

Gomez v 162 Stuyvesant Realty LLC

2022 NY Slip Op 33753(U)

November 2, 2022

Supreme Court, Kings County

Docket Number: Index No. 509123/2017

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

FAUSTO CAMPOS GOMEZ,

Plaintiff,

DECISION / ORDER

-against-

**Index No. 509123/2017
Motion Seq. No. 007**

**162 STUYVESANT REALTY LLC,
and MONDACO ASSOCIATES LLC,**

Date Sub: 9/22/22

Defendants.

X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion to set aside the jury's verdict.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed.....	<u>188-195</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>201-208</u>
Reply Affirmation.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant 162 Stuyvesant Realty LLC, (hereafter "Stuyvesant") moves, pursuant to CPLR 4404 (a), for an order setting aside the jury's verdict and directing judgment in its favor. Alternatively, defendant seeks an order setting aside the verdict by declaring a mistrial, and directing a new jury trial. The basis of the motion is the movant's claim that the court made several errors during the trial with regard to the admission of evidence, and that these errors were so significant that Stuyvesant is entitled to an order dismissing the complaint, or, in the alternative, directing a new trial. The motion is denied for the reasons which follow.

This action arises from a work-related accident which took place on March 16, 2017. The complaint was filed, and the case commenced, on May 8, 2017. The complaint avers

that “solely as a result of Defendants’ negligence, carelessness and recklessness, Plaintiff, Fausto Campos Gomez, was caused to be seriously injured when he fell as a result of an improperly maintained and/or unsecured boards used as a make-shift ramp, which was provided to him during the course of his duties. That on or about March 16, 2017, solely as a result of Defendants’ negligence, carelessness and recklessness, Plaintiff, Fausto Campos Gomez, was caused to be seriously injured when he fell from a make-shift ramp” [¶59-60].

A few months later, plaintiff changed attorneys. Discovery commenced. Plaintiff served a verified bill of particulars dated September 8, 2018 prepared by his new attorney, Michael Binder, Esq. It states, at ¶6, that plaintiff “was injured in the course of his employment when he was transporting the trash outside the building and he slipped outside near the dumpster as he was throwing the trash into the dumpster. The ground on the premise was unstable and/or slippery by accumulation of water, ice and snow.”

Six months later, defendants filed a third-party action against plaintiff’s employer, which is at NYSCEF Doc 24. It asserts claims for contribution and contractual indemnification. It states “At the time of Plaintiff’s accident, Plaintiff was employed by EZ Rubbish who was engaged in demolition work at the Premises. If the damages were sustained as alleged in Plaintiff’s Complaint, then pursuant to the Hold Harmless Agreement, EZ Rubbish is obligated to hold harmless Mondaco in this matter, including reimbursement of costs, disbursements and attorneys’ fees.”

On October 28, 2019, plaintiff filed a Note of Issue. Defendants then filed a motion for summary judgment (Motion Seq. #1) on February 25, 2020, and plaintiff filed a cross motion (Motion Seq. #2) for leave to amend his complaint. The proposed amended complaint was annexed, and was e-filed as Document 80. This document revises the

description of plaintiff's accident. The plaintiff's affidavit which accompanied the motion states at ¶¶ 6 and 7 "Jose and I worked for approximately 2-3 hours at the subject jobsite that morning removing dirt, demolition debris, and blocks from the basement. My accident occurred at approximately 11:45 am when I was bringing a bucket full of debris, dirt, and demolition material from the basement to the dumpster/container located adjacent to the curb line/in front of the jobsite. I carried the bucket with both hands. As I exited the building with the debris bucket, I was walking toward the dumpster/container when I slipped and fell on ice and water on the sidewalk, located just before the dumpster/container, and sustained significant and severe personal injuries to my neck, back, left shoulder, left forearm, and right knee."

The affirmation in opposition to defendants' motion for summary judgment dismissing the action, and in support of the motion to amend the complaint by plaintiff's counsel, states at ¶¶72-73 [Doc 76] "Industrial Code 23-1.7 (d), 'Slipping hazards,' provides that employers 'shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.'" He continues "Here, a violation of Industrial Code 23-1.7 (d) is established by Plaintiff's deposition testimony and affidavit indicating that he slipped and fell as a result of water and ice that was allowed to accumulate in a part of the worksite that Plaintiff was required to traverse in order to perform his assigned work (see *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 742 [2d Dept 2015] [Plaintiff was entitled to summary judgment where his deposition testimony and affidavit established that he slipped and fell as a result of the snow and ice at the location where he was performing the tasks assigned to him]." Counsel

points out that plaintiff alleged in his September 2018 bill of particulars that “Plaintiff, as he was carrying debris to a designated container or dumpster at the site, slipped and fell on water and ice that covered the ground in the area in front of the container or dumpster.” He avers at ¶58 that “this account of Plaintiff’s accident is consistent with what was presented in Plaintiff’s Workers’ Compensation Claim Form C-3, dated May 1, 2017, which indicated that Plaintiff “tripped/slipped and fell on the floor” while carrying a “bucket/cement block” (Defs. Ex. H, Plaintiff’s C-3 Form)[Doc 45].” Further, plaintiff’s counsel clarifies that “the original Complaint that was prepared and verified by Plaintiff’s prior counsel . . . it mistakenly alleged that Plaintiff fell from an improperly maintained make-shift ramp” [¶59].

The IAS Justice denied the defendants’ motion as untimely, and also denied the plaintiff’s motion, citing *Fischer v RWSP Realty LLC*, 53 AD3d 595, 596-97 [2d Dept 2008] (denying motion for leave to amend complaint after Note of Issue was filed where “plaintiff offered no excuse for the delay in seeking the amendment”) and “Plaintiff’s amendment seeks to add new facts to the complaint, which plaintiff was aware of three years earlier when this action was commenced. Amending the complaint at this stage in the litigation would prejudice defendants, because plaintiff ’s amendment is based on a different theory of liability, and defendants may not be able to investigate these allegations more than three years after the accident occurred.” Defendants moved to reargue the court’s denial of their summary judgment motion as untimely in Motion Seq. #3. Their motion was denied on April 5, 2021.

This matter was sent to the undersigned for trial on Thursday, March 30, 2022. The trial was scheduled to start on April 4, 2022. The defendants had made two written motions in limine, which were incorrectly e-filed and designated as motion sequence # 5 and 6, and are at NYSCEF as Documents 153-158. The first was “Defendants’ Motion in Limine to

Bifurcate Trail [sic],” which was granted, as trials are generally bifurcated in Kings County. The second is entitled “Defendants’ Motion in Limine to Exclude Prejudicial Evidence.” This motion was argued on the record on April 4, 2022. Defendants’ counsel stated that “we move to exclude, as prejudicial, any evidence concerning the theory of liability that Plaintiff slipped and fell on ice and snow on the public sidewalk” [Transcript Page 5]. He said such evidence was specifically precluded by the IAS Justice’s decision and order that denied plaintiff’s motion to amend the complaint in this regard. Plaintiff’s counsel responded “Plaintiff relies on the case law, liberally allowing the plaintiff to amend the pleadings at any point, including the trial. Also, to conform the pleadings to the proof. And, also to put in a prima facie case at trial in support of the bill of particulars; which, correctly states, and clearly states that the Plaintiff’s accident was caused while working at the premises when he slipped and fell on ice; which, is what the Plaintiff intend to prove at trial.” The court denied the defendants’ motion, and stated “The Bill of Particulars, specifically, has the location, and date, and the time. And, it says he slipped outside near the dumpster because the ground was slippery by an accumulation of water, ice, and snow. And the Bill of Particulars was served in 2018, almost four years ago. So, I see no surprise.” The court thus allowed the plaintiff to conform the pleadings to the proof.

Plaintiff then made an oral motion in limine. Counsel stated [Trial Tr. Page 7] that defendant was “intending on -- attempting to impeach my client based upon a litany, some one dozen records, uncertified medical records. Clearly hearsay. . . In addition, there are business records that are uncertified in the form of paystubs; that, I also believe counsel will attempt to introduce into evidence. That are also not certified.” Defendants’ counsel then responded that there were only two medical records he wanted to admit during the liability phase of the trial, “two doctor’s narrative reports. These are sworn statements --

sworn reports that were submitted in worker's comp." Counsel averred "Because it was filed in a worker's comp case. And every single doctor's report in a worker's comp case also comes with a form that says: "I swear under the penalty of perjury that the contents are true." The court ruled that medical records had no place in the liability phase of the trial, but if they were intended to impeach the plaintiff as to the description of the accident, they could be redacted appropriately, but still had to be admissible as trial evidence, which, for a medical record, can be certified if a hospital record and otherwise needed a live witness, the one who took down the information, to confirm that he or she obtained the information from the plaintiff directly, that it was information needed for diagnosis and treatment, and that an interpreter had been provided for plaintiff or that the author of the notes spoke Spanish.

Plaintiff's counsel next moved in limine to preclude defendant's attorney from including in his opening statement that plaintiff was committing insurance fraud in bringing his lawsuit, pointing out that counsel had included this statement in his affirmation in support of summary judgment. Defendants' counsel agreed "I will not be alleging that this is an insurance fraud in my opening statement" and the trial commenced. Defendants' attorney made many inappropriate statements in his opening statement, causing numerous objections.

On April 7, 2022, the jury reached a verdict on liability. They determined that defendants had violated Labor Law Section 241(6) by violating Industrial Code §23-1.7(d), (described above) and also that defendants violated Section 200 of the Labor Law, and that these violations were each a substantial factor in bringing about the plaintiff's accident. They found that the plaintiff was not negligent at all, and that he bore no responsibility for the accident. Following the trial, the court dismissed the third-party action against EZ

Rubbish Removal NY Inc. pursuant to CPLR 3215(c). The third-party plaintiffs had not taken a default against the third-party defendant, and more than three years had passed since the summons and complaint were served. This order is located at NYSCEF Doc 166. The damages trial followed, and on April 21, 2022, the jury rendered a verdict which awarded plaintiff damages for past pain and suffering, for future pain and suffering, for past medical expenses and for future medical expenses, for past lost earnings and for future lost earnings. During the damages trial, the court was informed that defendant Mondaco Associates LLC, the (ostensible) general contractor had filed a Chapter 11 Bankruptcy petition on April 18, 2022, and the plaintiff consented to an order severing the claims as against defendant Mondaco and allowing the trial to proceed solely against defendant Stuyvesant, the property owner. Thus, this motion is only made on behalf of defendant Stuyvesant.

Defendants' attorneys presented poorly to the jury and seemed to harm their clients' case. The principal attorney with the firm, Andrew Muchmore, who was not present for the entire trial, was extremely argumentative and confrontational with the witnesses and with the court. He prepared the motion presently before the court, but has since filed a motion for his firm to be relieved as counsel for defendant Stuyvesant. That motion has not yet been heard. A second attorney was present for the liability trial and delivered the summation. After the liability verdict, without any explanation, a different attorney from the Muchmore firm appeared for the damages phase of the trial. A fourth attorney from the Muchmore firm also participated in the trial and questioned some of the witnesses.

The court will briefly summarize what transpired during the trial. The subject building, located at 162 Stuyvesant Avenue, was renovated and obtained a new certificate of occupancy for eight apartments sometime in 2017, after the plaintiff's accident.

Defendants' attorney informed the court that defendant Mondaco was a general contractor in name only, and was used to "pull the permits," but its principal had died in 2021. Someone else, hired by Stuyvesant, served as the project manager, a Mr. Schwimmer, who was called to testify by plaintiff during the trial. During the damages trial, a Bankruptcy petition was filed by Mondaco. Plaintiff's claims against Mondaco had to be severed in order for the trial to proceed. Stuyvesant's attorney then informed the court that there was no insurance for the accident. Apparently Mondaco had misrepresented to the NYC Buildings Department that it had obtained the required insurance. There were no witnesses called to testify at the trial who were principals of either defendant, the owner or the general contractor. A witness named Mendel Schwimmer was called to testify by plaintiff. He testified that he was the project manager for the renovation project, hired by the property owner, and paid by the property owner [Trial Tr. P 167]. He did not say he was a general contractor. The only witnesses that defendants' attorney called to testify were affiliated with the third-party defendant, plaintiff's employer EZ Rubbish.

Shlomo Feder, the alleged one-half owner of plaintiff's employer, EZ Rubbish Removal NY Inc., the third-party defendant, was called by plaintiff to testify during the liability trial. He said that his business had closed three years earlier. He stated that he believed that defendants' attorneys represented his company, when they were in fact representing the company that was suing his company in the third-party action, and that is why he signed an affidavit prepared by defendants' attorney in support of defendants' motion for summary judgment. His affidavit is located at NYSCEF Doc 35. In the affidavit, he states there was no snow, that the weather was "unseasonably warm" on the day of plaintiff's accident, and that plaintiff was not working for his company on the day of the accident. Plaintiff introduced a certified NOAA weather report which indicated that on

March 14, 2017, 5 inches of snow had fallen, and on March 16, the day of plaintiff's accident, there was still 4 inches of snow on the ground as it was too cold to have melted. He also introduced into evidence a redacted emergency room record to show he went to the hospital on the day of the accident.

Defendants' first witness, Moises Solano, testified that he too had signed an affidavit for defendants' attorneys in connection with the summary judgment motion. It is located at NYSCEF Doc 36. He testified with the assistance of a Spanish interpreter. He said he did not provide defendants' counsel with any information for the affidavit, and he cannot read English. He said he signed the affidavit because he trusted the attorney, "because he's a lawyer." He did not understand what the affidavit said, and nobody translated it for him. His affidavit says that he was working for EZ Rubbish at the work site on the date of the plaintiff's accident, that he does not recall that plaintiff was a worker at the work site on the date of the accident, and that there was no snow or ice on the date of the accident. It is improperly notarized by defendants' attorney, as there is no notary stamp. Mr. Solano was asked on cross examination if he had talked to anyone involved with the trial before taking the witness stand. He responded that he drove to the court alone and did not talk to anyone. Plaintiff's attorney then marked a photo as plaintiff's #6 for identification, and showed it to the witness, to refresh his recollection. He asked him if that was him in the photo, talking to defendants' attorney in a restaurant at 1:15 p.m. that day. Mr. Solano then acknowledged that he had met with defendants' attorney at lunch that day, that he had met with him two weeks earlier, and that he had met with him once before that. The photo was not admitted into evidence, was not shown to the jury, and was solely used to impeach the witness' testimony.

Defendants' second witness, Fidel Serrano, testified, also with a Spanish interpreter, that plaintiff did work at the job site on the date of the accident, and that it had snowed the day before plaintiff's accident. He was shown the affidavit he signed in connection with defendants' summary judgment motion (Doc 37) and he said he does not read English and does not remember signing it. It also says that Mr. Serrano was working for EZ Rubbish at the work site on the date of the accident, that he does not recall whether plaintiff was a worker at the work site on the date of the accident, and that there was no snow or ice on the day of the accident. It is notarized by defendants' attorney.

The Court's Alleged Errors

Defendant Stuyvesant argues that the court should direct a verdict in their favor, or a new trial should be ordered, because it was deprived of a fair trial by the court's alleged errors.

Defendant's counsel first argues that

"Before the commencement of the liability phase of the trial, Defendant submitted a motion in limine before the presiding trial judge, Hon. Debra Silber, J.S.C., seeking to enforce Judge Fisher's Order by precluding Plaintiff from introducing evidence at trial as to his revised theory of liability, that he slipped and fell on ice [Exhibit "C", NYSCEF Doc. 155-158]. Judge Silber refused to enforce Judge Fisher's Order and denied Defendant's motion in limine. The Plaintiff was allowed to prove the second theory of liability, and as Judge Fisher had predicted, Defendant was unable to perform an adequate investigation. Indeed, Defendant was entirely deprived of all opportunity to make such an investigation as it had relied on Judge Fisher's clear mandate that Plaintiff would have to prove at trial his first theory of liability. As a result of Judge Silber's refusal to enforce Judge Fisher's Order, Defendant suffered further prejudice than had been previously found, as it had but a weekend to prepare a trial defense for a completely unexpected theory of liability. This violated CPLR 2221(a), which requires that a motion affecting a prior order be made 'to the judge who signed the [original] order,' and which precludes one trial court judge from serving as an appellate judge in relation to the decision of another" [Aff Doc 189 ¶8].

Counsel concludes "As all of Plaintiff's evidence relied on the revised theory of liability, the verdict obtained relied entirely on evidence that should have been precluded

as prejudicial. Accordingly, the verdict should be vacated and the parties should be directed to proceed to a new trial which complies with Judge Fisher's Order" [¶ 11].

The second alleged error is defendant's claim that the court excluded admissible evidence. Specifically, counsel states "the Plaintiff had made numerous inconsistent statements about how he was injured. Since the Plaintiff's allegations were not corroborated by other witnesses or contemporaneous evidence, the Defendant's case rested almost entirely on the ability to impeach the Plaintiff's testimony. By excluding almost all of the Plaintiff's prior inconsistent statements, the Defendant was effectively prevented from presenting its case to the jury. The proposed exhibits were compiled as exhibits to an Affirmation of Authenticity and Authority of Maximilian Travis and submitted in hard copy to the Court during the liability phase of the trial and via Electronic Case Filing [Exhibit "D"] (NYSCEF Doc. No. 160-161). They were contained in Defendant's exhibit binder that was marked for identification as Defendant's Exhibit "E". The documents include: 5.8.2017 Notice of WCB Case Assembly – Shulman & Hill; 5.8.2017 Summons and Verified Complaint; 7.7.2017 Second WCB Employee Claim – Terry Katz & Associates; 6.23.2017 Doctor's Initial Report – Complete Medical Services; 4.10.2018 Doctor's Initial Report – Colin Clarke M.D.; and 5.12.2017 EZ Rubbish First Report of Injury" [¶13-14].

Counsel states that "The arguments as to why these documents are admissible are fully developed in the Affirmation of Authenticity and are incorporated herein. In summary, the allegations in Plaintiff's Verified Complaint are admissible as informal judicial admissions. The statements made by Plaintiff's counsel in the First Employee Claim and Second Employee Claim to the NYS Workers Compensation Board are statements made by Plaintiff's authorized agent. The medical records and other documents downloaded from

the NYS Workers Compensation Board website are electronic governmental records admissible under New York State Technology Law §306 and CPLR 4518(a). Entries in medical records that are germane to diagnosis and treatment are admissible under long-standing New York common law. All of Plaintiff's inconsistent statements were admissible and should have been allowed for purposes of impeachment. Defendant's inability to cross-examine the Plaintiff as to his numerous prior inconsistent statement prejudiced Defendant's ability to present a defense at trial" [¶15].

The third error alleged by defendant is that the court "erred in not applying evidentiary rulings with consistent force as to the parties." Counsel avers that "Judge Silber erred in not allowing the Defendant to introduce the above evidence. However, once she had made these rulings as to the Defendant, Judge Silber was under an obligation to apply her rulings consistently and with the same force and effect upon the Plaintiff" [¶16]. Counsel argues that this court "lacked impartiality" in the evidentiary rulings in the liability trial, by not admitting the above items. Counsel then argues that the court also made erroneous evidentiary rulings in the damages phase of the trial. He states that "An even more egregious example of this tilted playing field occurred in the damages phase of the trial. In support of Plaintiff's claim for lost wages, the Court allowed a document downloaded from the NYS Workers Compensation Board website, an Order and Decision of the NYS WCB dated May 17, 2018 ("WCB Decision") [Exhibit "E"]" [¶ 19]. Apparently, counsel objects to the court having permitted plaintiff to admit the Workers' Compensation Board decision, which in part determined what his wages were, claiming this was an erroneous ruling. As defendant had no employment records and would not stipulate to his salary, this was the only item available for proof with regard to his claim for lost wages. Plaintiff's attorney represented that he obtained it from the State Workers' Compensation Board's website.

Finally, counsel states “Plaintiff’s counsel flashed a photograph in front of the jury of Defendant’s counsel meeting with one of their witnesses and insinuated that this was highly improper. The jury was allowed to see this photograph and accept this improper insinuation” [¶25].

Conclusions of Law

Defendant argues that these alleged errors warrant a new trial on all issues because they “were unfair to the Defendant, and taken as a whole, substantially and materially prejudiced Defendant’s ability to present a defense.”

These alleged errors are properly reviewed under the standard applicable to interest of justice claims, not weight of the evidence claims. Under this standard, the court “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” (*Heubish v Baez*, 178 AD3d 779, 780 [2d Dept 2019] [internal quotation marks omitted]). The court will consider each alleged error separately.

With regard to defendant’s claim that the court should not have allowed plaintiff to conform the pleadings to the proof, the court disagrees. (see *Kimso Apts., LLC v Gandhi*, 24 NY3d 403 [2014].) Not only did defendant have the plaintiff’s bill of particulars since September of 2018, which described his accident as having been a slip and fall on ice and snow, but defendant had moved for summary judgment in part on the basis that there was no snow or ice, with affidavits from multiple witnesses who claimed that there had been no snow and it was unseasonably warm. It was disingenuous for defendants in the liability phase of the trial to have claimed that defendants were “surprised” and somehow disadvantaged at the trial by plaintiff’s claim that he fell after slipping on snow and ice.

They had fully argued this claim years before the trial, in their untimely summary judgment motion, with the affidavits from the EZ Rubbish employees who signed them without understanding what they said.

With regard to the defendant's claim that specified items were not admitted into evidence, none of the referenced items were included by movant in the motion papers. Defendant apparently wanted to use these documents in the liability phase of the trial to impeach the plaintiff's testimony that he slipped and fell on the sidewalk. The court's notes indicate that a binder was marked as defendants' "E" for identification, but none of the documents were admitted, and it was therefore returned to defendants' attorney. Defendants' counsel argues now that these items, some from plaintiff's Worker's Compensation file, and some from plaintiff's medical records, were admissible because "Under the common law public documents hearsay exception, when a public officer is required or authorized by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports . . . are admissible as evidence" [Doc 193 ¶16]. This would be true if the government documents had been certified by the government agency, the Worker's Compensation Board, but they were not, and therefore, were not in admissible form. Counsel is incorrect that "this relates solely to the weight of the evidence and not its admissibility." The plaintiff's medical records were not in admissible form either, as the court recalls. But, again, these items which defendant argues should have been admitted at the trial are not included in the motion papers. However, the court has searched the court file and has located some of them in the defendants' motion for summary judgment.

One item is located at NYSCEF Doc 45. It is the "5.8.2017 Notice of WCB Case Assembly – Shulman & Hill." This is a notice to the employer and the carrier of the creation

of the case. It does not contain any information about the manner of the plaintiff's accident. The Claim form ("C-3") which initiated the claim is behind it in Doc 45, but that form was filled out a week earlier. Plaintiff did sign it, as did his attorney, on May 1, 2017. But defendant's counsel does not claim that this document should have been admitted, just the notice from WCB. Nor does it have any statement that is inconsistent with plaintiff's testimony. Whomever filled it out, and it was not the plaintiff, it says he "tripped/slipped and fell on the floor" while "performing job duties."

Next is "7.7.2017 Second WCB Employee Claim – Terry Katz & Associates". This is located at NYSCEF Doc 54. Apparently, plaintiff changed attorneys for his worker's comp case, and his new attorneys were not told that he had already filed a claim for Worker's Compensation. They filed a notice of appearance with the WCB and a new claim form C-3, dated 7/17/17 which states the accident took place when "I was wheeling a container of demolition debris to the dumpster" and "I fell from an unsecured board." There is no explanation for the cover letter, which does not acknowledge the prior filing, and says "We are enclosing our Notice of Retainer and Appearance, together with a C-3 claim form. Kindly assemble a file". The court, it is true, did not admit this document for impeachment purposes, which was prepared by an attorney who did not authenticate it, and which was not certified. This form was part of the motion in limine discussed above [Tr. P 10]. Defendants' counsel argued [Tr. P 83-85] that it was admissible as a sworn statement under CPLR 2106. While this section allows sworn statements to be admissible for purposes of summary judgment, they are not admissible at a trial. In any event, plaintiff is not eligible to affirm under CPLR 2106. He next argued that it was admissible as it had been turned over by plaintiff during discovery, pursuant to CPLR 4540-a. That section is not applicable. It explicitly applies to "material authored or otherwise created by such party"

and says that it shall be “presumed authentic when offered into evidence by an adverse party.” This presumption is rebuttable. But plaintiff Mr. Gomez did not create this document. Although defendants’ attorney claims he did, as it was authored by his agent, his attorney. That is not correct. The court ruled it was not admissible at the liability phase of the trial.

Next is “6.23.2017 Doctor’s Initial Report – Complete Medical Services” and “4.10.2018 Doctor’s Initial Report – Colin Clarke M.D.” Defendants submitted more than thirty five exhibits to the untimely summary judgment motion, but these items are not included. These items are listed as Docs 53 and 59, but both consist of a piece of paper that states “Redacted. Paper form to be submitted in person for *in camera* review.”

Next, is “5.12.2017 EZ Rubbish First Report of Injury”. This seems to be Doc 46 from the defendants’ summary judgment motion. It is not signed by anyone. It states that plaintiff was a full time employee for EZ Rubbish, and earned \$488 per week. It has the date of the accident, and states it was a “fall, slip or trip injury.” It says the contact at EZ Rubbish was someone named “Hershy Klein” with a phone number. It is unclear what relevance this document could have had in the liability phase of the trial, but it was not admitted by the court. Now, defendant’s attorney states that was an error.

The final item of evidence which defendant’s attorney claims the court should have admitted is the complaint in this action. Defendant wanted to admit it to show that the plaintiff’s prior attorney had stated that the accident occurred on a ramp. It was not verified by the plaintiff, and, as discussed above, was not what plaintiff testified to at his deposition, nor was this what he included in his bill of particulars. The complaint is not an item a jury is ordinarily entitled to see. Counsel argued [Doc 193] that a complaint is “obtained via the Court’s own electronic filing platform and was created and verified by Plaintiff’s hired counsel, acting as agent within the scope of his authority, this document must be admitted

pursuant to CPLR 4549, as a prior inconsistent statement, or as a formal or informal judicial admission.” Counsel is incorrect. The Court of Appeals has held that “Contrary to the defendant's contention, the Supreme Court properly refused to admit the criminal complaint into evidence as a prior inconsistent statement of a complainant absent proof that the complainant signed, prepared, or verified the accuracy of the complaint (*People v Collins*, 109 AD3d 482, 482 [2d Dept 2013]). This is no less applicable in a civil case.

The third alleged error, that the court was not impartial, because plaintiff was permitted to admit evidence which defendant was not permitted to introduce, is completely without logic. Each item offered was considered in accord with the rules applicable to the admission of evidence. The court permitted the plaintiff to admit the decision of the Worker’s Compensation Board as evidence of his salary in the damages phase. It is located at Doc 194. It is dated May 17, 2018, and reflects that a hearing was held on May 14, 2018. It says his weekly salary was \$440.00 “per employer testimony”. Plaintiff testified at the trial that he earned \$11 per hour. This is \$440 for a 40 hour week. As also discussed above, this document was prepared by the Worker’s Compensation Board. The court also charged PJI 1:65.1 to help the jury understand. To be clear, the alleged owner of EZ Rubbish testified that he did not do the payroll, but had it done by an outside company, Mega Pay, that he did not have any employment records any longer, and that he had closed the business three years earlier. He also testified that the company’s pay stubs were often inaccurate, as employees often forgot to turn in their time records. Apparently they were adjusted later, and so some paychecks were too little, and some too much, when compared to what the week’s salary should have been. He said he did not know if Mega Pay still is operating, or if they kept any of his employee’s records. The defendant sought to introduce

pay stubs at the liability phase. Not only was there nobody who could authenticate them, they indicated that plaintiff's first week of employment for EZ Rubbish was after the accident. A copy is at Doc 44. The first one says he worked 3/19/17 to 3/25/17, that he had no prior year-to-date earnings, and earned \$440 that week. They were prepared by Mega Pay USA, they state. The plaintiff testified that he did not work after the date of the accident, and had started the job a few months prior to his accident. His co-worker and supervisor testified that plaintiff was on the job site on the date of the accident. Mr. Feder testified that he had about twenty employees in March 2017, and he could not remember when he hired plaintiff, if or when he fired him, or what his salary was. He did not know if his company issued plaintiff a W-2 form for 2017. He said he remembered that plaintiff worked at 162 Stuyvesant with Moses and Fidel. He has not kept copies of any employment records or copies of any checks issued. He said his former secretary kept his QuickBooks records and he does not have them.

The court finds that these asserted errors did not prevent substantial justice from being done, and it is not likely that the verdict was in any way affected by this court's rulings. Viewing the evidence adduced at trial and the effect of prejudice, if any, arising from the rulings at issue here, the court finds that neither of the defendants (liability) nor defendant Stuyvesant (damages) were deprived of a fair trial, and justice was not subverted.

It should be noted here that defendant does not seek a reduction in the amount of damages awarded by the jury in his motion. A motion to reduce the verdict for deviating materially from reasonable compensation for the injuries that plaintiff sustained as a result of the accident might have had more success than this motion.

Accordingly, it is **ORDERED** that the branch of the defendant's motion to set aside the verdict and enter judgment in defendant's favor, is denied; and it is further

ORDERED that the branch of the defendant's motion for an order declaring a mistrial and for a new trial due to alleged errors in the trial court's rulings during the trial is also denied.

This constitutes the decision and order of the court.

Dated: November 2, 2022

ENTER:



Hon. Debra Silber, J.S.C.