Farrugia v 1440 Broadway Assoc.
2019 NY Slip Op 32602(U)
September 3, 2019
Supreme Court, New York County
Docket Number: 151857/2012
Judge: Frank P. Nervo

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

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ANTHONY FARRUGIA

Plaintiff,

-against-

1440 BROADWAY ASSOCIATES, 1440 BROADWAY OWNER, LLC, HARBOUR MECHANICAL CORP., 1440 BROADWAY MANAGEMENT, LLC, THE MARTIN GROUP, LLC., TIMBIL MECHANICAL, INC., and ARMA SCRAP METAL CO., INC.

Defendants.

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HARBOUR MECHANICAL CORP.

Third-Party Plaintiff,

-against-

THE MARTIN GROUP, LLC, GENTLEMAN SHEET METAL LTD., JOHN GRANDO, INC., TIMBIL MECHANICAL, INC., TRIUMVERATE ENVIRONMENTAL and ARMA SCRAP METAL, CO. INC.,

Third-Party Defendants.

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DECISION AND ORDER

Index Number

151857/2012

Third Party Index Number
590634/2013

FRANK P. NERVO, J.S.C.

Plaintiff seeks an order pursuant to CPLR § 4404 to modify and/or set aside the jury verdict award.[1] After trial, the jury found defendant owner 1440 Broadway and Harbour Mechanical negligent, and found plaintiff contributorily negligent for 25% of his injuries. The jury awarded plaintiff $400,000 for past lost wages, $50,000 for past pain and suffering, nothing for future pain and suffering, and nothing for future lost wages.[2] Plaintiff seeks to set aside the verdict, contending the award for past pain and suffering is unreasonably low and against the weight of the evidence. Plaintiff further

[1] Plaintiff also seeks relief under CPLR § 5501(c).

[2] The parties stipulated to an award of $45,570 for past medical expenses.

contends that the jury's failure to award any damages for future pain and suffering is also against the weight of the evidence. Relatedly, plaintiff argues that the jury's verdict is inconsistent. Finally, plaintiff contends the Court erred in denying his request for a missing witness charge and such error warrants a new trial.

I. Weight of the Evidence

To set aside the jury's verdict as against the weight of the evidence, the verdict must not be supported by a fair interpretation of the evidence (CPLR § 4404[a]; *Delgado v. Board of Educ.*, 65 Ad2D 547 [2d Dept 1978] *aff'd* 48 NY2d 643 [1979]). The Court cannot usurp the jury's function and substitute its judgment for that of the jury's on an issue of fact resolved by the jury and based on a fair interpretation of the evidence (*Martin v. McLaughlin*, 162 AD2d 181 [1st Dept 1990]; *Niewieroski v. Nat'l Cleaning Contrs.*, 126 AD2d 424 [1st Dept 1987] *lv. denied* 70 NY2d 602 [1987]).

The parties vehemently disagree on the severity of injury found by the jury. Defendants' experts opined that that plaintiff suffered a sprain-type injury to his ankle and a similar strain/sprain to his back. Plaintiff's experts opined that the injuries were significantly more severe, and included spinal disc injuries. Although defendants contend that jury accepted the entire opinion of defense experts and rejected the opinions of plaintiff's experts outright, the verdict does not so reflect. Instead, the verdict evinces the jury weighed these competing expert opinions and found plaintiff had suffered injury and past pain, but that he would not suffer future pain or be hindered from future employment. This finding is supported by evidence submitted at trial of plaintiff's successful surgery to remove a bone fragment and repair ligaments in his ankle. The jury heard conflicting descriptions of the incident and injuries, and it was the jury's duty to weigh the evidence and resolve any inconsistencies. The jury's verdict was not utterly irrational, given the totality of the evidence submitted by the parties. This Court cannot, and indeed will not, supplant the jury's determination under these circumstances.

II. INCONSISTENT VERDICT

Where a jury's verdict is inconsistent, the Court may either order the jury to reconsider its verdict or may set aside the verdict and order a new trial (*Marine Midland Bank v. Russo Produce Co.*, 50 NY2d 31 [1980]). The jury having been discharged, this Court is limited to ordering a new trial should it find the verdict inconsistent (*Vera v. Bielomatik Corp.*, 199 AD2d 132 [1st Dept 1993]; *see also Bellison Law LLC v. Iannucci*, 116 AD3d 401 [1st Dept 2014]). Where a fair interpretation of the evidence supports the jury's verdict, it is not inconsistent (*Caldas v. City of New York*, 284 AD2d 192 [1st Dept 2001]; *Kelly v. City of New York*, 6 AD3d 188 [1st Dept 2004]).

As an initial matter, plaintiff's motion to set aside the verdict as inconsistent is procedurally flawed; plaintiff having failed to raise the issue prior to the jury's discharge (*Arrieta v. Shams Waterproofing Inc.*, 76 AD3d 495 [1st Dept 2010] "In order to serve as a predicate for appeal, the issue must be raised before discharge of the jury so that the trial court may take corrective action to cure the inconsistency..."; *Ramos v. NYCHA*, 280 AD2d 235 [1st Dept 2001] "failure to move to set aside the verdict as inconsistent prior to discharge of the jury renders the claim unpreserved for appellate review"; *see also Mescall v. Structure-Tone, Inc.*, 100 AD3d 490 [1st Dept 2012]; *Knox v. Piccorelli*, 83 AD3d 851 [1st Dept 2011]).

Notwithstanding procedural deficiencies, plaintiff's motion to set aside the verdict as inconsistent is also substantively without merit. Plaintiff's claim of inconsistency is predicated on defendants' argument that plaintiff suffered a sprain-type injury to his ankle and similar strain/sprain to his back. Plaintiff contends the jury's award for years of lost wages is inconsistent with a sprain type injury, as a sprain would heal much sooner than the period of lost wages the jury awarded. Contrary to the parties' arguments, and as discussed above, the jury did not explicitly find plaintiff suffered a sprain-type injury to his ankle, and thus claims that the jury's award is inconsistent as it provides for greater past lost wages than a sprain injury is irrelevant impermissible speculation (*Bellison Law LLC*, 116 AD3d at 403; *Dubec v. New York City Hous. Auth.*, 39 AD3d 410, 411 [1st Dept 2007]). The parties' expert witnesses presented conflicting opinions to the jury regarding plaintiff's pre-existing ankle and

back conditions, the severity of the injuries suffered by plaintiff and the resulting limitations, as well as whether the pre-existing conditions were the cause of plaintiff's injuries. Furthermore, plaintiff conceded that he omitted to inform his treating physician of a prior ankle injury, despite the physician's questions relating to plaintiff's past ankle medical history, and the treating physician agreed that this information would be important to determine the injuries caused by the accident.

The jury's verdict is consistent with this evidence presented at trial, and a valid line of reasoning exists for the jury to have found: plaintiff suffered injuries to his ankle and/or back; these injuries were severe enough to render him unable to work for a period; these injuries caused him pain; but these injuries will not impede his return to work; and he will not suffer future pain as a result of these injuries. As a fair interpretation of the evidence supports the jury's determination, the verdict is not inconsistent as a matter of law, and the Court will not order a new trial on this basis.

III. Missing Witness

A missing witness charge is appropriate when: (1) the witness' knowledge is material; (2) the testimony is not cumulative; (3) the party against whom the charge is sought has control over the witness; and (4) the witness is available (*DeVito v. Feliciano*, 22 NY3d 159 [2013]; *People v. Savinon*, 100 NY2d 192 [2003]).

Plaintiff, at trial, sought a missing witness charge against defendant's vocational consultant, Mr. Capotosto. The request was denied. Plaintiff now seeks a new trial, arguing that the Court improperly denied a missing witness charge, prejudicing plaintiff, and such prejudice warrants a new trial. Defendants contend that plaintiff inappropriately sought a missing witness charge after the close of evidence, a week after defendants disclosed that they would not be calling the expert, and thus the charge was properly denied as untimely.

Alternatively, defendants argue that even if the charge was timely sought, Mr. Capotosto's testimony would be cumulative, as he would have referenced and incorporated plaintiff's expert's conclusions, and thus a missing witness charge is inappropriate. Defendants do not dispute that the witness was available, that the

defendants had control over their own expert, or that the expert's knowledge was material.

To the extent that defendants contend that plaintiff's expert, by referencing and incorporating plaintiff's expert's conclusions, rendered defendant's expert's testimony cumulative, that argument is rejected. "[A] witnesses' testimony is not cumulative merely because it would be cumulative of the opposing witness's testimony" (PJI 1:75; *see also Devito*, 22 NY3d at 166). However, a missing witness charge must be sought "as soon as practicable to avoid substantial possibilities of surprise" (*People v. Gonzlez*, 68 NY2d 424 [1986]). The charge must be sought before all parties rest at the close of evidence (*People v. Catoe*, 181 AD2d 905 [2d Dept 1992]). Plaintiff's failure to request a missing witness charge a week after learning defendants would not call their vocational expert and after the close of evidence is fatal to his request.

Accordingly, it is

ORDERED that the motion is denied.

THIS CONSTITUES THE DECISION AND ORDER OF THE COURT.

Dated

September 3 2019

ENTER:

J.S.C.

HON. FRANK P. NERVO