Secondly, I think that under 205-a, the violation of the section alone is a sufficient predicate for the action, and I think to charge stuff -- that something like proximate cause when the statute itself says whether the violations directly or indirectly caused the accident -

THE COURT: I intend to use the words in the exact words, and you will have it in the verdict sheet, directly or indirectly. I am not taking out directly or indirectly.

MR. McMANUS: Okay. My other point is that if you look at PJI 2:29, it says that if you find the defendant violated the statute, you may consider the violation as some evidence of negligence, but that's not really the case here. If you find that they violated the section, that's the end of the inquiry. And if you find they violated the section, and then go to whether it directly or indirectly had an effect. So I think it's adding a layer that the jury must consider that's not required under the statute.

THE COURT: Your exception is noted.

(T.238, 1.6 - T. 240 1. 22).

The record reflects that the Court then went on to charge as follows:

So in this case, we have the plaintiff claiming that either or both of the defendants violated a statute.

If you find that either or both defendants violated that regulation, you may consider that violation as some evidence of negligence, along with such evidence in the case, provided that such violation was a substantial factor in bringing about the occurrence. So first, I am going to tell you I used some words in there. I used the word negligence. I am going to tell you, first, what negligence is. It's a lack of ordinary care. It's a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.

Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances. So let me read to you the section that we are talking about. We are talking about Section 28-301.1 of the Building Code, and that says:

"Owner's responsibilities" - all buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building shall be maintained in good working condition. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner.

Subchapter 2 of Article - - Subsection 2 of Article 2 of the Administrative Code defines "owner" as: A person having legal title to premises or control of premises. So now you have to consider, next, the Administrative Code Section 28-105.1, which says:

It shall be unlawful to construct, enlarge, alter, repair, move, demolish, remove or change the use or occupancy of any building or structure in the city, or to erect, install, alter, repair, or use or operate any sign or service equipment in or in connection therewith, or to erect, install, alter, repair, remove, convert or replace any gas, mechanical, plumbing or fire suppression system in or in connection therewith, or to cause any such work to be done unless and until a

written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code.

So that's the section that you are to consider. In addition to those sections that I just referred to, the plaintiff is claiming that - - now, I want to tell you one thing. I told you that you should find - - if you find negligence, along with other evidence provided, that the violation was a substantial factor in bringing about the occurrence, so you have got to know what a substantial factor means.

And the definition of that is an act or omission is regarded as a cause of an accident if it was a substantial factor in bringing about the accident. That is, if it had such an effect in producing the accident that reasonable people would regard it as a cause of the occurrence.

So the other claim by the plaintiff here is that the defendant Rahman failed to comply with the thus violated another statute. This is statute General Municipal Law Section 205-a, which says:

In addition to any other right of action or recovery under any provision of the law, in the event of any accident occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence - - and I just told you a few minutes ago what negligence was - - of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules orders and requirements of the Federal, State, County, Village, Town or City governments or of any and all of their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury shall be liable to any officer, member, agent, or employee of any fire department injured while in the discharge or performance of any duty imposed by the Fire Commissioner, Fire Chief, or other superior officers of the fire department, injured on the discharge or performance of any duty imposed by the Fire Commissioner, Fire Chief, or other superior officer of the fire department.

So, therefore, if you find that defendant Rahman violated that statute, and if that statute and violation was a proximate cause, directly or indirectly, of the accident, then defendant Rahman would be liable under that section of the General Municipal Law.

(T.247, 1.12 - T. 250 1. 24).

It is clear from the Court's explanation on the record, the Court was merely clarifying for the jury: (1) the meaning of the term "negligence" which is mentioned in General Municipal Law § 205-a, i.e. "... in the event of any neglect, omission, willful or culpable negligence ..." the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury ..."; (2) the meaning of legal words used in charge with respect to causation concerning the violation of the Administrative code section and whether that violation directly or indirectly caused the accident; and (3) the definition of "substantial factor" as it relates to the term "culpable negligence." After defining these terms for the jury, the Court then proceeded to charge the jury on the statutory violation of GML 205-a by stating as follows: "So, therefore, if you find that defendant Rahman violated that statute, and if that statute and violation was a proximate cause, directly or indirectly, of the accident, then defendant Rahman would be liable under that section of the General Municipal Law". When a judge charges a jury, it is important that the judge make every effort to state the law and explain the legal terms and words in a manner that the lay jury can understand and comprehend. By charging PJI 2:29, PJI 2:10 and PJI 2:70, the Court was helping the jury's understanding of legal terms and concepts, and therefore was not in error.

POINT 3: Defense Counsel's Statements in Summation did not Create Confusion and Prejudice for the Plaintiff.

Although the Court does not disagree with plaintiff's argument that at multiple times throughout defendant Rahman's counsel presentation of the case, she mentioned in front of the jury that the plaintiff suffered no injury, the Court finds that plaintiff suffered no real prejudice, as when the plaintiff's counsel objected, the Court sustained the objection and struck the testimony from the record. Moreover, although defendant's counsel articulated the word "injury", in essence, defendant's counsel was really asserting defendant's defense that no accident

occurred. Although, the statements were improper and irrelevant on a liability trial, the Court finds that they did not prejudice the plaintiff to the point that the Court would order a new trial. The Court notes a substantial part of defendants' defense boiled down to an issue of credibility concerning the plaintiff's account of the occurrence and the existence of no other witnesses to the alleged accident. Defendant's argument that there was no injury is inextricably intertwined with defendant's arguments that there was no accident, and that plaintiff is not credible. Therefore, in the context of the entire trial, the Court finds that the comments by defendant's counsel in summation were not unduly prejudicial and created little or no confusion for plaintiff.

IV. CONCLUSION

Accordingly, as the Court determines that: (1) the jury verdict was not against the weight of the evidence; (2) the Court did not erroneously charge PJI 2:29, PJI 2:10 and PJI 2:70 notwithstanding there was no cause of action for negligence before the jury; and (3) defense counsel's commentary throughout the trial and in summation did not unduly prejudice the findings of the jury, the motion by plaintiff Thomas Gilliam for an order pursuant to CPLR 4404(a) and granting a new trial is denied.

The Court has considered the plaintiff's remaining arguments and finds them to be without merit or moot.

The foregoing constitutes the decision and order of this Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: May 26, 2016

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Howard G. Lane, J.S.C.