Pacheco v City of New York
2012 NY Slip Op 33623(U)
May 7, 2012
Supreme Court, Bronx County
Docket Number: 0016368/2007
Judge: Geoffrey D. Wright
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[* 1] FILED Jun 11 2012 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

6-11-18

PART 01

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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PACHECO,CARLOS Index №. **0016368/2007**

-against- Hon..**GEOFFREY D. WRIGHT** ,

THE CITY OF NEW YORK Justice.

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The following papers numbered 1 to _____ Read on this motion, **ANNUL, SET ASIDE & VAC**
Noticed on **December 27 2010** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed written decision.

TWS Post-trial
Motion is Respectfully Referred to:
Justice: Geoffrey Wright
Dated: 28 JAN 2014
HON. [illegible] PAYNE
J.S.C.

Dated: 5 7 , 2012

GEOFFREY D. WRIGHT
AJSC

Hon._____
GEOFFREY D. WRIGHT, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 1A-1

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CARLOS PACHECO, Index # 16368/07

Plaintiff,

-against- DECISION

THE CITY OF NEW YORK, (NYC FIRE DEPARTMENT and EMERGENCY MEDICAL SERVICES), P.O. LOPEZ (Shield # unknown) and P.O. ZAHIRDIN (Exact name and shield # unknown), and SGT. JAMES SUTTER (Shield 3 unknown),

Defendant.

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

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RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order set aside jury verdict.

Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other.....cross-motion.....	

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

Defendants, moves pursuant to CPLR 4404(a) to enter judgment for Defendants notwithstanding the verdict. Defendants' motion is based on the alleged failure of the Plaintiff to establish a prima facie case, and that the verdict rendered by the jury is against the weight of the evidence presented at trial. In the alternative, Defendants seek a reduction of the amounts awarded to Plaintiff by the jury.

That part of the motion to set aside the verdict is denied. The totality of the evidence adduced at trial fully support the verdict rendered against Defendants . Plaintiff's proof at trial, consisting of his testimony and the testimony of other witnesses (two other police

Officers, a paramedic, and Plaintiff's girlfriend), all of whom were present at the time Plaintiff was tasered. There was overwhelming credible evidence that Plaintiff did refused to go to the hospital and was nevertheless restrained - handcuffed behind his back in an EMS chair, with a lap belt, a chest belt and legs restraints and was twice tasered by Sargent Sutter (testimony of Officer Zahirdin). The jury awarded Plaintiff for excessive force the sum of $ 409,166 from the date of the incident to the date of verdict; the sum of $633,333 for future damages for the use of excessive force; and $1,000,000 as punitive damages against Sargent Sutter.

In addition to the claim that Plaintiff failed to establish a prima facie case which the court found above lacks merit, Defendants enunciated other grounds for setting aside the verdict. The first argument was that the verdict was against the weight of the evidence and is denied.

Next the Defendants argued that the jury was not provided with the proper burden of proof on the punitive damages charge nor was the burden of proof incorporated into the interrogatory.

The Defendant argued that the Court failed to charge the jury with the correct burden of proof on punitive damages - a finding of clear, unequivocal, and convincing evidence. The Defendant failed to raise any objection to the charges with respect to burden of proof when, after giving the charges, the court asked the parties if they had corrections to the charges (pg 679 -Trial Transcript). In addition to an issue of waiver, that the issue was not preserved for trial, there is also a 1st Department Appellate Division holding where the Court found that "Defendant's claim that the trial court failed to charge that wanton and reckless conduct had to be proven by clear and convincing evidence was not preserved by either its objection to the general burden of proof charge or its unelaborated objection to the punitive damages charge" Browne v. Prime Contracting Design Corp., 308 A.D.2d 372, 764 N.Y.S.2d 269, (App. Div. 1 Dept. 2003). The Court in Browne, *supra,* concluded that "any errors in these respects were harmless, given a record replete with clear and convincing evidence" as was presented in the instant trial where the credible testimony showed that Plaintiff was restrained (by arms and legs in a chair) when he was tasered.

Defendants allege that the Court erred in allowing testimony as to exacerbation of Plaintiff's seizure disorder. Defendants refer to a pre-trial decision in the instant matter by Judge Williams that precluded any testimony by Dr. Gutstein as to exacerbation relating to a seizure disorder. The testimony referred to by Defendant, however, is solely that of Plaintiff who is allowed to testify as to his injury or suffering experienced as a result of Defendant's action. The other statements made by Plaintiff's attorney in summation were in accordance with Plaintiff's testimony of experiencing more seizures after the September 2006 incident.

The Decision of Judge Williams was directed solely to testimony of Dr. Gutstein.

The allegation that the jury rendered a compromise damage verdict, which could only have been reached by averaging the proposed verdict amounts of each individual juror and is a "quotient verdict' and therefore invalid lacked merit. Unless there is shown that there was an agreement by each juror to abide with the average prior to the averaging, the argument is not a basis for setting aside the verdict. Micozzi v. Glowacki, 178 A.D.2d 585, 577 N.Y.S.2d 480 (App. Div. 2 Dept.,1991); Klein v Eichen, 63 Misc.2d 590, 310 N.Y.S.2d 611 (Sup. Ct. Bronx 1970).

Defendants allege that the court erroneously denied Defendants' request to include a substantial factor question as to the cause of Plaintiff's emotional distress and psychological injuries. In Siagha v. Salant-Jerome the Appellate Division 1st Department held (citing other authority) that:

> "The various trial rulings cited by defendants as grounds for a new trial are either unpreserved for appellate review, insufficiently prejudicial to warrant a new trial, or were proper exercises of the court's discretion. In particular, the trial court's failure to include on the verdict sheet an interrogatory requiring the jury to conclude, prior to awarding damages, that plaintiff's injuries were proximately caused by the assault, was harmless error in light of the fact that the issue of proximate causation was fully explained in the jury charge"

271 A.D.2d 274, 706 N.Y.S.2d 634 (2000). Rock v. City of New York, 294 A.D.2d 480, 742 N.Y.S.2d 565 (App. Div.. 2 Dept. 2002).

Finally Defendants allege that the damages awarded by the jury deviates materially from what would constitute reasonable compensation and seek to set aside the damage awards. Plaintiff cited to several cases Segal v City of New York, 66 A.D.3d 865, 887 N.Y.S.2d 624 (App. Div. 2 Dept. 2009); Chianese v Meier, 285 A.D.2d 315, 729 N.Y.S.2d 460 (App. Div. 1st Dept. 2001); Papa v City of New York, 194 A.D.2d 527, 598 N.Y.S.2d 558 (App. Div. 2nd Dept. 1993) that show that the awards of damages were not excessive. In Ferguson v. City of New York, 73 A.D.3d 649, 901 N.Y.S.2d 609 (App. Div. 1st Dept. 2010) an award of $2.7 million as punitive damages was not considered excessive. The Court in Ferguson held that:

> "Punitive damages award of $2.7 million was reasonably related to harm done and flagrancy of conduct of defendant police officer in using excessive force during arrest by shooting arrestee in head, and consistent with purpose of punishing defendant for wanton and reckless acts, thereby discouraging similar conduct in future, and therefore was not excessive, since officer's conduct resulted in death and was in complete disregard of police procedure".

While the instant court is aware that the matter herein did not end in Plaintiff's death, the

conduct displayed by Sargent Sutter was as wanton and reckless as that found in Ferguson. The $1,000,000 awarded as punitive damages is therefore not excessive.

May 7, 2012

GEOFFREY D. WRIGHT

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court