

Suarez v Bertolero

2021 NY Slip Op 32941(U)

December 7, 2021

Supreme Court, Onondaga County

Docket Number: Index No. 009456/2018

Judge: Scott J. DelConte

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court of the State of New York held in and for the County of Onondaga on December 7, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
ONONDAGA COUNTY

FERNANDO SUAREZ,

Plaintiff,

Index No. 009456/2018

v.

JOHN J. BERTOLERO,

Defendant.

**DECISION AND ORDER
ON PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT
(Motion No. 6)**

APPEARANCES:

William Mattar, P.C. *by Matthew J. Kaiser, Esq. for Plaintiff*

Kenney Shelton Liptak Lowak, LLP, *by Lauren Miller, Esq. for Defendant*

On February 12, 2018, just after midnight, Plaintiff Fernando Suarez was walking home from work when he was struck by the snowplow fixed to the front of the pickup truck driven by Defendant John Bertolero. Suarez sustained an open ankle fracture, and commenced this personal injury action on October 3, 2018. At the jury trial held on June 28 and 29, 2021, Suarez asserted that Bertolero was negligent because he did not see “what was there to be seen,” and failed to take any measures to avoid the collision. Bertolero challenged Suarez’s proof, contending that Suarez could not be seen because he was wearing dark clothes on an unlit stretch of highway at night. The jury returned a verdict for Bertolero, finding him not negligent. Suarez now moves pursuant to CPLR 4404(a) for an Order setting aside the verdict and directing a new trial. For the reasons set forth below, Suarez’s motion is **DENIED**.

I.

It is well established that “[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence. That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury” (*Harris v Campbell*, 155 AD3d 1622, 1624 [4th Dept 2018][internal citations and quotations omitted]).

Here, in his post-trial motion, Suarez argues, as he did at trial, that Bertolero was negligent by causing or, at the very least, contributing to the accident, because Bertolero did not see him as he was walking in the roadway at night. However, as Bertolero explained directly to the jury,

he was fully awake and alert, had not consumed any alcohol, and was traveling well within the posted speed limit. Further, Bertolero testified that his headlights were on, his windshield was clean, his truck was running well and, most critically, the area where the accident happened was dark with no street lighting. Most importantly, as Suarez conceded during his direct examination – and as amplified through defense counsel’s effective cross-examination – Suarez was walking in the unlit roadway, with his back to Bertolero’s oncoming truck, while wearing dark clothes and carrying only a small, and rather weak, flashlight that may not have illuminated him.

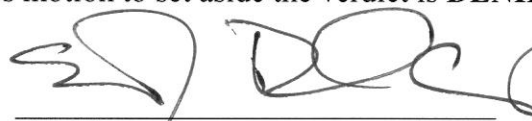
Based upon the proof presented at trial, and considering the jury’s exclusive responsibility to assess the witnesses’ credibility and weigh their testimony, “the jury’s interpretation of the evidence was neither “palpably irrational” nor “palpably wrong” (*McMillan v Burden*, 136 AD3d 1342, 1344 [4th Dept 2018] [internal citations and quotations omitted]). On the trial record that is presented here, then, it would be an abuse of this Court’s discretion to usurp the jury’s fact-finding function and grant Suarez’s motion to set aside the verdict.

II.

Accordingly, following due deliberation, it is hereby

ORDERED that Plaintiff Fernando Suarez’s motion to set aside the verdict is **DENIED**.

December 7, 2021


HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 23, 2021 (NYSCEF Doc. 104);
2. Attorney Affidavit of Matthew J. Kaiser, Esq., sworn to September 24, 2021, with Exhibits A through G, attached (NYSCEF Docs. 105-112);
3. Attorney Affirmation of Lauren M. Miller, Esq., in Opposition to Plaintiff's Motion to Set Aside Verdict, affirmed October 12, 2021 (NYSCEF Doc. 114); and
4. Attorney Affirmation in Reply of Matthew J. Kaiser, Esq., affirmed October 18, 2021 (NYSCEF Doc. 117).