

Ammon v Dollar Tree Stores
2020 NY Slip Op 31267(U)
May 8, 2020
Supreme Court, Kings County
Docket Number: 519294/2017
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 8th day of May 2020.

P R E S E N T:

Honorable Reginald A. Boddie, JSC

-----X

JENNIFER AMMON,

Plaintiff(s),

Index No. 519294/2017

MS 7

Against

DECISION AND ORDER

DOLLAR TREE STORES, DOLLAR TREE INC.
and 1183 FLATBUSH AVENUE LLC,

Defendant(s).

-----X

<u>Papers</u>	<u>Numbered</u>
Notice of Motion & Annexed Affirmation/Affidavit in Support	1-2
Affirmation in Opposition	3
Reply	4

Upon the foregoing cited papers and after oral argument, the decision and order on plaintiff's motion to set aside the jury verdict, pursuant to CPLR 4404, and grant a new trial on the issue of damages is as follows:

Plaintiff commenced this lawsuit to recover for personal injuries allegedly sustained on the premises of the Dollar Tree Store, located at 1183 Flatbush Avenue in Brooklyn, on January 15, 2015. Defendant conceded liability and a trial on the issue of damages was commenced in Part 95

on October 15, 2019. The jury returned a verdict in the amount of \$80,000 on October 23, 2019.

The verdict was read as follows:

COURT CLERK: Will the foreperson please rise. As to question 1, "State the amount awarded to plaintiff, Jennifer Ammon, for pain and suffering from January 15th, 2017 to the date of your verdict."

THE FOREPERSON: \$80,000

COURT CLERK: And was that unanimous?

THE FOREPERSON: Yes.

COURT CLERK: And as to question 2, "State the amount awarded to plaintiff, Jennifer Ammon, if any, for pain and suffering, including the permanent effect of her injuries from the time of verdict to the time that she could be expected to live."

THE FOREPERSON: None.

COURT CLERK: And was that unanimous, sir?

THE FOREPERSON: Yes.

THE COURT: Question 3 says none, but there was no need to go any further. Do you wish to poll the jury?

MR. HARRIS: Yes.

THE COURT: Will you poll the jury?

COURT CLERK: Jurors, listen to your verdict as it is read and was asked of you --

THE COURT: Was that unanimous?

COURT CLERK: Yes.

THE COURT: So you don't need to poll them. It was unanimous on 2 so there is nothing to poll.

Thereafter, the attorneys thanked the jurors for their service and the court discharged the jurors. Plaintiff's counsel then made a motion to set aside the verdict as against the weight of the evidence. Defense counsel opposed the motion on the ground that the issue of damages was within the province of the jury to decide. The court denied the motion.

On November 6, 2019, the trial extract was filed by the Clerk of the Court. Nancy T. Sunshine, the Kings County Clerk signed the extract and stated, "Jury awards, by 5 of 6, \$80,000 to plaintiff Jennifer Ammon for pain and suffering from January 15, 2017, to the date of this verdict, and none for pain and suffering, including the permanent effect of her injuries, from the time of the verdict to the time that she could be expected to live."

Plaintiff's counsel brought the instant motion to set aside the verdict pursuant to CPLR 4404. Plaintiff argued:

Polling the jurors in open court was Plaintiff's absolute right and failure to conduct a polling of the jury by the Court was a fundamental and reversible error. The record supports the conclusion that the Court Clerk's improper action to announce a unanimous verdict resulted in the jury not being polled. The trial judge concurred with the Court Clerk's assertion of a unanimous jury decision while unaware that it was not a unanimous verdict. The Court's failure to poll the jury after Plaintiff's request is reversible error and grounds for a new trial.

Defense counsel opposed the motion arguing:

Plaintiff's counsel did not preserve any potential error concerning the alleged failure to charge the jury. Counsel did not object to any of the statements made by the Court concerning the polling of the jury nor was an exception taken at any time concerning the polling of the jury. The trial transcript clearly shows that plaintiff's counsel did not object to the Court's comment that there was "nothing to poll." Instead, plaintiff's counsel merely thanked the jury for its service and moved on to his motion to set aside the verdict as against the weight of the credible evidence. No objection or exception was taken and therefore, the issue is not preserved for review of any kind.

CPLR 4404 (a) provides:

After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

It is well-settled under New York law that "a verdict is not recognized as valid and final until it is pronounced and recorded in open court: the jury may change their mind and disagree as to their verdict after they have pronounced it in open court before it is received and entered on the minutes" (*Duffy v Vogel*, 12 NY3d 169, 174 [2009]). In *Duffy*, shortly after the verdict was read, plaintiff requested that the jury be polled to ascertain whether "each juror consents this is the

verdict as read by the foreperson” (12 NY3d at 172). The request was denied as “unnecessary” and the jury discharged (*Duffy*, 12 NY3d at 172).

The trial court subsequently acknowledged that it had erred in denying the poll and, on that ground, granted plaintiff’s post trial motion to set aside the verdict and declare a mistrial (2007 NY Slip Op 34280[U]) (*Duffy*, 12 NY3d at 172). Defendants conceded it was error not to poll the jury, yet urged that harmless error analysis may save the verdict (*Duffy*, 12 NY3d at 172). The Court held, “Inasmuch as, under New York law, the honor of a request for a jury poll is a necessary condition of a ‘finished or perfected’ verdict, it follows that in this State’s courts the failure to poll a jury may never be deemed harmless. Harmless error analysis is a judicial device employed to sustain an already perfected verdict, not to perfect a verdict in the first instance” (*Duffy*, 12 NY3d at 175).

It is the “. . . absolute right of a party to have the jury polled on their bringing in their verdict, whether it be sealed or oral, unless [the party] has [waived] that right” (*Duffy*, 12 NY3d at 174, citing *Labar v Koplin*, 4 NY 547, 550-551 [1851]). Waiver may be express or implied (*see Duffy*, 12 NY3d at 174, citing *Labar v Koplin*, 4 NY at 550-551; *see Holstein v Community Gen. Hosp. of Greater Syracuse*, 86 AD3d 911, 912 [4th Dept 2011]). The failure to voice a timely objection to the procedure chosen by the court for polling the jury or request that the jury be polled constitutes a waiver (*see People v Marilla*, 7 NY2d 319, 321 [1960]; *see Giannattasio v Han Suk Kang*, 84 AD3d 728, 729 [2d Dept 2011]; *see Holstein*, 86 AD3d at 912; *see also Rokitka v Barrett*, 303 AD2d 983, 984 [4th Dept 2003], citing *see Farhart v Matuljak*, 283 AD 977, 978 [3d Dept 1954]; *see also People v Mercado*, 91 NY2d 960, 963 [1998]).

In *Farhart*, counsel asked that the jury be polled (283 AD at 978). The trial court commented that the verdict was unanimous (*Farhart*, at 978). Counsel pursued the matter no

further and made the usual motions (*Farhart*, at 978). The Appellate Division held that it was counsel's failure to persist rather than the trial court's adverse determination that cost counsel the right to have the jury polled (*Farhart*, at 978).

In *Holstein*, the Appellate Division rejected appellant's contention that a new trial was warranted based upon the failure of the court to poll the jury because counsel failed to make a timely objection to preserve this right. Following the jury's announcement of the verdict, defense counsel "ask[ed] that the jury be polled," to which the court responded, "Jury be polled, they have signed. They each have individually signed." Defense counsel then stated, "Okay. All right. Thank you," following which the court excused the jury. (*Holstein*, 86 AD3d at 912). The Court reasoned that it could not conclude that the equivocal comment by the court constituted a ruling on defense counsel's request. The Court distinguished *Duffy*, 12 NY3d at 172, where the trial court explicitly denied the request to poll the jury as unnecessary and the jury was discharged, and reasoned that, here, defense counsel was afforded an opportunity to clarify her request prior to the jury being discharged "and [,] when [defense] counsel immediately abandoned the subject[,], the court might well have assumed that [defense] counsel acquiesced that the polling was unnecessary" (*Holstein*, 86 AD3d at 912).

Here, the court, not counsel, raised the issue of polling in the first instance. Unlike counsel in *Duffy*, 12 NY3d at 172, the record evidences, that plaintiff failed to pursue his right to poll the jury. As there was no request asserted, there was no ruling made. The court's statement that there was nothing to poll was merely a comment and not a ruling, to which plaintiff's counsel assented (*see Holstein*, 86 AD3d at 912). Plaintiff's counsel failed to timely raise an objection to the polling procedure or the court's comment that there was nothing to poll. Instead, plaintiff thanked the jurors, saw them discharged, and made a motion to set aside the verdict as against the weight of

the evidence. Plaintiff's counsel sought to object only after the trial extract revealed the verdict was not unanimous, prompting the instant motion.

Having failed to assert his right to poll the jury in the first instance or raise an objection to the court's comment or procedure while the jurors were still empaneled, plaintiff's counsel waived the right to poll the jury and cannot now raise the objection (*see Giannattasio*, 84 AD3d at 729; *Holstein*, 86 AD3d at 912; *see Farhart*, 283 AD at 978). Accordingly, plaintiff's motion to set aside the verdict and for a new trial, pursuant to CPLR 4404, is denied.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court