

<b>Zeidel v City of New York</b>
2020 NY Slip Op 33420(U)
October 20, 2020
Supreme Court, New York County
Docket Number: 154849/2015
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

*Justice*

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ROSLYN ZEIDEL,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NYC DEPARTMENT OF  
EDUCATION, FRANK RUGGIERO, CARLOS HERNANDEZ

Defendant.

-----X

INDEX NO. 154849/2015

MOTION DATE 8/26/2020

MOTION SEQ. NO. 006

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113

were read on this motion to/for

SET ASIDE VERDICT

I. BACKGROUND

In this personal injury action, the plaintiff, Roslyn Zeidel, who slipped and fell on a wet hallway floor in the New York City public school where she was employed as a teacher, moves pursuant to CPLR 4404(a) to set aside the jury verdict in favor of the defendants. The plaintiff argues that (1) the court erred in denying her motion *in limine* to preclude the appearing defendants, The City of New York, The City of New York Department of Education and Frank Ruggiero, the school's custodial engineer, from raising defenses at trial on the issue of liability based on a default judgment previously entered against defendant Carlos Hernandez, a custodian, and (2) the jury's verdict is against the weight of the credible evidence. The defendants oppose the motion. The motion is denied.

II. DISCUSSION

A. Motion in Limine

Prior to trial, on September 18, 2018, the court (Tisch, J.) granted the plaintiff's motion for leave to enter a default judgment on the issue of liability as against defendant Carlos Hernandez. At trial, the plaintiff argued that liability was thus decided, and moved to preclude the defendants from offering evidence in their defense on that issue, seemingly asserting the

principle of collateral estoppel. In a ruling on the record, the court denied the *in limine* motion as procedurally improper and without merit. The court ruled that the *in limine* motion was, essentially, an untimely motion for partial summary judgment on the issue of liability and that no good cause for the delay in moving for summary judgment was demonstrated. See Miceli v State Farm Mut. Ins. Co., 3 NY3d 725 (2004); Brill v City of New York, 2 NY3d 648 (2004); Ofman v Ginsberg, 89 AD3d 908 (2<sup>nd</sup> Dept. 2011). The court explained that the case scheduling order (Chan, J.) required that any motion for summary judgment be filed no later than 60 days after the filing of the Note of Issue. The Note of Issue was filed on March 30, 2018, making the deadline on or about May 30, 2018. The subject motion *in limine* was made in the spring of 2019. Even if the intervening issuance of the default judgment constituted good cause for the delay, the motion was still untimely by several months. The only motion filed by the plaintiff during that time was a motion to preclude evidence, which was later withdrawn in October 2019. The absence of good cause alone warranted denial of the motion. See Jones v City of New York, 130 AD3d 686 (2<sup>nd</sup> Dept. 2015). This the court properly denied the motion as procedurally improper. In any event, the motion *in limine* was meritless.

CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2<sup>nd</sup> Dept. 2003); Holt v Holt, 262 AD2d 530 (2<sup>nd</sup> Dept. 1999). “The judgment obtained by the plaintiff as against a defaulting defendant is not entitled to collateral estoppel effect against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability.” Holt v Holt, 262 AD2d at 530 (2<sup>nd</sup> Dept. 1999); see Woodson v Mendon Leasing Corp., 259 AD2d 304 (1<sup>st</sup> Dept. 1999). Therefore, the default judgment entered against Hernandez could not have relieved the plaintiff of her burden of proof at trial or precluded the answering defendants from asserting defenses and litigating the issue of liability. As such, the motion *in limine* was properly denied in its entirety.

#### B. Verdict – Weight of the Evidence

The trial court’s role on a motion pursuant to CPLR 4404(a) is very limited, since deference is owed to the fact-finding powers of a jury, and a trial judge may not substitute her own credibility determinations for that of the jury. “A trial court may not interfere with the fact-finding function of a jury simply because it disagrees with the verdict or would have evaluated credibility in a different manner.” Rivera v 4064 Realty Co., 17 AD3d 201, 203 (1<sup>st</sup> Dept. 2005); McDermott v Coffee Beanery, Ltd., 9 AD3d 195, 206 (1<sup>st</sup> Dept. 2004). It is well settled that a

motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as a matter of law may only be granted where there is “simply no valid line of reasoning and permissible inferences which could possibly lead rational men [or women] to the conclusion reached by the jury on the basis of the evidence presented at trial.” Cohen v Hallmark Cards, 45 NY2d 493, 499 (1978). That is, a CPLR 4404(a) motion to set aside a jury verdict as contrary to the weight of the evidence and for a new trial may only be granted where the verdict is “palpably wrong” (Rivera v 4064 Realty Co., supra, at 203). That standard was not met here.

The plaintiff does not demonstrate that there is “no valid line of reasoning and permissible inferences” (Cohen v Hallmark Cards, supra at 499) to support the verdict rendered, that the verdict was “palpably wrong” (Rivera v 4064 Realty Co., supra, at 203) or that “the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence.” Lolik v Big V Supermarkets, 86 NY2d 744, 746 (1995) (citation and internal quotation marks omitted); see KBL, LLP v Community Counseling & Mediation Servs., 123 AD3d 488 (1<sup>st</sup> Dept. 2014); McDermott v Coffee Beanery Ltd., 9 AD3d 195 (1<sup>st</sup> Dept. 2004).

Specifically, the plaintiff argues that the jury’s finding that the defendants kept the hallway in a reasonably safe condition could not be reached on any fair interpretation of the evidence. The plaintiff’s view is that the credible evidence adduced at trial showed that she slipped in a hallway area which had recently been mopped by Hernandez, and that a safety sign was merely propped against a wall and not adequately or properly placed to apprise her of the wet floor in time to avoid it. However, a fair interpretation of the evidence supports the jury’s finding that the defendants were not negligent. Although the plaintiff is correct in asserting that some evidence was presented to show that the yellow wet floor sign was propped up against or close to a wall rather than placed on the wet surface, the jury also heard testimony regarding the layout of the hallway and the visibility of the sign to allow them to reasonably conclude that the hallway was in a reasonably safe condition. The plaintiff’s assertion is based on her own trial testimony. But, in addition to the plaintiff, Mary Lee and Shuk Lee also testified and portions of Hernandez’ deposition testimony were read into the record by defendant Department of Education, who gave a differing account. Any determination as to where the sign was placed and whether that placement sufficiently warned her of the potential danger is “a factual matter clearly within the province of the jury to determine” such that setting aside the verdict and ordering a new trial would be an improper usurping of the jury’s role. See Niewieroski v Nat’l

Cleaning Contractors, 126 AD2d 424 (1<sup>st</sup> Dept. 1987) *appeal denied* 70 NY2d 602 (1987). Furthermore, “[i]t is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses.” KBL, LLP v Comm. Counseling & Mediation Servs., 123 AD3d 488, 489 (1<sup>st</sup> Dept.), *quoting* Exarhouleas v Green 317 Madison, LLC, 46 AD3d 854, 855 (2<sup>nd</sup> Dept. 2007). Since the issue of the placement and visibility of the wet floor sign largely presented an issue of credibility for the jury to resolve there is no basis upon which to set aside the verdict as contrary to the weight of the evidence. See Martinez v Metropolitan Transp. Auth., 159 AD3d 584 (1<sup>st</sup> Dept. 2018). As stated, the court “may not employ its discretion simply because it disagrees with the verdict.” McDermott v Coffee Beanery, Ltd., 9 AD3d 195, 196 (1<sup>st</sup> Dept.).

III. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff’s motion pursuant to CPLR 4404(a) is denied.

This constitutes the Decision and Order of the court.

  
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 NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

	<u>10/20/2020</u> <b>DATE</b>		
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:			<input type="checkbox"/> REFERENCE