

**Eaton v Fiotos**

2020 NY Slip Op 34391(U)

November 30, 2020

Supreme Court, Kings County

Docket Number: 189/14

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30<sup>th</sup> day of November, 2020

P R E S E N T:

HON. MARK I. PARTNOW

Justice.

-----X

MARTIN EATON,

Plaintiff(s),

MS#7

- against -

Index No. 189/14

FRANK FIOTOS, JOHN FIOTODIMITRAKIS, ANTONIOS FIOTODIMITRAKIS, 514 FIOTO PROPERTY CORP., FIOTO PROPERTY CORP., 518 METROPOLITAN AVE. CORP., KELLOGG'S DINER, BRYAN VETELL, FORTE SECURITY GROUP, INC. and JOHN DOE(s),

Defendant(s).

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The following papers numbered 1 to 3 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-2 _____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____ 3 _____

Upon the foregoing papers, defendants Frank Fiotos, John Fiotodimitrakis, Antonios Fiotodimitrakis, 514 Fioto Property Corp., Fioto Property Corp., 518 Metropolitan Ave. Corp. and Kellogg's Diner (Diner defendants) move for an order: 1) pursuant to CPLR 4404 (a), setting aside the liability jury verdict and any judgment entered thereon, and granting a new trial, in the interest of justice; 2) pursuant CPLR 4404 (a), setting aside the jury verdict

awarding damages to plaintiff Martin Eaton in the amount of \$585,000, in the interest of justice; and 3) striking the names of defendants Frank Fiotos, John Fiotodimitrakis, Antonios Fiotodimitrakis and 541 Fioto Property Corp. from the caption on the ground that the jury made no finding of liability against these individual defendants.

Plaintiff commenced this action to recover damages for personal injuries and psychological trauma sustained as the result of a physical altercation with a security guard at Kellogg's Diner in Williamsburg and plaintiff's subsequent arrest/detention by unidentified plain clothes police officers. According to the trial testimony of plaintiff, he attempted to pay for a meal at the diner with a credit card and was informed that only cash was accepted. Plaintiff was directed by the diner staff and the security guard, defendant Bryan Vetell, to an ATM located in the foyer. Dissatisfied with the fees charged by the ATM, plaintiff decided to withdraw cash from an ATM located at a grocery store across the street from the diner. While proceeding to the store, plaintiff was grabbed by Vetell and pulled back into the diner. Once inside, Vetell forced plaintiff to the floor, causing injuries. Plaintiff was subsequently handcuffed by plain clothes police officers patronizing the diner at the time and placed inside an unmarked vehicle located in a dark alley. Fearing for his safety, plaintiff flagged down a marked police car. Plaintiff was arrested by the uniformed officers, detained at the local precinct and processed at central booking over the next several hours. Criminal charges against plaintiff were subsequently dismissed.

Plaintiff commenced the instant action on January 7, 2014. Plaintiff alleged that Vetell was employed and trained by defendant Forte Security Group, Inc. (Forte) and, at the time of the incident, was specially employed and supervised by the Diner defendants, thus imputing liability to the Diner defendants under the doctrine of respondeat superior and the special employee rule. Plaintiff set forth causes of action which included battery, negligent hiring, false arrest, false imprisonment, malicious prosecution and violation of civil rights. A bifurcated trial was held as to liability on March 9, 2020 and as to damages on March 11, 2020. Following the portion of the bifurcated trial as to liability, all causes of action were dismissed except for the battery claim. Forte, which never appeared in this action, was stricken from the caption over the Diner defendants' objection. Vetell likewise never appeared in the instant action.

At the liability portion of the trial, the verdict sheet submitted to the jury contained two interrogatories: 1) whether or not Vetell was an employee or special employee of Kellogg's Diner, and 2) whether or not Vetell committed a battery on the date of the incident. This court denied a request by the Diner defendants to include an additional interrogatory as to whether Vetell acted within the scope of his employment. The court advised the Diner defendants' trial counsel that the jury would be instructed as to such element in the court's charge. The jury thereafter returned a verdict finding that Vetell was an employee/special employee of Kellogg's Diner and that Vetell committed a battery on the date of the incident.

During the damages portion of the trial, plaintiff testified as to physical injuries and emotional/psychological distress suffered as the result of the incident. Plaintiff's therapist testified that he diagnosed plaintiff with post traumatic stress disorder as the result of the incident. The testimony addressed not only the physical altercation with Vetell, but the subsequent detention of plaintiff by the plain clothes police officers and plaintiff's confinement in the unmarked vehicle. The jury awarded plaintiff damages of \$275,000 for past pain and suffering, \$275,000 for future pain and suffering and \$35,000 for future medical expenses.

The Diner defendants seek a new trial in the interest of justice insofar as the liability trial jury sheet did not include a question as to whether or not Vetell was acting within the scope of his employment when he assaulted plaintiff. The Diner defendants also challenge the propriety of the damages verdict as they claim that the jury did not limit damages to those resulting solely from the battery committed by Vetell but improperly included damages resulting from the subsequent conduct of the plain clothes police officers for which the Diner defendants should not have been held responsible. The Diner defendants further contend that Forte should not have been stricken from the caption as it prevented the jury from apportioning damages between Forte (the actual employer of Vetell) and special employer Kellogg's Diner. Finally, defendants seek to strike the names of Frank Fiotos, John Fiotodimitrakis, Antonios Fiotodimitrakis and 514 Fioto Property Corp. from the caption as the liability of Kellogg's Diner cannot be imputed to these individual defendants.

Pursuant to CPLR 4404 (a), the court, upon the motion of any party or on its own initiative, may set aside a verdict “in the interest of justice,” which is “predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein” (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]). “A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court’s rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise” (*Allen v Uh*, 82 AD3d 1025, 1025 [2d Dept 2011]; see *Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021, 1023 [2d Dept 2016]; *Rodriguez v City of New York*, 67 AD3d 884, 885 [2d Dept 2009]). In considering such a motion, “[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and ‘must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision’” (*Micallef*, 39 NY2d at 381 [citation omitted], quoting *Weinstein-Korn-Miller*, NY Civ Prac ¶ 4404.11; see *Morency*, 139 AD3d at 1023; *Allen*, 82 AD3d at 1025).

### **Liability Verdict**

“To determine the propriety of a verdict sheet, the interrogatories must be examined in the context of the court’s charge” (*Booth v Penney Co.*, 169 AD2d 663 [1st Dept 1991], citing *Grzesiak v General Elect. Co.*, 68 NY2d 937 [1986]; *Rubin v Pecoraro*, 141 AD2d 525 [2d Dept 1988]). Here, the Diner defendants have not shown that the absence of a verdict

sheet interrogatory requiring the jury to conclude that Vetell was acting within the scope of his employment was prejudicial or beyond harmless error, especially in light of the fact that the issue of scope of employment was fully explained in the jury charge (*see Siagha v Salant-Jerome, Inc.*, 271 AD2d 274 [1st Dept 2000]).

Defendants further contend that Forte should not have been stricken from the caption as the jury did not have the opportunity to apportion responsibility between Forte and Kellogg's Diner. This argument is unavailing as apportioning liability would have required the jury to make the improper finding that Vetell's liability may be imputed to both the actual employer Forte and to the special employer, Kellogg's Diner. A finding by the jury (as here) that Vetell was a special employee of Kellogg's Diner equates to a finding that Forte relinquished control of Vetell to Kellogg's Diner, and making Kellogg's Diner, rather than Forte, liable for Vetell's acts (*Reinitz v Arc Elec. Constr. Co.*, 104 AD2d 247, 250 [3d Dept 1984] ["The special servant rule applies only where the usual employer relinquishes control of the servant to another person, thereby making the servant a special employee of the other person and making that person, rather than the usual employer, liable for the servant's acts"]). The court specifically charged the jury, in the liability portion of the trial, that they must determine whether Vetell was an employee of Forte or special employee of Kellogg's Diner, but that under no circumstances can the jury find that both Forte and Kellogg's Diner were responsible for Vetell's battery of plaintiff (Tr. at 212-213). Accordingly, there was no prejudicial error in striking Forte from the caption.

### **Damages Verdict**

In challenging the award of damages, the Diner defendants contend, in essence, that the testimony of plaintiff and his therapist addressed the psychological trauma occurring both before and after the altercation with Vetell and, as a result, the jury failed to apportion those damages caused by Vetell and those allegedly caused by the plain clothes police officers. Defendants maintain that the jury improperly considered damages (i.e. psychological trauma) caused as the result of the actions of the plain clothes police officers occurring apart from the battery by Vetell, which was the only cause of action submitted to the jury at the liability portion of the trial. However, there is no showing, beyond mere speculation, that the jury considered any of the dismissed causes of action or the events following plaintiff's encounter with Vetell when it determined the amount of the award. In his summation, the Diner defendants' counsel expressly implored the jury that they should consider only those damages arising from the battery by Vetell (Tr. at 153) and plaintiff's counsel did not state or imply in his own summation that any damages should be awarded based on any events occurring subsequent to Vetell's handling of plaintiff. Thus, there is no showing that the absence of a specific instruction in the jury charge or the verdict sheet that damages must be based solely on the actions of Vetell constitutes prejudicial error. There is further no showing by defendants that the award was otherwise excessive.

### Caption

Turning to that part of the motion to strike the certain individual Diner defendants from the caption, there were no facts adduced at trial on which to base a finding of personal liability on the individual defendants Frank Fiotos, John Fiotodimitrakis or Antonios Fiotodimitrakis. According to the testimony of Frank Fiotos, these individuals were the owners of 518 Metropolitan Avenue Corporation, the company doing business as Kellogg's Diner, and owners of Fioto Property Corp., the owner of the property on which the diner is located. "The general rule . . . is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*Sky-Track Tech. Co. Ltd. v HAS Dev., Inc.*, 167 AD3d 964, 964 [2d Dept 2018], quoting *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *aff'd* 16 NY3d 775 [2011]; see *Town-Line Car Wash, Inc. v Don's Kleen Mach. Kar Wash, Inc.*, 169 AD3d 1084, 1085 [2d Dept 2019]). Accordingly, Frank Fiotos, John Fiotodimitrakis or Antonios Fiotodimitrakis shall be stricken from the caption. However, with respect to 514 Fioto Property Corp., plaintiff has raised an issue in opposition as to whether this defendant may be held liable for Vetell's actions as the corporate entity which was possibly doing business as Kellogg's Diner, as evidenced in an insurance policy and disclaimer letter, at the time of the incident.

Accordingly, it is hereby

**ORDERED** that those parts of the Diner defendants' motion to set aside the jury verdicts as to liability and damages are denied; and it is further

**ORDERED** that the part of Diner defendants' motion to strike Frank Fiotos, John Fiotodimitrakis and Antonios Fiotodimitrakis from the caption is granted; and it is further

**ORDERED** that the part of defendants' motion to strike 514 Fioto Property Corp. from the caption is denied.


The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW  
SUPREME COURT JUSTICE

**FILED**   
DEC 08 2020  
KINGS COUNTY CLERK'S OFFICE