SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT: **HON. PHILLIP HOM** **PART 14**

Justice

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EMILIYA UBAYDOVA,

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

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INDEX NO. 721577/2019

MOTION DATE 07/25/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

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

Upon the foregoing documents, this motion to set aside the jury verdict by plaintiff Emiliya Ubaydova ("Plaintiff") is determined as follows:

Plaintiff is suing defendant City of New York ("Defendant") for injuries she alleged sustained at Juniper Valley Park Playground (the "Playground") on July 24, 2019, when she tripped on a balance beam. Defendant owns and operates the Playground.

On November 28, 2023, the Court sent an e-mail to the parties confirming that the jury trial was scheduled for March 4, 2024, setting a schedule for motions in limine to be returnable February 15, 2024 and requesting certain trial documents, including proposed pattern jury instructions and verdict sheets by February 23, 2024.

Defendant filed a motion in limine on January 31, 2024 seeking to preclude Plaintiff from, (i) introducing evidence or testimony regarding the Consumer Product Safety Public Playground Safety Handbook ("CPSC guidelines") and the American Society for Testing and Materials F-1487 Standard Consumer Safety performance Specification for Playground Equipment for Public Use ("ATSM F1487") (together, the "Guidelines") (ii) precluding Plaintiff's expert witness Celia Petersen ("Ms. Petersen"), a registered landscape architect, from testifying and (iii) precluding any testimony regarding the balance beam being an alleged tripping hazard because such testimony goes to an ultimate issue in the case.

The Court issued a decision and order dated March 4, 2024, that, (1) precluded the Guidelines because they were irrelevant to the facts in the present case, (2) precluded Ms. Petersen from testifying because the Guidelines were precluded and she did not cite to any other industry guidelines allegedly violated by Defendant, and (3) precluded opinion testimony that the balance beam was a tripping hazard because the witness could give opinion evidence only if the subject matter of the testimony made it impossible to accurately describe the facts without stating an

opinion or impression. The Court found that the fact witness could describe the balance beam without stating his opinion that the balance beam was a tripping hazard, which was ultimately a question for the jury.

The Court held a jury trial on liability which began on March 6, 2024, and ended on March 11, 2024 with a jury verdict. The jury unanimously found Defendant was not negligent.

Plaintiff moves under CPLR 4404 (a) to set aside the verdict as being against the weight of credible evidence and in the interest of justice and for a new trial. Specifically, Plaintiff argues a new trial should be granted because, (i) the jury failed to apportion fault between the parties, (ii) a portion of the jury charge was in error and confusing, (iii) certain remarks made by Defendant's counsel were inappropriate, and (iv) the Court should not have precluded (a) Plaintiff's expert, (b) Mr. Albacary's opinion testimony regarding the balance beam being a tripping hazard, and (c) the Guidelines.

Under CPLR 4404 (a), "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, 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" (CPLR 4404 [a]; *see Yac v County of Suffolk*, 205 AD3d 764, 765 [2d Dept 2022]).

A motion to set aside a jury verdict as contrary to the weight of the evidence should be granted "(o)nly where the evidence so preponderates in favor of the unsuccessful litigant that the verdict 'could not have been reached on any fair interpretation of the evidence'" (*Yac* at 765-66, quoting *Reilly v Ninia*, 81 AD3d 913, 915 [2d Dept 2011] [internal quotation marks omitted]). "'It is for the jury to make determinations as to the credibility of witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses'" (*Anarumo v Herzog*, 201 AD3d 778, 779 [2d Dept 2022], quoting *Russo v Levat*, 143 AD3d 966, 968-69 [2d Dept 2016]). If the court grants such a motion, it is required to order a new trial, since it does not have the power to make new findings of fact in a jury case (*see Osorio v New York Health & Hosps. Corp.*, 211 AD3d 842, 845 [2d Dept 2022]).

Apportionment of Fault

"'The apportionment of fault among the parties is generally an issue of fact for the jury, and the jury's apportionment of fault should not be set aside unless it could not have been reached based upon a fair interpretation of the evidence'" (*Plazas v Sherlock*, 228 AD3d 788, 790 [2d Dept 2024], quoting *Hernandez v Pappco Holding Co., Ltd.*, 136 AD3d 981, 983 [2d Dept 2016]).

Although Plaintiff testified that the balance beam was dark blue, blended with the floor and the lighting in that area was not very good. She also testified at the time of the accident, "[t]he sun was setting but it wasn't dark yet. The dusk was coming" (Trial Transcript at 38 [EF 80]). The parties also read into evidence Plaintiff's EBT deposition testimony where she stated that although she did not see the balance beam, there was enough light for her to see her sister 15 to 20 meters

away (Trial Transcript at 66 [EF 80]). Plaintiff argues the balance beam was dangerously placed and created a hazardous condition, but there was no testimony that there had been prior complaints or accidents involving the balance beam. Plaintiff's motion to set aside the verdict because the jury did not apportion fault is denied. The Court finds that the jury could have reached its verdict that Defendant was not negligent based upon a fair interpretation of the evidence.

Inherently Dangerous/Open and Obvious Jury Instruction

Plaintiff argues the jury verdict should be set aside because the jury instruction on open and obvious hazards was confusing. Specifically, Plaintiff argues the following instruction confused the jurors:

> Whether a condition is not inherently -- whether a condition is not inherently dangerous or constitutes a reasonably safe environment depends on the totality of the specific facts of each case. If you find that the balance beam was open and obvious and not inherently dangerous, then you must find that the defendant was not negligent. If you find that the balance beam was not open and obvious and/or that the balance beam was inherently dangerous, then you must find that the defendant was negligent.

After instructing the jury, Plaintiff objected to the reading of this instruction arguing the balance beam was not inherently dangerous, but was dangerous in this case because of its location and color.

The related instruction right before the allegedly confusing instruction was:

> The issue of whether a condition is open and obvious is generally fact-specific and cannot be divorced from the surrounding circumstances. A condition is open and obvious if it could have been readily observed by any person reasonably using his or her senses. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured.

As noted by Defendant, at the charge conference, Plaintiff did not object to this instruction (Trial Transcript at 111-12 [EF 80]). The Court further finds this instruction, when read in context with the related open and obvious instruction was not confusing. Both instructions emphasize that the determination of whether a condition is open and obvious is "generally fact-specific and cannot be divorced from the surrounding circumstances," and "whether a condition is not inherently dangerous or constitutes a reasonably safe environment depends on the totality of the specifics of each case." Both instructions directed the jurors to make their findings based on the facts of this case and the surrounding circumstances. The jurors were also instructed that if they had any questions about the testimony or instructions on the law, they could send a jury note requesting clarification (Trial Transcript at 140 [EF 80]). The jury did not send any such note. Accordingly, Plaintiff's motion to set aside the verdict based upon an allegedly confusing jury instruction is denied.

Defense Counsel's Remarks

Plaintiff argues that certain comments made by Defendant's counsel were sufficiently prejudicial to warrant a new trial. Plaintiff objected to some of the comments including Defendant's summation where he discussed placement of the balance beam inside the playground and argued the City would have to get rid of parks and playgrounds if it were liable for open and obvious hazards. Plaintiff also objected to Defendant's comments in his opening statement that to win the case, Plaintiff would have to prove that the balance beam was unreasonably dangerous. Although Plaintiff did not object, she argues that Defendant's counsel's comments regarding Plaintiff not calling certain witnesses deprived her of a fair trial.

The Court examines defense counsel's conduct in the context of the whole trial to determine whether improper remarks by defense counsel are pervasive or prejudicial or so inflammatory as to deprive plaintiff of a fair trial (*see Lariviere v NY City Tr. Auth.*, 131 AD3d 1130, 1132 [2d Dept 2015]). Where there were no objections to allegedly improper remarks, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial (*see Kleiber v Fichtel*, 172 AD3d 1048, 1052 [2d Dept 2019]).

In the context of the whole trial, Defendant's counsel's alleged improper remarks were not so pervasive, prejudicial or inflammatory as to deprive Plaintiff of a fair trial. The remarks regarding placement of the balance beam and open and obvious hazards were fair comments in response to Plaintiff's arguments the balance beam was negligently placed and the lighting conditions were poor. The comments that Plaintiff would have to prove the balance beam was unreasonably dangerous was addressed by the Court's opening and closing instructions that the jurors were bound by the Court's instructions on the law and could not accept anyone else's interpretation of the law. Defendant's counsel's remarks regarding certain witnesses not being called did not cause a gross injustice requiring a new trial. Accordingly, Plaintiff's motion to set aside the verdict based upon Defendant's counsel's alleged improper remarks is denied.

Motion to Preclude

While labeled as a motion to set aside the verdict, Plaintiff, in effect, seeks to re-argue the Courts decision on the motion in limine to preclude. Defendant filed a motion in limine to preclude use of the Guidelines, Plaintiff's expert witness and certain opinion testimony that the balance beam was a tripping hazard. The Court issued a decision dated March 4, 2024 (the "Preclusion Order") granting Defendant's motion. Defendant served a notice of entry of the Preclusion Order on March 5, 2024. Plaintiff sought to reargue on March 8, 2024, which the Court denied. Under CPLR 2221 a motion to reargue must be filed within 30 days of notice of entry of the order. Even if we assume that the Parties' March 21, 2024 so ordered stipulation extending the time to file a post-trial motion to April 25, 2024, also extended Plaintiff's time to seek re-argument, Plaintiff has not demonstrated that the Court overlooked or misapprehended the facts or misapplied any controlling law in the Preclusion Order (*see Rodriguez v Gutierrez*, 138 AD3d 964, 966 [2d Dept 2016]). Plaintiff's motion to set aside the verdict based upon the Court's preclusion order is denied.

In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff's motion to set aside the verdict is denied in its entirety; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that Defendant shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon all parties within ten (10) days from the date of entry.

This constitutes the Decision and Order of this Court.

Dated: August 5, 2024

PHILLIP HOM, J.S.C.