Hernandez v 83-25 Vietor Owners Corp.
2021 NY Slip Op 32606(U)
July 26, 2021
Supreme Court, Queens County
Docket Number: Index No. 8070/201
Judge: Phillip Hom
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Phillip Hom
Justice

IAS Part 43

MARGARITA HERNANDEZ, SOCRATES RODRIGUEZ,

Plaintiff,

-against-

83-25 VIETOR OWNERS CORP., FIRST MANAGEMENT CORP.,

Defendant.

Index No.: 8070/201
Motion Date: 3/8/21
Motion Seq. No.: 5

The following papers numbered 1 to 9 read on this motion by Defendants, 83-25 Vietor Owners Corp. and First Management Corp., for an order, pursuant to CPLR §§4404(a) and 4405 setting aside the verdict of the jury rendered on March 10, 2020 and granting Defendants a new trial in the interest of justice and as contrary to the weight of the evidence; and for such other and further relief as this court may deem just, proper, and equitable.

Papers	Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Affirmation in Reply.....	8-9

Upon the foregoing papers, it is ORDERED that the motion is denied in its entirety.

Background

Plaintiff Maria Hernandez ("Hernandez") was injured walking down the stairs within the building at 83-25 Vietor Avenue, Elmhurst, NY. The building is owned and operated by

Defendant 83-25 Vietor Owners Corp., and managed and maintained by Defendant First Management Corp (collectively "Defendants"). Hernandez fell down the stairs and was injured, resulting in five operations, including two operations to her left knee, one operation to her cervical spine, one operation to her left ankle, and one operation to her right ankle.

Hernandez asserted that her fall and injuries were due to optical confusion; the bottom step of the staircase was painted a different color than the rest of the staircase and the same color as the floor, causing her to miss the bottom step and fall. Plaintiffs began a lawsuit against Defendants and after a Bifurcated Jury Trial on Liability, the jury found Defendants 100% liable for Hernandez's accident. The trial on Damages was adjourned but has not taken place due to COVID restrictions.

Missing Witness Charge

Defendants now move to set aside the verdict, arguing, among other things, that the Court erred in not giving the jury a missing witness charge regarding the missing testimony of Mr. David Doddridge ("Doddridge"), Plaintiffs' expert witness who ultimately did not testify.

Plaintiffs opposes this motion, arguing that the theory of liability Doddridge would have testified about was never introduced to the jury. Plaintiffs maintains that Doddridge's testimony would have been cumulative of other witnesses' testimonies. Plaintiffs also asserts that an expert was not necessary to prove their *prima facie* case based on the doctrine of optical confusion. Plaintiffs contends that because Defendants made a motion in *limine* to preclude Doddridge, they are not prejudiced by his failure to appear. Finally, Plaintiffs asserts that Doddridge's refusal to testify placed him outside of their control. Therefore, Plaintiffs maintains that the Court did not err in failing to give a missing witness charge.

When considering a missing witness charge, Defendants assert that the Court is required to follow the criteria outlined in *People v Gonzalez*, 68 N.Y.2d 424, 427 [1986] (*See* discussion of missing witness charges *infra* at 4-5). Defendants argue Doddridge was under Plaintiff's control because a witness' refusal to come to Court does not mean the witness is outside of the calling party's control. Defendants also rejects Plaintiffs' argument that Defendants were not prejudiced by Doddridge's absence. Defendants contend that a missing witness' testimony could only have been cumulative of the testimonies of witnesses called by the same party; because Doddridge would have been a witness for Plaintiffs, his testimony could not have been cumulative of any Defendants' witnesses' testimony. Defendants argue that all four *Gonzalez* criteria are met and the Defendants were entitled to a missing witness charge, and the Court's failure to give the missing witness charge was an error.

Plaintiffs' Attorney's Alleged Improper Conduct

Defendants also argue in their motion that Plaintiffs' attorney:

- made improper remarks during closing arguments;
- intentionally misled the jury during closing arguments as to why Plaintiffs did not produce an expert witness, and;
- made a statement about photographs in evidence, asserting that these photographs showed something that was never testified about at trial.

Plaintiffs oppose these arguments, asserting that these arguments are unpreserved from the trial record. However, if the Court were to hear these arguments, Plaintiffs argue that Plaintiffs' Counsel's statements would not be considered inflammatory or prejudicial because the statements in question were made only twice during closing arguments. Plaintiffs also argue that

the statements made about the photographs in evidence were related to testimony by Defendants' witnesses, Andrew Yarmus ("Yarmus").

Defendants' reply states that these arguments were preserved by Defendants' Counsel objecting to the statements in question during Plaintiffs' closing statements, which the Court overruled. Defendants argue that Plaintiffs' Counsel's statements were misleading, prejudicial, and inflammatory and denied the defendants the opportunity for a fair trial.

Setting Aside Verdict

CPLR §4404(a) reads in relevant part that: "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 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." The compelling factor in a court's decision to set aside a verdict is a determination that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*See Delgado v Board of Education*, 65 AD2d 547, aff'd 48 NY2d 643 [1979]). Such is not the case at bar.

A missing witness charge is appropriate where it is shown that the missing witness is knowledgeable about a material issue for which evidence has already been entered in the case, that the witness was expected to provide noncumulative testimony favorable to the party who has not called them, and that the witness is available to the party calling them or under that party's control such that they would be expected to testify (*Gonzalez*, 68 N.Y.2d at 427). In New York, if the nonmoving party demonstrated that they made diligent efforts to locate the uncalled witness without success, the court may properly deny a defendant's request for a missing witness

charge (*See id.; People v Kitching*, 78 NY2d 532, 537 [1991]; *People v Williams*, 47 AD3d 854 [2d Dept 2008]; *People v Aguirre*, 201 AD2d 485, 486 [2d Dept 1994]). As the Court of Appeals in *Gonzalez* wrote, "it would be unfair as well as illogical to allow a jury to draw an adverse inference from the failure of the party to call a witness when the party is unable to do so" (*See Gonzalez*, 68 NY2d at 428).

In the instant case, Doddridge refused to appear despite Plaintiff's efforts to call him as a witness. Plaintiff's intentions to have Doddridge testify were made clear, emphasized by Plaintiffs' opposition to Defendants' motion in limine to preclude Doddridge and Plaintiffs' inability to introduce an intended theory of liability due to Doddridge's absence. The Court finds it was correct to deny Defendants' request for a missing witness charge.

In addition, the arguments regarding Plaintiff's Counsel's closing statement are unpreserved for review because Defendants failed to raise these issues at trial. In New York, a lawyer simply saying the word "objection" is insufficient to preserve an argument (*People v Tevaha*, 84 NY2d 879 [1994]). A counselor's failure to mention the grounds for the objection renders the objection too generalized and does not sufficiently alert the Trial Judge of the basis for the objection and to preserve the arguments for review (*People v Ford*, 69 NY2d 775, 776 [1987]. *See People v Escobar*, 79 AD3d 469, 469 [1st Dept 2010]).

In the present case, Defendants' Counsel merely uttered the word "objection" to oppose Plaintiff's Counsel's statements (tr at 368, lines 21-22). These arguments are therefore unpreserved. Unpreserved arguments are not available for review under CPLR §4404(a) unless the verdict was indisputably irrational and considering the matter is in the interest of justice (*See Dessasore v New York City Hous. Auth.*, 70 AD3d 440, 441 [1st Dept 2010] (where on reviewing a liability case, the First Department found portions of the jury's verdict to be "indisputably

irrational," and therefore, in the interest of justice, the court considered an unpreserved argument); *Goldman & Assoc., LLP v Golden*, 115 AD3d 911, 912 [2d Dept 2014]). Such is not the case at bar, and the Court will not consider them here.

The Court finds that the verdict is not against the weight of the evidence. "It 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" (*See Exarhouleas v Green, 317 Madison, LLC*, 46 AD3d 854,855 [2d Dept 2007]). Where there exists a right of a trial by jury and where the evidence presents an issue of fact, which is true for the case at bar, the Court may not direct a verdict and usurp the function of the jury (*See Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]).

Conclusion

In accordance with the foregoing, the motion to set aside the verdict is denied in all respects.

The parties shall attend a Settlement Conference on Damages via Microsoft Teams on Wednesday, July 28, 2021. An invitation will be sent to both parties under separate cover.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 26, 2021

Hon Phillip Hom, JSC