

Caminiti v Extell W. 57th St. LLC

2023 NY Slip Op 32397(U)

July 12, 2023

Supreme Court, New York County

Docket Number: Index No. 150298/2013

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS PART 18

Justice

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MARIA CAMINITI as Administratrix of the Estate of PASQUALE CAMINITI (deceased) and MARIA CAMINITI, Individually,

Plaintiffs,

- v -

EXTELL WEST 57th STREET LLC, EXTELL DEVELOPMENT COMPANY, LEND LEASE (US) CONSTRUCTION HOLDINGS, INC., and LEND LEASE (US) CONSTRUCTION LMB, INC. f/k/a BOVIS LEND LEASE LMB, INC.,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 10) 290-336 were read on this motion to/for For new trial

In this personal injury/wrongful death action the decedent Pasquale Caminiti was working as an electrician installing wires and cabling on a ladder on January 3, 2012. A colleague, Robert Munoz, went over to the decedent who complained he had chest pains and subsequently collapsed into him. Munoz noticed that the ladder was upright. The decedent was taken to the hospital where he was diagnosed with an aortic tear and underwent surgery. The decedent passed away on January 18, 2012 as a result of complications from surgery.

Plaintiff moved for summary judgment and, as set forth in the decision and order from the Appellate Division, First Department, which, in modifying the lower court to deny judgment on the Labor Law § 240 (1) claim, found that the plaintiff had made a rebuttable prima facie showing of judgment on that claim by presenting decedent's statement made to his spouse, plaintiff Maria Caminiti, that while he was working on the ladder, it started to move, and while trying to stabilize the ladder, it tipped and struck him in the chest. However, there was no

reference to the ladder accident in decedent's medical reports. Defendants raised triable issues of fact as to whether decedent's injuries were causally related to the ladder accident claiming the aortic aneurysm was the cause. *See* NYSCEF Doc. No. 177. A jury trial was held before the undersigned from April 19 through April 28, 2022 where the jury's unanimous verdict determined that the defendants were liable pursuant to Labor Law § 240 but that the violation was not a substantial factor in causing the decedent's aortic dissection. *See* NYSCEF Doc No. 288.

Plaintiff now moves, pursuant to CPLR 4404 (a), for an order to set aside the jury's award and to direct a new trial on the basis that (1) the defendants' cross-examination of decedent's physician, Dr. Edward Levine, was prejudicial and inflammatory; (2) that PJI 2:283 applied and should have been charged because the decedent's aortic condition made him more susceptible to injury; (3) that PJI 1:75 applied and should have been charged because the defendants did not call Dr. Stanley Schneller as a witness; (4) that the defendants should not have been permitted to use medical literature on cross-examination of Dr. Bruce Decter; (5) Plaintiff was prejudiced by the Court's failure to grant a directed verdict on liability; (6) that the jury's verdict on causation was against the weight of the credible evidence.

Cross Examination of Dr. Edward Levine

Plaintiff called Dr. Edward Levine, the decedent's primary care physician, as a witness at the trial. The Court did not sustain plaintiff's objections to defendants cross-examination, which questioned Levine about his federal conviction to defraud the United States and an opinion by a New Jersey Appellate Court that found Dr. Levine to be untrustworthy. Plaintiff asserts that this was prejudicial, in part because the conviction had taken place approximately twenty years before the trial. CPLR 4513 permits such subject matter to be raised on cross-examination.

Witness credibility is at issue in a trial and a criminal conviction may be used to impeach credibility. *See Sansevere v United Parcel Service, Inc.*, 181 AD2d 521 (1st Dept 1992).

Further, Dr. Levine was convicted of a crime of moral turpitude. *See Badr v Hogan* 75 NY2d 629 (1990). Moreover, defense counsel did not use unsubstantiated falsehoods or engage in speculation in impeaching Dr. Levine as was the situation in the cases cited by plaintiff.

Therefore, the Court finds no basis to disturb the verdict based on the cross-examination of Dr. Levine as it was neither prejudicial nor inflammatory.

PJI 2:283

Plaintiff asserts that PJI 2:283 should have been charged because decedent had an increased susceptibility to injury, in this case an aortic dissection because of hypertension. However, this was not plead prior to trial. *See* NYSCEF Doc No. 300. The pleadings refer in passing to exacerbation/activation/aggravation, not susceptibility. In fact, the plaintiff's case was premised on the decedent not having a pre-existing condition and that the aortic dissection was the result of the accident, an unstable ladder. *See* NYSCEF Doc No. 298. The defendants' case was premised on the existence of hypertension that led to the aortic dissection but that it was not triggered by his work, that it could have occurred at any time and any place. Therefore, the Court finds no basis to disturb the verdict based on not charging PJI 2:283 as the failure to do so was not prejudicial to plaintiff's case.

PJI 1:75

Plaintiff asserts that PJI 1:75 should have been charged because defendants did not call Dr. Stanley Schneller, a non-examining disclosed expert. Defendants retained two experts, Dr. Michael Argenziano, a cardiothoracic surgeon, and Schneller, a cardiologist. Plaintiff contends that the two doctors' testimony would have conflicted so therefore the charge was appropriate.

Defendants contend that Schneller's testimony would have been cumulative of the testimony of Dr. Argenziano, which is an exception to the rule. *See Devito v Feliciano*, 22 NY3d 159 (2013). Most of the cases cited in the PJI reference using the charge when expert witnesses who, unlike Dr. Schneller, actually examined or treated the plaintiff. *See Brooks v Judlau Contracting, Inc.*, 39 AD3d 447 (2d Dept 2007); *Griffin v Nissen*, 89 AD2d 808 (4th Dept 1982); *Laffin v Ryan*, 4 AD2d 21 (3d Dept 1957). After a review of the expert witness disclosures that their testimony would have been cumulative, as they both maintained that decedent's prior hypertension was the cause of the dissection, the Court declined to charge PJI 1:75. *See* NYSCEF Doc. No. 302 and 330. Moreover, earlier in the case plaintiff moved to preclude the testimony of Dr. Argenziano on the basis that it would have been cumulative of the testimony of Dr. Schneller. *See* NYSCEF Doc No. 251. Therefore, the Court finds no basis to disturb the verdict based on not charging PJI 1:75 as the failure to do so was not prejudicial to plaintiff's case.

Use of Medical Literature on Cross-Examination

Plaintiff contends that it was improper for defendants to cross-examine plaintiff's expert, Dr. Bruce Decter, using medical literature relied upon by Dr. Decter claiming it was inadmissible hearsay because Dr. Decter did not specifically say that the literature was authoritative or not. However, Dr. Decter did admit that he relied on the literature that was used on cross-examination because they supported his opinion. *See* testimony in NYSCEF Doc No. 318 at pp. 292:20-293:9. The literature was also included in Dr. Decter's expert witness disclosure. *See* NYSCEF Doc No. 331. Dr. Decter cannot evade a full cross-examination on literature that he relied on by using the "semantic trick" of not saying it is authoritative. *See Kearney v Papish*, 136 AD3d 690 (2d Dept 2016); *Spiegel v Levy*, 201 AD2d 378 (1st Dept 1994). That the defendants displayed the portions of the literature being used to impeach the testimony of Dr. Decter instead of just

reading it to him is a distinction without a difference. Therefore, the Court finds no basis to disturb the verdict based on the use of medical literature relied upon by Dr. Decter in his cross-examination.

Directed Verdict

Plaintiff first contends that the plaintiff's case was prejudiced because the Court failed to direct a verdict on the Labor Law § 240 claim and that only the issue of causation should have been presented to the jury. It was the testimony of Ms. Caminiti of what decedent told her that placed the decedent on the ladder to begin with. The jury had a right to assess Ms. Caminiti's credibility. Plaintiff's argument that placing this question in front of the jury confused or fatigued them is purely speculative. Moreover, because the jury found liability pursuant to Labor Law § 240 any conceivable error on this ground is moot and, therefore, harmless.

Plaintiff further contends that the Court should set aside the verdict and order a new trial on the basis that the jury's verdict was against the weight of the evidence. As an initial matter, the Court notes that a jury verdict "is entitled to great deference based on its evaluation of the evidence, including conflicting expert testimony." *Vukovich v 1345 Fee LLC*, 72 AD3d 496 (1st Dept 2010); *see e.g. Nicastro v Park*, 113 AD2d 123, 133 (2d Dept 1985) ("[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised 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"; *id.* ("Fact-finding is the province of the jury" and the trial court should not "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty") (internal quotations omitted).

Further, when setting aside a jury's verdict for being against the weight of the evidence, this "invokes the court's discretion, [including the] professional judgment gleaned from the Judge's background and experience as a student, practitioner and judge." *Nicastro*, 113 AD2d at 134-35; *see id.* at 133 (setting aside a jury verdict that is "contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors"); *see also McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 (1st Dept 2004) ("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"); *Bottalico v City of New York*, 281 AD 339, 341 (1st Dept 1953) (when evaluating the jury's verdict against the weight of the evidence, "we are not required to give credence to a story so inherently improbable that we are morally certain it is not true").

Finally, in the interest of justice, a trial court may set aside a jury's verdict and order a new trial when the trial court erred in ruling on admissibility of evidence; newly discovered evidence; misconduct on part of the attorneys or jurors; and mistakes in the jury charge. *See Allen v Uh*, 82 AD3d 1025 (2d Dept 2011); *see also Rodriguez v City of New York*, 67 AD3d 884, 885 (2d Dept 2009). The "power conferred upon a court to order a new trial is discretionary in nature." *Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381 (1976) (The Trial Judge who "is in the best position to evaluate errors" [...] must decide whether substantial justice has been done, whether it is likely that the verdict has been affected [...] and must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision") (internal quotation and citations omitted).

The Court has considered the parties' submissions and concludes the award made by the jury was supported by the weight of the evidence. Set forth in the record, the jury was presented

testimony from Ms. Caminiti, Munoz, Stanley Fein (an engineering expert), Dr. Levine, Dr. Decter, Deborah Dwyer (forensic accountant), Nicholas Caminiti and Francesca Caminiti (the decedent's children), and Dr. Argenziano. The jury concluded based on the testimony and evidence presented that the decedent fell off the ladder, resulting in the finding of a Labor Law § 240 violation. Dr. Decter's opinion essentially was that the aortic dissection occurred because of the physical strain placed on the decedent while engaging in his physical work activity and from additional stress caused by an adrenaline surge and rise of blood pressure when the decedent felt the ladder begin to shift. Decter indicated that the decedent did not have an enlarged aorta or an underlying weakness of the aorta that would have caused the dissection but for the work events (Decter trial transcript NYSCEF Doc No. 318). Dr. Argenziano's opinion essentially was that the aortic dissection was not resultant from the ladder accident. That the dissection could have taken place at any place and any time, inclusive of at work (Argenziano trial transcript NYSCEF Doc No. 321). This conflicting expert testimony on causation was for the jury to reconcile. It was a reasonable reading of the credible evidence for the jury to conclude that the aortic dissection was not the result of the ladder accident. Their verdict did not go against the weight of the evidence.

The Court also finds plaintiff's arguments in favor of setting aside the verdict in the interest of justice unavailing.

The Court has considered plaintiff's remaining contentions and find them without merit.

Accordingly, after careful consideration, it is hereby ORDERED that the motion is denied. This constitutes the decision and order of the Court.

7/12/2023

DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE