

Vnuk v City of Albany
2019 NY Slip Op 33049(U)
June 24, 2019
Supreme Court, Albany County
Docket Number: 5249-16
Judge: Richard M. Platkin
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STATE OF NEW YORK
SUPREME COURT

2019 JUL -5 PM 12: COUNTY OF ALBANY

DONNA M. VNUK and STEPHEN J. VNUK,

ALBANY COUNTY CLERK

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Plaintiffs,

-against-

DECISION & ORDER

CITY OF ALBANY and COUNTY OF ALBANY,

Defendants.

Index No.: 5249-16

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiff Donna M. Vnuk and her husband, Stephen J. Vnuk, commenced this action against defendants City of Albany (“City”) and County of Albany (“County”), seeking to recover for personal injuries sustained when Donna Vnuk (“plaintiff”)¹ tripped and fell over the remnants of a traffic control device that had been improperly removed from a City sidewalk. Following joinder of issue and the completion of all necessary discovery, defendants separately moved for summary judgment dismissing the complaint.

By Decision & Order dated January 31, 2019 (“SJ Decision”), the Court granted the County’s motion but denied summary judgment to the City. As is relevant here, the Court found a triable issue of fact as to “whether the City created the dangerous condition through the actions of the [private] developer that it tasked with performing the removal of the City’s traffic signal device from City property,” so as to render inapplicable the requirement of prior written notice (SJ Decision, pp. 8-11). The Court denied the City’s motion for reargument on April 19, 2019 (“Reargument Decision”).

A jury trial was held from May 6, 2019 through May 9, 2019. The jury returned a verdict in favor of plaintiff, finding that the City had created a dangerous condition through the actions of the private developer. The jury awarded plaintiff \$137,500 in past pain and suffering, \$100,000 in future pain and suffering, and the stipulated sum of \$26,486 in medical and therapy expenses.

¹ The claim alleged by plaintiff Stephen Vnuk is purely derivative, and the jury declined to make any award of damages to him.

The City now moves for judgment as a matter of law on liability and/or damages, notwithstanding the jury's verdict (*see* CPLR 4404 [a]). Alternatively, the City seeks an order setting aside the jury's finding of liability as against the weight of the evidence and the award of damages as excessive (*see id.*). The City also seeks "an order of remittitur and/or reapportionment of damages," a hearing on the appropriate rate of interest on the damages award, and a stay pending appeal.

ANALYSIS

A. Threshold Issues

Plaintiff contends that the City's motion should be summarily denied due to: (1) the City's failure to properly notice its post-trial motion; and (2) the absence of any evidentiary or legal support for the motion.

1. Notice of the Motion

The City's motion was made returnable on June 7, 2019 (*see* Notice of Motion), the same day that the motion papers were served on plaintiff's counsel (*see* Affidavit of Service, sworn to on June 7, 2019; *see also* CPLR 2211). Plainly, the motion is not properly noticed (*see* CPLR 2214 [b]). However, plaintiff opposes the motion on the merits, and she has failed to identify any prejudice flowing from this procedural irregularity. Under the circumstances, the Court will consider the merits of the motion, notwithstanding the City's failure to properly notice it (*see Piquette v City of New York*, 4 AD3d 402, 403 [2d Dept 2004], *lv denied* 3 NY3d 605 [2004]).

2. Lack of Evidentiary Support

The Court concludes that the City's motion, which is supported only by an affirmation of counsel, is procedurally defective in that it fails to include the trial transcript. It is the obligation

of the moving party to furnish all “papers not already in the possession of the court necessary to the consideration of the questions involved” (CPLR 2214 [c]), and it is necessary and appropriate for the Court to review the entire trial record when ruling on post-trial challenges to a jury verdict (*Gerhardt v New York City Tr. Auth.*, 8 AD3d 427, 427 [2d Dept 2004]). Based on the City’s failure to supply the Court with the necessary papers, the instant motion is subject to denial on this ground alone.²

B. Creation of the Defect

The City argues that “the jury could not find for plaintiff as a matter of law because there was no evidence submitted by plaintiff as to who committed the defect. The plaintiff failed to demonstrate who created the defect” (DeThomasis Aff., ¶ 4).

In denying the City’s motions for summary judgment and reargument, the Court held that, in light of the City’s nondelegable duty to maintain its sidewalks in a reasonably safe condition, there was “a triable issue of fact as to whether the City made the developer of the Wellington DeWitt project its agent for the removal of the traffic device through a relationship that was the functional equivalent of contractual privity, thereby implicating the affirmative negligence exception to the prior written notice rule” (Reargument Decision, p. 6). In particular, the Court relied upon the deposition testimony of William E. Trudeau, Jr., the City’s chief supervisor of traffic engineering (*see id.*, pp. 5-6).

At trial, Trudeau delivered testimony that was substantially similar to the deposition testimony relied upon by the Court in denying summary judgment. In particular, Trudeau

² Notwithstanding this procedural defect, the Court will endeavor to decide the remaining branches of the motion on the basis of the documentation supplied by plaintiffs and its own recollection of the trial.

testified at trial that: (1) the City owns the sidewalk where plaintiff fell; (2) the City has responsibility for the removal of any traffic control devices; and (3) he directed the private developer to remove the City's traffic signal from the City's sidewalk.

Given the theory of notice and liability upon which this case was presented to the jury, the Court is satisfied that plaintiff's failure to identify the private party who actually performed the incomplete removal work does not provide a basis for setting aside the verdict against the City.

C. Expert Testimony

At trial, plaintiff elicited expert testimony from Theodore DeLucia, Jr., a long-time municipal building inspector. DeLucia opined that the presence of exposed bolts and footings on the City sidewalk constituted a "dangerous condition" within the meaning of the New York Property Maintenance Code ("PMC") and, therefore, a violation of a State regulation. The City claims that this expert testimony was unduly prejudicial.

The Court is unpersuaded by the City's contention. It was plaintiff's burden to establish the dangerousness of the exposed footing and bolts, and plaintiff was entitled to rely upon proof that the City violated a New York State regulation (*see* PMC § 302.3) by failing to keep its "[s]idewalks . . . in a proper state of repair, and maintained free from hazardous conditions" (*id.*; *see Selkowitz v County of Nassau*, 45 NY2d 97, 101-102 [1978]; *see also People v Cronin*, 60 NY2d 430, 432-433 [1983]).

Further, even if the standard established by Section 302.3 of the PMC is insufficiently specific to serve as a predicate for a finding of negligence (*compare Witkowski v Island Trees Pub. Lib.*, 125 AD3d 768, 770 [2d Dept 2015], *with Stancarone v Sullivan*, 167 AD3d 676, 678 [2d Dept 2018]), any error relative to DeLucia's testimony was harmless and would not warrant

setting aside the jury's verdict. The jury properly was instructed that a violation of Section 302.3 was merely "some evidence of negligence," to be considered "along with the other evidence in the case," and this "other evidence" overwhelmingly established that the presence of an exposed concrete footing with bolts on a sidewalk constituted an unsafe condition for pedestrians.

D. Severance of the Third-Party Action

The City claims that it was severely prejudiced by the Court's severance of the third-party action. For the reasons that follow, this contention is without merit.

Plaintiff commenced this action against the City and County in 2016, a trial-term note of issue was filed on June 29, 2018, the case was assigned a day certain for trial on July 9, 2018, and the City's motion for summary judgment was denied on January 31, 2019. Nonetheless, the City did not commence a third-party action against the private developer and its contractors until March 25, 2019 – just weeks before the May 6, 2019 trial of the main action.

It appears that the City orally applied to the Part 1 Judge in early April 2019 to adjourn the trial due to the commencement of the third-party action. The Court (Hartman, J.) denied the request on April 11, 2019, ordering as follows: "The recently filed third-party claims, for which issue has apparently not yet been joined, are hereby severed from the underlying action (*see* CPLR 603)."

Pursuant to CPLR 603, a court may order severance "[i]n furtherance of convenience or to avoid prejudice." In addition, CPLR 1010 provides that a court has the discretion to "order a separate trial of the third-party claim" where "the controversy between the third-party plaintiff and the third-party defendant[s] will unduly delay the determination of the main action."

In the Court's view, the Part 1 Judge's severance of the belated third-party action was an entirely appropriate exercise of discretion in light of the City's extreme tardiness in commencing the third-party action, the City's lack of any reasonable excuse for the delay, and the resultant and unwarranted delay to the main action if severance of the third-party action were not ordered (*see Nielsen v Greenman Bros.*, 100 AD2d 578, 579 [2d Dept 1984]; *Cipollina v Kent*, 52 AD2d 632, 632 [2d Dept 1976]).

E. Apportionment of Damages

The City contends that the Court erred in refusing to allow the jury to apportion liability against the third-party defendants. In denying the City's request at trial, the Court began by questioning whether such an allocation was proper under CPLR article 16, given the non-delegable nature of the City's duty to maintain its sidewalks (*see CPLR 1602 [2] [iv]; Lopes v Rostad*, 45 NY2d 617, 623 [1978]). Nonetheless, the Court declined to reach this issue because the City had failed to make out a *prima facie* case of liability for the dangerous condition against any of the third-party defendants.

For essentially the reasons stated on the record at trial, the Court finds that the City has failed to adduce legally-sufficient proof demonstrating liability on the part of any of the third-party defendants (*see Zalinka v Owens-Corning Fiberglass Corp.*, 221 AD2d 830, 831 [3d Dept 1995] [defendant bears the burden of demonstrating the culpability of any non-parties against whom it seeks to apportion liability]).

F. Damages

The City seeks remittitur, contending that the jury's award to plaintiff of \$237,500 in damages for pain and suffering was excessive.

A jury's award of damages "will not be set aside unless it deviates materially from what would be reasonable compensation" (*Garrow v Rosettie Assoc., LLC*, 60 AD3d 1125 [3d Dept 2009]; see CPLR 5501 [c]). "[B]ecause pain and suffering awards are not subject to precise quantification, examination of comparable cases is necessary to determine whether the award materially deviated from reasonable compensation" (*Nolan v Union Coll. Trust of Schenectady, N.Y.*, 51 AD3d 1253, 1256 [3d Dept 2008] [internal quotation marks and citations omitted], *lv denied* 11 NY3d 705 [2008]). "Moreover, factors to be considered in evaluating such awards include the nature, extent and permanency of the injuries, the extent of past, present and future pain and the long-term effects of the injury" (*id.* [citation omitted]).

The City has failed to support its motion with any examination of comparable cases, whereas plaintiff has provided verdict and settlement reports that support the reasonableness of the jury's award. Further, the testimony of plaintiff, her orthopedic surgeon, Dr. Max Alley, and her physical therapist, Michelle Rocklein, sufficiently establish that plaintiff was subjected to a long, painful rehabilitation process as a result of the fall and that plaintiff will permanently suffer the effects of these injuries.

Under the circumstances, the City has failed to meet its burden of demonstrating the excessiveness of the damage award.

G. Stay

In its Notice of Motion, the City requests a stay pending appeal, but it has failed to support this branch of the motion with any argument or evidence. Moreover, the City's motion does not address the availability of an automatic stay under CPLR 5519 (a) (1). Accordingly, the application for a discretionary stay is denied.

CONCLUSION

For all of the foregoing reasons,³ it is

ORDERED that defendant City of Albany’s post-trial motion is denied in all respects; and finally it is

ORDERED that a collateral source hearing is hereby scheduled for Tuesday, July 30, 2019 at 9:30 a.m. in the Albany County Courthouse.

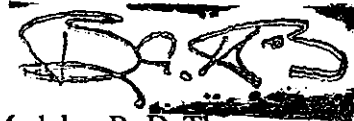
This constitutes the Decision & Order of the Court, the original of which is being transmitted to counsel for plaintiffs; all other papers are being delivered to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: Albany, New York
June 24, 2019


RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

1. Notice of Motion, dated June 7, 2019; Affirmation of Madalyn R. DeThomasis, Esq., dated June 7, 2019; Affidavit of Service, sworn to June 7, 2019;
2. Plaintiffs’ Opposition to the Post Trial Motion of Defendant City of Albany, dated June 12, 2019, with annexed exhibits A-H; and Affidavit of Personal Service, sworn to June 12, 2019.



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³ The Court has considered the City’s remaining requests for relief, but finds them to be unsupported and/or lacking in merit.

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