

Galeano v Giambrone

2020 NY Slip Op 35479(U)

April 27, 2020

Supreme Court, Queens County

Docket Number: Index No. 708551/16

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

SANDRA GALEANO,

Index No. 708551/16

Plaintiff,

Motion

Date June 18, 2019

- against-

Motion

FRANCESCO GIAMBRONE,

Cal. No. 10

Defendant.

Motion

Seq. No. 2

FILED
5/8/2020
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QUEENS COUNTY

The following papers numbered E27 to E33 and E35 to E37 read on this motion by plaintiff seeking to set aside a jury verdict, pursuant to CPLR 4404(a).

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	E27 - E33
Affirmation in Opposition - Exhibits.....	E35 - E36
Reply Affirmation.....	E37

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff allegedly sustained serious injuries when she fell on October 10, 2015 as a result of a loose handrail at defendant's property.

This case was assigned to the undersigned on February 1, 2019. A trial on liability was held in this Part on February 6, 2019 - February 8, 2019, February 11, 2019, February 13, 2019. On February 14, 2019, the jury returned a 5/6 verdict in favor of defendant, dismissing the action. On question number one of the verdict sheet, the jury found in favor of plaintiff, that an unsafe condition existed on the front steps and handrail. On question number two, the jury found in favor of plaintiff, that defendant knew or should have known about the unsafe condition. On question number three, the jury found in favor of plaintiff, that defendant failed to correct the unsafe condition. On question number four, the jury ruled that defendant's failure to correct the unsafe condition was not a substantial factor in causing plaintiff's accident.

Plaintiff's counsel asked the court to set aside the verdict. The court set forth a motion schedule. The motion was to be returnable on June 18, 2019, with plaintiff's motion due by April 30, 2019 and defendant's opposition due by May 30, 2019 (564). By letter dated June 10, 2019, defense counsel requested an enlargement of time to submit his opposition to the motion.

Pursuant to CPLR 4404(a), a 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 [or] in the interest of justice" (CPLR 4404(a); see *Lariviere v New York City Transit Authority*, 31 AD3d 1130 [2d Dept 2015]). In the case at bar, plaintiff moves to vacate the verdict only pursuant to "the interest of justice" ground, alleging that plaintiff did not receive a fair trial.

"A new trial should be granted in the interests of justice only if there is evidence that substantial justice has not been done" (*Gomez v Park Donuts*, 249 AD2d 266 [2d Dept 1998]). This "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 [2d Dept 2011]). The court has the inherent authority to set aside a jury verdict and order a new trial "in the interest of justice" (CPLR 4404[a]). This inherent authority "is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein" (*Heubish v Baez*, 178 AD3d 779 [2d Dept 2019], citing *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376 [1976]). The evidence herein reflects that plaintiff was awarded substantial justice.

Contrary to plaintiff's contention, defense counsel did not engage in any inappropriate conversation with the interpreter. Rather, defense counsel only asked if it was necessary for him to speak in a loud manner when the interpreter was not able to otherwise hear him due to the acoustics of the courtroom.

The court properly ruled on defense counsel's objections and instructed defense counsel not to make speeches (see pp. 82-84, 94, 101-02, 105-06). In any event, objections with speeches are not a basis for setting aside a trial verdict.

In addition, the court made certain that defendant's remark to plaintiff's counsel, made as the jury was leaving the courtroom, did not prejudice plaintiff. Defendant as a witness was antagonistic. The jury was not in the courtroom when the court asked the interpreter to place defendant's remark in Italian on the record. Further, the court questioned each juror individually in the robing room and ascertained that no juror heard and/or understood the remark. Plaintiff's allegation that juror number four was intimidated, is meritless. Juror number four said that she did not understand defendant's remark and ensured that she can be fair and impartial (368). Plaintiff's counsel clearly stated in conclusion that he was satisfied with the individual polling of the jury and the results thereof (373).

Plaintiff's speculation as to juror number four is baseless. The jurors, as finders of fact and assessors of the credibility of witnesses are awarded deference in interpreting the evidence (*see Brezinski v Island Medical Care*, 291 AD2d 366 [2d Dept 2002]). The fact that juror number four dissented on the first three questions of the verdict sheet is irrelevant as only five out of six jurors are required for a verdict and five other jurors answered in the affirmative. In any event, whether five out of six jurors or six out of six jurors answered on the verdict sheet is of no consequence as there was no evidence of intimidation. Further, question number four was answered in the negative by five jurors in total, not solely juror number four. Indeed after the verdict was rendered, juror number four explained that she did not believe that the handrail was the cause of plaintiff's fall or injury (556-57).

Defense counsel's summation was within the broad bounds of rhetorical comment permissible in closing argument (454-80; *Kleiber v. Fichtel*, 172 AD3d 1048 [2d Dept 2019]). It is well established that in a civil trial, "counsel is afforded wide latitude" in summation to characterize and comment on the evidence (*Acosta v City of New York*, 153 AD3d 765 [2d Dept 2017]). It was proper for defense counsel to comment on missing witnesses (475). Notably, plaintiff's counsel did not object to most of the now challenged comments (*id.*). As such, plaintiff's contentions are not preserved for appellate review. For instance, plaintiff did not object or request a curative instruction to the inadvertent sole mention of the word "carrier" (409; *Lucian v Schwartz*, 55 AD3d 687 [2d Dept 2008]). Further, plaintiff's counsel failed to object to defense counsel's mention of the word "lie" or request a mistrial on this ground (475; *Kleiber v. Fichtel*, 172 AD3d 1048 [alleged improper remarks during summation by defense counsel referring to the plaintiff case as being based on lies, were not improperly prejudicial]). Neither did plaintiff object or take exception when the court asked plaintiff's son a question (412). In any event, any possible prejudice to plaintiff was averted because plaintiff's counsel rehabilitated plaintiff's son on rebuttal examination (420-21). Moreover, the court's limiting instructions to the jury properly guided the jury's use of the summation comments (424-26).

The court went above and beyond in ensuring that the verdict was properly received. On February 14, 2019, at approximately 9:40 a.m., the jury sent a note asking for portions of the architect's testimony to be read back. The court placed the note on the record and instructed the jury to stop deliberations until the requested testimony was retrieved (524-25). Before the readback, however, the jury sent a second note at approximately 11:40 a.m., stating that they had reached a verdict (539-41). Nevertheless, the court had the requested portion of the architect's testimony read back to the jury (540). Furthermore, the court informed the jurors that their second note was invalid as they did not follow the court's instruction to stop deliberating (540). The jury was sent back to deliberate and at approximately 12:57 p.m., the jury sent a note stating that they had reached a verdict (540, 542). At the request of plaintiff's counsel, the court individually asked each juror in the robing room if the readback of the architect's testimony provided clarification or if they had reached a verdict without hearing the readback (550-59). The jurors replied that they had filled out the verdict sheet prior to the

readback and that the readback of the architect's testimony did not change their opinion (550-59).

Plaintiff's remaining contention that the verdict was not reasonable because defendant did not provide an expert at trial, is without merit. Reviewing the trial transcript, facts and evidence, plaintiff received a fair trial. The issues raised by plaintiff did not constitute error. Furthermore, the court repeatedly instructed the jury with curative instructions. Therefore, there is no basis to disturb the jury determination "in the interest of justice" as there was no evidence "that substantial justice has not been done" in this case (*Lucian v Schwartz*, 55 AD3d 687 [2d Dept 2008], citing *Gomez v Park Donuts*, 249 AD2d 266 [2d Dept 1998]).

Accordingly, the motion to set aside the jury verdict, rendered on February 14, 2019, is denied.

Dated: April 27, 2020



DARRELL L. GAVRIN, J.S.C.

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