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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 12

Index Number : 107304/2008
SHARMA, JOAN
vs
HOUSING AUTHORITY
Sequence Number : 009
VACATE

INDEX NO. 107304/08

MOTION DATE

MOTION SEQ. NO. 009

The following papers, numbered 1 to ____, were read on this motion to/for Vacate

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1

Answering Affidavits — Exhibits ____ | No(s). 2

Replying Affidavits ____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

DEC 26 2013

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/23/13

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JOAN SHARMA,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------x

Index No. 107304/08

Motion seq. no. 009

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant:
William P. Pawlow, Esq.
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By notice of motion, plaintiff moves pursuant to CPLR 4404 for an order setting aside the verdict rendered against her and granting her a new trial. Defendant opposes the motion.

Following a trial held on July 23, 25, 29, 30, and 31, 2013, the jury determined that defendant was negligent in failing to repair floor tiles in plaintiff's apartment but that its negligence was not a substantial factor in causing plaintiff's injuries.

Plaintiff now argues that the jury's determination finding defendant negligent but also finding that its negligence was not a substantial factor in causing her injuries is inconsistent, and that the jury failed to consider the impact of defendant's negligence on plaintiff's health. She also contends that I erred in failing to admit in evidence copies of her Magnetic Resonance Imaging (MRI) films, claiming that her trial counsel, the fifth attorney to represent her, had no chance to prepare adequately for trial. (Affirmation of Jacqueline Bukowski, Esq., dated Aug. 15, 2013).

Defendant maintains that any claim that the verdict was inconsistent was waived by plaintiff's failure to object to the verdict before the jury was discharged, and that the verdict was not against the weight of the evidence given plaintiff's medical history and prior accidents and testimony that defendant had offered to repair the tiles before plaintiff's accident but she refused to let it do so. It also asserts that the MRI films were properly precluded as plaintiff failed to comply with CPLR 4532-a and established no other basis for their admission. (Affirmation of William P. Pawlow, Esq., dated Sept. 23, 2013).

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial, and direct judgment in favor of the moving party or grant a new trial, where the verdict is contrary to the weight of the evidence or in the interest of justice.

As plaintiff failed to raise the issue of the verdict's alleged inconsistency before the jury was discharged, she waived the argument. (*Barry v Manglass*, 55 NY2d 803 [1981]; *Ramos v New York City Tr. Auth.*, 90 AD3d 492 [1st Dept 2011]; *Gunther v Muschio*, 40 AD3d 1030 [2d Dept 2007]; *Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186 [4th Dept 2008]). In any event, the verdict is not inconsistent.

In order to find that a verdict is against the weight of the evidence, the court must determine 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." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). Thus, if "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." (*Id.* at 499).

"[G]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses." (*Desposito v City of New York*, 55 AD3d 659 [2d Dept 2008]). The jury's resolution of disputed factual issues and inconsistencies in witnesses' testimony is also entitled to deference. (*Bykowsky v Eskenazi*, 72 AD3d 590 [1st Dept 2010], *lv denied* 16 NY3d 701 [2011]). And it is the jury's function to determine whether a witness is credible and what weight should be given to the testimony of experts. (*Devito v Feliciano*, 84 AD3d 645 [1st Dept 2011], *citing Harding v Noble Taxi Corp.*, 182 AD2d 365 [1st Dept 1992]). Moreover, a verdict rendered in favor of a defendant may not be set aside unless the evidence so preponderated in the plaintiff's favor that the verdict for the defendant could not have been reached on any fair interpretation of the evidence. (*Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744 [1995]; *Jordan v Port Auth. of New York and New Jersey*, 82 AD3d 936 [2d Dept 2011]; *Myers v S. Schaffer Grocery Corp.*, 281 AD2d 156 [1st Dept 2001]).

The issue of whether a defendant's negligence was a proximate cause of an accident is separate and distinct from the issue of whether defendant acted negligently, and a defendant may act negligently without that negligence constituting a proximate cause of the accident. (*Pavlou v City of New York,* 21 AD3d 74 [1st Dept 2005]). A jury's finding that a party was a fault but that such fault was not a proximate cause of the accident is against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause. (*Niebles v MTA Bus Co.*, 110 AD3d 1047 [2d Dept 2013]).

Here, the jury was presented with evidence that plaintiff had suffered numerous accidents

before the accident at issue and that her medical condition made her prone to spontaneous injuries, and that defendant had offered to repair the tiles before the accident but plaintiff refused to let it do so. The jury could have thus reasonably concluded that defendant's failure to repair the tiles did not cause plaintiff's injuries in that plaintiff's injuries, rather plaintiff's injuries resulted from her medical condition and/or were pre-existing or that it was plaintiff's refusal to let defendant repair the tiles that caused the accident. (*See eg Tomaino v Marotta*, 106 AD3d 1527 [4th Dept 2013] [jury's finding that defendant was negligent in failing to remove lead paint from apartment but that negligence was not substantial factor in causing plaintiff's injuries was not logically impossible as jury could have concluded that exposure to lead paint only minimally affected plaintiff and that injuries could have been caused by other factors]; *Coma v City of New York*, 97 AD3d 715 [2d Dept 2012] [although jury could have reasonably concluded that defendant failed to repair sidewalk defect, it could also have found that accident was caused solely by plaintiff's conduct who admittedly turned her head to look behind her just before she tripped on defect]; *Lebron v Said*, 51 AD3d 1384 [4th Dept 2008] [finding that landlord's negligence was not proximate cause of accident not against weight of evidence as conditions in stairwell which allegedly caused plaintiff's fall had existed for two months before accident and plaintiff had used stairwell without incident before accident, and thus jury could have found that plaintiff's own conduct was sole proximate cause of accident]; *see also Genza v Richardson*, 95 AD3d 704 [1st Dept 2012] [given evidence of plaintiff's complicated medical history and concurrent medical conditions, jury could have reasonably concluded that defendant's failure to supervise plaintiff's condition was not substantial cause of her injuries]).

The MRI films were properly excluded based on plaintiff's failure to comply with CPLR

4532-a. (*See Dwight v New York City Tr. Auth.*, 30 AD3d 270 [1st Dept 2006], *lv denied* 7 NY3d 711 [exclusion of x-rays for plaintiff's failure to satisfy CPLR 4532-a was proper as plaintiff admittedly did not comply with statute's notice provisions]; *Kovacev v Ferreira Bros. Contracting, Inc.*, 9 AD3d 253 [1st Dept 2004] [MRI films not admissible pursuant to CPLR 4532-a as plaintiff failed to meet its requirements or show that films were admissible pursuant to business records exception to hearsay rule]; *Wierzbicki v Mathew*, 8 AD3d 476 [2d Dept 2004] [court providently exercised discretion in precluding admission in evidence of MRI films given plaintiff's failure to comply with CPLR 4532-a]). That plaintiff may have had a succession of attorneys representing her does not constitute a valid excuse for not complying with the statute.

Accordingly, it is hereby

ORDERED, that plaintiff's motion to set aside the verdict is denied.

ENTER:

Barbara Jaffe, JSC

DATED: December 23, 2013
New York, New York