Onilude v City of New York
2019 NY Slip Op 33978(U)
January 8, 2019
Supreme Court, Bronx County
Docket Number: 309622/2009
Judge: Wilma Guzman
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

TOKUNBO ONILUDE,

Plaintiff,

-against-

THE CITY OF NEW YORK, JORGE CHICO, KEITH KUCERAK and GREGORY HERNANDEZ,

Defendants,

Index No.: 309622/2009
Returnable: 6/11/18
Motion: #14

Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, Exhibits Thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Motion decided as follows: Upon deliberation of the application duly made by defendants herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order pursuant to CPLR §4404(a): (1) setting aside the verdict for plaintiff and ordering a new trial in the interests of justice; and/or; (2) setting aside the damages verdict for plaintiff and ordering a new trial on damages as the jury award was excessive and contrary to the weight of the evidence; and (3) staying th entry of judgement until 60 days after decision on all post-trial motions, is heretofore denied.

On September 16, 2008, plaintiff was arrested, charged with and prosecuted for attempted murder, attempted robbery, assault in the 1st Degree and various lesser crimes due to his alleged involvement in the stabbing of a livery cab driver on September 7, 2008 on Hering Avenue, Bronx New York. Plaintiff denied being involved in the stabbing. This action was commenced in 2009 and proceeded to trial in November, 2017. The trial of this matter, which was held between the dates of November 8, 2017 and December 21, 2017 involved causes of action for false arrest and malicious prosecution with state and federal claims against THE CITY OF NEW YORK (hereinafter "City") and the three (3) named police officers. On December 21, 2017, the jury returned a verdict in favor of plaintiff on every cause of action against each defendant, awarding plaintiff $2,200,000.00 in compensatory damages and $178,000 in punitive damages.

Defendants claim that the Court made a reversible error by precluding Andrea Lounds, requiring a new trial. More specifically, defendants claim that Ms. Lounds was a critical eyewitness who saw plaintiff run from he crime scene, and pointed out plaintiff to the police, thereby giving defendants Hernandez and Kucerak reasonable cause to arrest him. Moreover, defendants claim that Ms. Lounds signed a confirmatory photograph, further supplying defendant Chico with probable cause to arrest and prosecute plaintiff.

This Court precluded Ms. Lounds from testifying pursuant to CPLR §3101(h). CPLR §3101(h) provides, in pertinent part:

> "A party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading."

Here, there was an issue as to where Ms. Lounds resided, dating back to 2013. It does not appear that defendants ever supplemented the last known address to Ms. Lounds despite representation by Ms. Lounds

in her own affidavit that she advised counsel for defendants in 2017 that she was living in Connecticut. A September 19, 2017 Witness Exchange provided by defendants indicates that Ms. Lounds' last known address as 1151 Burke Ave., #2, Bronx, NY 10469. Plaintiff's counsel represented to the Court that they could not locate Ms. Lounds during the course of litigation and affirmatively represented to the Court during trial that they did not have Ms. Lounds' current address.

This Court heard arguments about precluding Ms. Lounds from testifying in the early stages of the trial, and reserved judgement. After plaintiff rested, defense counsel represented that they intended to call Ms. Lounds to testify as a witness. This Court was compelled to therefore reach a decision on the matter.

In contemplation of making a ruling, the Court ordered a hearing on the issue of what defendants knew about Lounds' change of address and when they knew it. The hearing did not simply turn on control, but also whether defense counsel's behavior was prejudicial, and wilful and contumacious in not providing Ms. Lounds' last known address in violation of CPLR §3101(h). Counsel for defendants voluntarily decided not to participate in the hearing, thereby forcing the Court to make a determination about preclusion without defense counsel's participation in the hearing. This Court made a discretionary ruling that defense Counsel's behavior was prejudicial, willful and contumacious by failing to provide the updated address to plaintiff, and therefore precluded Ms. Lounds from testifying pursuant to CPLR § 3101. *See* Frenk v. Frederick, 38 A.D.3d 593 (2nd Dept. 2007). This Court finds that such a preclusion ruling was not reversible error and does not require this Court to Order a new trial.

Defendants next seek to set aside the verdict based on the grounds that plaintiff's wife, Shawanna Balkcon and plaintiff's criminal defense lawyer, Robin Frankel, both testified that they thought plaintiff was innocent, prejudicing the defendant as it had no bearing on defendants' reasonable belief that a crime had been committed by plaintiff. This Court finds that defense Counsel has unclean hands in this matter. Defense counsel made several comments during his opening statement about plaintiff "catching a lucky break" while simultaneously making demonstrative overtures toward plaintiff. Moreover, defendant Chico testified that the person who brutally stabbed the victim got away with it, and insinuated that it was plaintiff who got away with attempted murder. The Court's decision to allow testimony by plaintiff's wife and lawyer are, at worst, harmless error, taking into consideration all the testimony proffered in the month long trial. It should be noted that the Court gave curative instructions which mitigated any prejudice that could follow from the inclusion of such testimony.

Defendant next seeks to set aside the verdict and order a new trial on the basis that the Court submitted a jury question on "improper stop" and failed to charge the applicable standard for an improper stop, which confused the jury. Even, assuming, *arguendo*, the Court did make an error in charging an "improper stop," such an error would be harmless and would not require a new trial. The defendants unanimously found that defendants did not have probable cause to arrest plaintiff, and defendants do not claim any error in this Court's "false arrest" charge. Defendants have not set forth any actual prejudice that resulted from this Courts "improper stop" charge, and especially given that any cause of action for an illegal stop is "subsumed" in the cause of action for false arrest. As such, assuming, *arguendo*, that such a charge was an error, it was harmless and does not require a new trial. *See* People & C. v. Viruet, 29 N.Y.3d 527 (2017).

Defendants seek to set aside the verdict on the basis that the Court unduly prejudiced the defendants by referring to defendant Chico's hospital interview with plaintiff as a "purported" interview during jury instruction. The Court did not make an error or express an improper opinion by referring to the interview as "purported." Simply stated, there was a genuine issue of fact as to whether such an interview occurred. As such, the Court's language was proper given the circumstances.

Defendants next seeks to set aside the verdict for what they view as excessive curative instructions and negative commentary by the Court allegedly aimed primarily at defense counsel, as well as one sided rulings and instructions in favor of plaintiff and at the expense of defendants. This Court finds that there is no basis for such claims, and such claims are belied by the record.

Next, defendants argue that the Court should set aside the verdict as being "excessive, exorbitant, and shocking." The standard for whether an award is excessive turns on whether such an award deviates materially from what would be reasonable compensation. *See* CPLR §5501(c); Matter of 91st St. Crane Collapse Litig., 154 A.D.3d 139 (1st Dept. 2017). This Court finds that the award in this matter is not excessive as a matter

of law. The evidence presented at trial with respect to damages empowered the jury to make an ward that was reasonable given the circumstances. This Court will not disturb a reasonable jury verdict that is based on the evidence.

Finally, defendants seek to stay entry of judgement by any party until sixty (60) days after the Court renders a decision on any post-trial motions made in connection with this action. Defendants indicate that the purpose of the stay is to "resolve all issues pertaining to entry of judgement, including, but not limited to, all monetary issues involving the judgement." This Court finds that defendants have not set forth any sufficient or specific basis for this Court to stay entry of judgement herein. As such, that application is denied.

Accordingly, it is:

ORDERED that defendants application for an Order pursuant to CPLR §4404(a): (1) setting aside the verdict for plaintiff and ordering a new trial in the interests of justice; and/or; (2) setting aside the damages verdict for plaintiff and ordering a new trial on damages as the jury award was excessive and contrary to the weight of the evidence; and (3) staying th entry of judgement until 60 days after decision on all post-trial motions, is heretofore denied. It is further

ORDERED that defendants shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 1/8/19

HON. WILMA GUZMAN
J.S.C.