SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING **PART** 62

Justice

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ELIAS LUGO,

Plaintiff,

- v -

FJC SECURITY SERVICES INC., THE CITY OF NEW YORK, WILLIAM MAHONEY

Defendants.

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INDEX NO. 154302/2015

MOTION DATE 03/29/2022

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for SET ASIDE VERDICT.

In the underlying action, plaintiff alleged that he sustained personal injuries on December 12, 2014 as a result of an assault perpetrated by defendant William Mahoney ("Mahoney") occurring at or near the exit/entrance to defendants' premises known as HRA Men's Shelter (the "Shelter") located at 400 East 30th Street, City, County and State of New York.

Defendant Mahoney never appeared in this matter and on December 1, 2015, plaintiff was granted leave to enter a default judgement against defendant Mahoney (NYSCEF Doc. No. 11). A trial of this matter against defendants FJC Security Services Inc. (the "Security Company") and The City Of New York (the "City") was held before the undersigned from March 7, 2022 to March 16, 2022. At the conclusion of this trial, the jury rendered a verdict concluding that neither the Security Company nor the City was negligent.

Pending now before the court is a motion filed by plaintiff seeking an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 4404(a), to set aside the jury verdict as against the weight of the evidence and direct a new trial.[1]

Conclusions of Law

As a preliminary matter, this court notes that, upon rendering their verdict, each juror was individually polled and answered in the affirmative, without objection, that the verdict was consistent with their findings.

In Cohen v Hallmark Cards, Inc., 45 NY2d 493, 498 (1978), the New York Court of Appeals held:

> The question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors [...]. For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, however, requires a harsher and more basic assessment of the jury verdict. It is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict. It is a basic principle of our law that "it cannot be correctly said in any case where the right of trial by jury exists, and the evidence presents an actual issue of fact, that the court may properly direct a verdict" [...]. Similarly, in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence [...]. [citations omitted]

[1] Plaintiff's claim for a new trial on the grounds that the jury was not instructed on PJI 2:29 is belied by the record, as the record is devoid of any evidence that such charge was requested.

In McDermott v Coffee Beanery, Ltd., 9 AD3d 195 (1st Dept 2004), the First Department opined:

> The court's authority to set aside a verdict as against the weight of the evidence and order a new trial is an inherent one and demands a discretionary balancing of many factors [...]. Such authority is codified in CPLR 4404(a), which provides in pertinent 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 the evidence ..."
>
> While the statutory standard has been characterized as an elusive one which has "long defied precise definition" [...], it is a settled rule that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence [...].
>
> In making this determination, the court must proceed with considerable caution, "for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" [...]. Indeed, the court must cautiously balance " 'the great deference to be accorded to the jury's conclusion' ... against the court's own obligation to assure that the verdict is fair" [...], and the court may not employ its discretion simply because it disagrees with a verdict, as this would " 'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty'" [...].
>
> Particular deference is to be accorded a jury verdict in favor of a defendant in a tort action [...], especially if the resolution of the case turns on the evaluation of the conflicting testimony of expert witnesses [...]. The resolution of such a conflict rests with the jury, and not the court [...], and the jury is entitled to accept, or reject, an expert's testimony in whole or in part [...].

The instant case is a tort action in which the crux of plaintiff's allegations is that he was a resident of the Shelter; that defendants Security Company and City were negligent in their maintenance and security of the Shelter; and that this negligence allowed Mahoney, another Shelter resident, to perpetrate the assault on plaintiff.

As stated above, Mahoney never appeared in this matter and a default judgment was issued against him. The trial, with respect to the Security Company and City, lasted eight days and numerous witnesses, including plaintiff, fact witnesses, and expert witnesses testified.

A New York City Department of Homeless Services ("DHS") officer, Joel Pichardo, who worked at the facility when the incident happened, in December 2014, and prior thereto, testified that he believed the shelter was safe and that DHS always had enough manpower. If they were shorthanded, they ensured all posts were covered. He also testified that the post "In Front Of" ("IFO") the Shelter was always manned, and if there was only one officer available, they would not be required to walk the block.

Charlene Dunlop, the FJC security guard who witnessed the incident, testified that FJC was the eyes and ears of the DHS police; that their job was to observe and report; that the security booth in front of the shelter was constantly manned by an FJC person, but that person had no authority to leave the booth; and that FJC personnel could not physically intervene with shelter residents.

The defendants' police procedure's expert, John Monaghan, testified that Ms. Dunlop's failure to use her walkie talkie did not in any way contribute to the intentional stabbing of plaintiff. He further opined that FJC properly reported the incident to DHS and DHS in turn responded quickly and appropriately to get the situation under control.

It was also undisputed that the attack took place on a public sidewalk, not in the Shelter, and the testimony of Michael Pearl, plaintiff's premises security expert, was that evicting Mahoney from the Shelter would not have necessarily prevented an intentional assault on a public sidewalk, and that cameras at the shelter would not have necessarily prevented an incident on the public sidewalk outside of the shelter.

Finally, plaintiff claimed that he was fighting with Mahoney for "upwards of 20 minutes," which was in direct conflict with the testimony from Sgt. Pichardo, Ms. Dunlop, and Mr. Monaghan. With respect to plaintiff's claims that there was a long history of stabbings in the shelter which were unaddressed, it is undisputed that all of these alleged prior incidents occurred within the actual shelter building, whereas the subject incident occurred on the sidewalk of 30th street near First Avenue.

Given the above, the court finds that it was within the province of the jury to conclude that the defendants were not negligent for failing to stop an intentional assault that occurred on the sidewalk outside of the Shelter. *See, e.g.,* Demetro v Dormitory Auth., 199 AD3d 605 (1st Dept 2021) ("[…] the court improperly set aside the jury's finding that ACS was not negligent. As to ACS we cannot say that 'there is simply no valid line of reasoning and permissible inferences which could possibly lead [a rational jury] to the conclusion reached by the jury on the basis of the evidence presented at trial' […]. The jury's finding that ACS was not negligent was not against the weight of the evidence."); Foley v City of New York, 151 AD3d 431 (1st Dept 2017) ("The trial court improperly set aside the verdict against the City for lack of legally sufficient evidence that the City had prior written notice of the alleged defect in the curb at the corner where plaintiff indicated she fell […]. A jury verdict may not be set aside for legal insufficiency unless there is 'no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial' […]. Here, it cannot be said that it was 'utterly irrational for [the] jury to reach the result it has determined upon'") [citations omitted].

For the reasons set forth above, it is hereby

ORDERED that this motion is DENIED; it is further

ORDERED that an inquest regarding defendant Mahoney shall be held at **10 a.m. on October 13, 2022** via Microsoft TEAMS.

7/26/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE