

<b>Garrett v New York City Tr. Auth.</b>
2018 NY Slip Op 30529(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 152892/2013
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED**

**PART 2**

*Justice*

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CLARA GARRETT,

INDEX NO. 152892/2013

Plaintiff,

MOTION SEQ. NO. 003

- v -

NEW YORK CITY TRANSIT AUTHORITY,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number 47, 48, 49, 50, 51, 52, 53, 54, 57, 58

were read on this motion to/for SET ASIDE VERDICT

Upon the foregoing documents, it is ordered that the motion is denied.

Defendant New York City Transit Authority moves for an order: 1) pursuant to CPLR 4401 and 4404, setting aside the jury verdict rendered against it and dismissing the action, or, in the alternative; 2) granting defendant a new trial on the ground that the verdict was contrary to the weight of the evidence and excessive; or 3) conditionally reducing the damages awarded to plaintiff. Plaintiff Clara Garrett opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

**FACTUAL AND PROCEDURAL BACKGROUND:**

This case arises from an incident on September 26, 2012 in which plaintiff, approximately 65 at the time; was injured when she slipped and fell on a defective stairway located at the Union Square subway station. Doc. 1.<sup>1</sup> Following a trial held on July 26, 28, and 31, 2017, a jury determined that defendant was liable because it had constructive notice of an unsafe condition on the stairway and awarded plaintiff \$40,000 for past pain and suffering and \$160,000 for future pain and suffering. Docs. 45, 48.

Plaintiff, the sole witness to the accident, testified at trial that the accident occurred at approximately 12:30-12:45 p.m. when, while she was about to descend the stairway, she stepped off the landing with her right foot into a “cake like substance”, “started to slip between the first and second step” and, although she was upright by second step, she slipped off third step. Doc. 49, at p. 13, 15, 18. She then fell and her wrist struck the stairs. Doc. 49, at p. 17. She maintained that the edge of the third step was worn and shiny and that a photograph of the stairs marked as an exhibit at trial reflected that the step was in that condition. Doc. 49, at p. 14-15. The photograph of the stairs was taken “right around the incident or a couple of months afterwards.” Doc. 49, at p. 13. According to plaintiff, the photograph was taken by an investigator or a good Samaritan. Doc. 49, at p. 14, 78.

After the incident, plaintiff was taken to the hospital, where she learned her wrist was fractured, and doctors reset the bone in her wrist, causing her a great deal of pain. Doc. 49, at p. 22-23. She was discharged from the hospital that evening at approximately 11 p.m. Doc. 49, at

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<sup>1</sup> Unless otherwise indicated, all references are to the documents filed with NYSCEF in this matter.

p. 22. She wore a cast on her dominant hand for approximately 2-3 months. Doc. 49, at p. 23, 25. While she wore the cast, she had a lot of pain, could not drive, and needed assistance with basic activities such as cleaning and bathing. Doc. 49, at p. 24-26. Although plaintiff admitted that she went on a cruise approximately 2 months after the incident, she maintained that she went with a friend who assisted her with activities of daily living. Doc. 49, at p. 27-28.

Approximately 2-3 weeks after the accident, plaintiff visited Dr. Fragner, an orthopedist. Doc. 49, at p. 26. She saw Dr. Fragner every 2-3 weeks for a total of 5-6 visits. Doc. 49, at p. 27. She also went to physical therapy for several months. Doc. 49, at p. 30.

Prior to the accident, plaintiff, a right-handed retired teacher, played tennis as a hobby. Doc. 49, at p. 6-7. Since the accident, plaintiff has been unable to play tennis. Doc. 49, at p. 32. She wears a wrist brace for support every day except when she bathes or sleeps. Doc. 49, at p. 32. Plaintiff continues to have pain in her wrist, takes Aleve as needed, and still has difficulty performing certain tasks. Doc. 49, at p. 33-34.

On cross-examination, plaintiff admitted that, at her 50-h hearing, she stated that she fell because she slipped on cake which was on the steps, and that she did not see that food before her fall. Doc. 49, at p. 40, 44. She also admitted that, at her deposition, she said that she had cake on her right shoe but was not certain whether there was cake on her left foot. Doc. 49, at p. 59-60. She conceded that the cake contributed to the accident but did not cause it. Doc. 49, at p. 58. Plaintiff further stated that, although she could not drive for 2 ½ months after the incident, she was thereafter able to drive again. Doc. 49, at p. 48.

Plaintiff conceded that she did not know exactly when the photograph of the stairway was taken but said she believed she was there when it was taken. Doc. 49, at p. 56, 76. Plaintiff then stated that she was not certain whether she was present when the photograph was taken. Doc. 49, at p. 77-79. She was not certain whether the photograph was taken at the time of the accident or “a couple [of] months later.” Doc. 49, at p. 57. However, she maintained that the photograph depicted the stairway she fell on. Doc. 49, at p. 79.

Surgery has never been performed on plaintiff’s right wrist and she last visited a doctor for the wrist in 2015. Doc. 49, at p. 61.

Plaintiff’s expert, Robert Schwartzberg, a licensed professional engineer, testified that stairs are comprised of risers, treads, and nosing. Doc. 50, at p. 15. The riser is the vertical face of a step. Doc. 50, at p. 9. The tread is the horizontal part of the step. Doc. 50, at p. 9. The nosing, or “forward most part” of a step, is the part one’s foot usually lands on and is supposed to provide good traction. Doc. 50, at p. 12-13, 15. If the nosing is slick or slippery, one can slide off of it. Doc. 50, at p. 15.

When Schwartzberg measured the treads and risers, he found that they were not of uniform size and thus violated reasonably accepted engineering standards. Doc. 50, at p. 19-21. He further observed that the treads were not level, which could cause an individual to lean forward when descending the steps. Doc. 50, at p. 22. Additionally, Schwartzberg measured the coefficient of friction on the third tread down, where plaintiff allegedly fell, and found it to be between .39 and .47, below the accepted standard of .5. Doc. 50, at p. 24-25.

Schwartzberg opined, based on the photograph of the stairway marked into evidence, that the nosings on the steps were worn, uneven and irregular. Doc. 25, at par. 26. He postulated that, if plaintiff stepped in cake with her right foot on the first step down, and then tried to regain her balance by placing her left foot on the third step down, she would slide off of the third step since it had a low coefficient of friction and was on an angle. Doc. 25, at p. 27. He further opined, based on the photograph and his measurements, that the condition of the stairs existed for “many years” prior to the accident. Doc. 25, at p. 28.

In rendering his opinion, Schwartzberg relied on the photograph of the stairway, the notice of claim, the bill of particulars, and his inspection of the stairway on August 3, 2014. Doc. 50, at p. 3, 6, 8. His inspection revealed that nothing more than “cosmetic changes” to the stairs between the time the photograph was taken after the accident and the date of his inspection. Doc. 50, at par. 17.

#### **CONTENTIONS OF THE PARTIES:**

Defendant argues that the verdict must be set aside as against the weight of the evidence because the testimony of plaintiff and Schwartzberg were incredible as a matter of law and failed to establish that it had constructive notice of the alleged defect. It further asserts that the damages awards for past and future pain and suffering must be set aside since they are excessive and contrary to the weight of the evidence.

In opposition, plaintiff argues that the jury had sufficient evidence to conclude that the unsafe condition of the third step prevented her from recovering from her fall after stepping into

cake on the first step. Plaintiff further asserts that it “moves for additur” based on CPLR 5501 since the amount awarded to her was inadequate.

### LEGAL CONCLUSIONS:

Initially, defendant’s motion is denied due to its failure to annex a complete copy of the trial transcript to its motion, thereby preventing this Court from conducting a meaningful review of all of the relevant issues it raises on this application. *See Gorbea v DeCohen*, 118 AD3d 548 (1<sup>st</sup> Dept 2014).

In any event, the motion to set aside the verdict as against the weight of the evidence would be denied. CPLR 4404(a) allows a court to set aside a verdict or judgment entered after trial, and direct judgment in favor of the moving party or grant a new trial, where the verdict is contrary to the weight of the evidence. In order for a court to determine that a verdict is against the weight of the evidence, it must find that “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [individuals] to the conclusion reached by the jury on the basis of the evidence presented at trial.” *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 (1978). Thus, if “it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence.” *Id.* at 499.

It is well-settled that “great deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the

opportunity to see and hear the witnesses." *Desposito v City of New York*, 55 AD3d 659, 866 N.Y.S.2d 248 (2d Dept 2008). A jury's resolution of disputed factual issues, as well as any inconsistencies in witnesses' testimony is also entitled to deference. *Bykowsky v Eskenazi*, 72 AD3d 590 (1st Dept 2010), *lv denied* 16 N.Y.3d 701 (2011). It is also the function of the jury to determine whether a witness is credible and what weight ought to be given to the testimony of experts. *Devito v Feliciano*, 84 AD3d 645 (1st Dept 2011), *citing Harding v Noble Taxi Corp.*, 182 AD2d 365 (1st Dept 1992).

Here, despite some inconsistencies in plaintiff's testimony, it is evident that the jury credited her testimony that, as she was descending a stairway leading to the Union Square subway station, she stepped on a cake-like substance with her right foot and then, when she tried to step with her left foot on the third step to avoid falling, the worn nosing of the third step led her to slip and fall down the stairs. Indeed, although defendant insists that the verdict must be set aside because plaintiff testified that a "cake-like substance" on the first step contributed to her accident, the verdict sheet establishes the jurors' determination that defendant "fail[ed] to correct the unsafe condition" that existed "on the third step from the top", and that such failure was a substantial factor in causing plaintiff's injuries. Doc. 48.

Further, regardless of the fact that Schwartzberg examined the stairway approximately two years after the accident, he was still permitted to rely on a photograph, taken immediately or a few months after the incident and marked as an exhibit at trial, in rendering his opinion that the worn condition of the nosing of the steps had existed for several years. *See Admiral Ins. Co. v Joy Contractors, Inc.*, 19 NY3d 448 (2012); *Tafrate v Gucciardo*, 2014 NY Slip Op 30330(U) (Sup Ct New York County 2014).

This Court cannot meaningfully analyze that branch of defendant's motion to set aside the damages verdict insofar as it did not append crucial portions of the transcript to its motion. *See Gorbea v DeCohen, supra*. The most glaring omission in this regard is defendant's failure to append to its motion the trial testimony of plaintiff's treating physician, Dr. Gabriel Dassa, which would presumably contain his opinions regarding plaintiff's prognosis, including the possible need for plaintiff to undergo surgery in the future.<sup>2</sup>

In any event, the sole case cited by defendant in connection with its excessive damages argument, *Claudio v City of New York*, 280 AD2d 403 (1<sup>st</sup> Dept 2001), would not persuade this Court to reduce the verdict. Contrary to defendant's contention, this 17 year-old decision is not a "recent appellate case." Doc. 47, at par. 22. Further, plaintiff in that case, who sustained a fracture of her *nondominant* wrist, an injury to her shoulder and ankle and was in a cast for six weeks, was awarded \$17,500 for past pain and suffering and \$6,000 for future pain and suffering. The Appellate Division, First Department directed a new trial on damages unless defendant stipulated to increase the awards for past and future pain and suffering to \$75,000 and \$40,000, respectively. Since plaintiff in *Claudio* received these awards for a fracture of her nondominant wrist almost 20 years ago, this Court disagrees that the awards of \$40,000 and \$160,000 for past and future pain and suffering, respectively, deviated from what can be considered reasonable compensation.

Finally, plaintiff's purported cross motion to increase the damages award is procedurally deficient insofar as plaintiff's counsel failed to submit a notice of cross motion in accordance with CPLR 2215. Even if a notice of cross motion had been filed, this Court would be unable to

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<sup>2</sup> Plaintiff also notes that, although she appeared for a physical examination by a physician designated by defendant, defendant failed to produce its examining physician as a witness at trial and, as a result, received as a sanction a missing witness instruction. *See* Pltf. Aff. In Opp., at par. 46. That defendant received a negative inference charge would further warrant the denial of its request for the reduction of the damages award.

increase the verdict given the aforementioned absence of all testimony regarding plaintiff's damages.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant New York City Transit Authority to set aside the verdict is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

3/27/2018

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: