Lichy v Mount Sinai Med. Ctr.
2017 NY Slip Op 31552(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 110038/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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JACOB LICHY and REGLA LICHY,

INDEX NO. 110038/09

Plaintiffs

-against-

THE MOUNT SINAI MEDICAL CENTER, THE MOUNT SINAI HOSPITAL, LAPAROSCOPIC SURGICAL CENTER OF NEW YORK LLP, ANTHONY JAMES VINE, LESTER BRIAN KATZ, ERIC S. GOLDSTEIN, M.D., PLLC and ERIC SIMON GOLDSTEIN,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiffs move pursuant to CPLR 4404(a) to set aside the jury verdict on various grounds including that defense counsel's comments during summation warrants setting aside the verdict and granting a new trial in the interest of justice. Defendants oppose the motion, which is denied for the reasons below.

Background

This medical malpractice action arises out of a surgical procedure performed by defendant Anthony James Vine, M.D. in the summer of 2008 to remove a suspected mass in the antrum of plaintiff Jacob Lichy's stomach. Based on severe abdominal pain and various diagnostic tests, Mr. Lichy was advised to have the suspected mass removed and agreed to have Dr. Vine perform the surgery. Plaintiffs allege that Mr. Lichy wanted to have the laparoscopic surgery, that Dr. Vine unnecessarily converted a laparoscopic procedure into an open one and improperly removed a larger portion of Lichy's stomach than was necessary.

Dr. Vine testified that at the outset of the laparoscopic procedure, Dr. Eric Goldstein performed an endoscopy that revealed no mass present. However, Dr. Vine testified he observed an antral process that was cause for concern and therefore stomach samples were taken to be biopsied. According to Dr. Vine, based on certain pathology results that were available at the time of the operation and visual observations, Dr. Vine converted the surgery into an open one because he was concerned plaintiff had cancer. Dr. Vine recalled that plaintiff was "angry" when he was told immediately following the procedure that it was converted to an open one.

In support of plaintiffs' allegations that Dr. Vine improperly performed a more invasive procedure, plaintiff produced two experts, Dr. Meyer Solny, a gastroenterologist, and Dr. Richard Goldstein, a surgical expert. It is the cross examination of these experts and comments by defense counsel during summation which are at issue in this motion.

Specifically, plaintiffs assert that defense counsel committed misconduct in portraying plaintiffs' expert witnesses as "hired guns," whose testimony was unworthy of belief. Plaintiffs further argue that defense counsel improperly acted as an unsworn witness vouching for the relevance of evidence and commenting on the credibility of witnesses and improperly interjecting juror's personal preferences into the trial.

With respect to defense counsel's denigration of plaintiffs' experts, plaintiffs point to the following questions asked by defense counsel of Dr. Solny:

> Q. Am I correct that insofar as doing business with lawyers, you have in the past, advertised in legal publications that your services as an expert are available?
> A. That is correct.
> Q. And am I correct that in addition to advertising, you subscribe to a myriad of internet services that announce "We have experts in malpractice litigation available for hire."
> A. I have a marketing company that does that on my behalf. I personally don't do that.
> Q. But you retained a marketing company?

A. Right.
Q. And as a result of their efforts on your behalf, you've been listed with at least six or seven different kinds of expert-for-hire services?
A. That sounds about right. (Tr. at 534).

As to Dr. Goldstein, during cross examination, he was asked if

Q. Am I correct that you list yourself with expert for hire services (Tr at 737)

An objection to the question was sustained, and counsel asked the following:

Q. Am I correct that you list yourself with an organization for TASA, which is a service that makes available experts for retention by lawyers."
A. Yes, and I've received as many plaintiff referrals — I mean defense referrals from TASA as I have received plaintiff referrals.(Id).

Plaintiffs argue during the summation defense counsel exacerbated such improper questioning by highlighting to the jury plaintiffs' experts' testimony as to their testimony in other cases. Plaintiffs point to defense counsel's description of Dr. Goldstein's testimony as admitting "that he lists himself with expert for hire services." (Id at 1552). With respect to Dr. Solny, plaintiffs point to defense counsel's statements that he "[t]estified in 18 states. I identified for them 7 or 8 websites where they advertise doctors available for hire by lawyers." (Id at 1572-73).[1]

In addition plaintiffs argue that defense counsel acted as an unsworn witness in stating his personal opinion that plaintiffs contention is "not true," that a report by a Dr. Marlansky, "a good friend of Dr. Vine's" who "sends him a lot of business," was written "to help Dr. Vine." In the same vein, plaintiffs point to defense counsel's statement that a tape recorded conversation with Dr. Vine was "not valuable." Plaintiffs also argue that defense counsel became a de facto trier of

[1]Plaintiffs' counsel objected to the use of the terms "for hire" and the objections were sustained (Id at 1552; 1573).

fact by stating that "Dr. Lichy and Mrs. Lichy don't give consistent , or truthful testimony on a regular basis ... Untruths? Sure." (Id at 1563).

Finally, plaintiffs argue that defense counsel improperly asked jurors to put themselves in the shoes of Dr. Lichy and to bolster the testimony of defendants' expert by asking the jurors "[a]sk yourself if you needed a doctor, which of the two would you [choose] to be your doctor, and offer you opinions about how to proceed, that man, or the guy who doesn't operate and said to you no big deal, they could have waited, what was the rush?" (Id at 1554).

In opposition, defendants argue that the comments made by the defense were "isolated remarks, that were either fair comment on the evidence and testimony adduced at trial, or permissible rhetorical speech."

Discussion

"In ruling on a motion for a new trial based on attorney misconduct, the trial court must determine, in its discretion, whether counsel's conduct created undue prejudice or passion which played upon the sympathy of the jury." Valenzuela v. City of New York , 59 AD3d 40, 44 (1st Dept 2008). The Rules of Professional Responsibility also limits attorney's advocacy during summation, and prohibits a lawyer from "asserting personal knowledge of the facts in issue, except when testifying as a witness, and [from] asserting a personal opinion as to the credibility of a witness.[2] Id. (internal citation omitted). It has been held that "[t]his conduct amounts to a subtle form of testimony, as to which the opposing party cannot cross-examine." Id, citing People

[2]See generally NY Rules of Professional Conduct 3.3(f)(2) to (3), 3.4(d)(1) to (3). Valenzuela supra cites the Cannons of Ethics under the Lawyer's Code of Professional Responsibility DR 7-106 [c] [3], [4] [22 NYCRR 1200.37 (c) (3), (4)]. The Lawyer's Code of Professional Responsibility has been renamed and renumbered since Valenzuela was decided, the text of the applicable rules remain substantially the same.

v Paperno, 54 NY2d 294, 301 (1981).

The cases relied on by plaintiffs fall into two categories. The first includes Valenzuela supra and Berkowitz v. Marriot Corp., 163 AD2d 52, 53 (1st Dept 1990), in which the verdict was set aside based on comments by attorneys which were of an extreme, prejudicial and pervasive nature.

In Valenzuela supra, plaintiff's counsel interjected his view of the baseball field where the accident occurred, including whether the part of the field depicted in the photographs was third base or the pitcher's mound and whether a vehicle could have entered the field. In addition, he vouched for his own credibility by stating he had been to the field and by stating in the jury's presence that the defense attorney's summation as to the vehicle was a fabrication. In finding that the verdict should be overturned based on such conduct, the Appellate Division wrote that its "examination of the record... indicates that plaintiff's counsel so tainted the course of the trial that he effectively destroyed any chance for a fair outcome." 59 AD3d at 44.

In Berkowitz, supra , the Appellate Division found that reversal of a verdict in plaintiff's favor was mandated by "the reprehensible conduct of plaintiff's counsel in cross examination and during his summation in the course of which he engaged in unfair and highly prejudicial attacks upon medical competence of defendant's expert witnesses and attorney." 163 AD2d at 53. Among the improper remarks were repeated remarks that the defense experts were "'hired guns,' who were brought into the brought to the litigation to 'fluff up the case' and 'fill up some time'" and that there was no reason that physicians from Suffolk County were retained other than defendants could not "locate a physician to support their case from here to Suffolk County...After that boy, it's Europe." Id at 53-54. Moreover, plaintiff's counsel inferred an undisclosed

relationship between defendant's expert and defendants' present or prior counsel. The court also found "equally egregious" plaintiff's counsel's statement that "the defense attorney was merely carrying out 'instructions from his principals, and possibly he doesn't even believe himself some of the things that he said, but he has to do what he has to do.'" Id at 54.

In reversing the trial court, the Appellate Division found that "[t]he impact of the summation by plaintiffs' counsel, whose purpose was undoubtedly to discredit defendants' expert witnesses and attorneys, could only have been devastatingly prejudicial to defendants and amounted to a violation of their right to a fair trial." Id. In addition, the court took the usual step of appending part of plaintiff's counsel's summation containing these and other improper remarks.

In the instant case, defense counsel's questioning of plaintiffs' experts and remarks in summation, while not to be condoned, cannot be said to be as pervasive or "devastatingly prejudicial" as the conduct in Berkowitz supra. Nor does defense counsel's comments with respect to Dr. Marlansky's report or the tape recorded conversation rise to the same level of impropriety as counsel's statements in Valenzuela supra. Thus, neither case provides a basis for setting aside the verdict.

The second category includes cases where the verdicts were set aside based on errors in law or the weight of evidence in conjunction with improper arguments and remarks of attorneys. See Rodriguez v. New York City Housing Authority, 209 AD2d 260 (1st Dept 1994); Nuccio v. Chou, 183 AD2d 511 (1st Dept 1992), lv dismissed 81 NY2d 783 (1993); Clarke v. New York City Transit Authority, 174 AD2d 268, 277 (1st Dept 1992).

In Rodriguez supra, the Appellate Division reversed and remanded for a new trial based,

in part, on inflammatory and prejudicial remarks, but also on errors in permitting plaintiff "to attempt to prove negligence by expert testimony regarding the meaning and applicability of a statue imposing a standard of care." 209 AD2d 260-261. While the court found that plaintiff's counsel's remarks during summation improperly intimated that because defendant medical expert was compensated for his appearances that the witness was not credible, and interjected her own disagreement with the defense witness thereby making herself an unsworn witness, it found that "the cumulative effect of her summation together with the error in the engineer's testimony warrants reversal and a new trial." Id. at 261.

Similarly, in Nuccio supra, the verdict was set aside based on the errors in certain instructions by the court , and as against the weight of evidence with respect to the allocation of fault, and the denial of defendant's request for a missing witness charge. The Appellate Division found that added to the unfairness of the proceedings was plaintiffs' counsel's remarks which made him an unsworn witness and during which he attempted to vouch for the credibility of his clients; implied the defense counsel made up defense raised by defendants; injected racial overtones into the case, and called plaintiffs' expert a "hired gun" unworthy of belief because he was compensated. 183 AD2d at 515.

And, in Clarke supra, the court set aside the verdict based on the court's giving a Noseworthy charge in its instructions, permitting into evidence certain internal rules of the defendant Transit Authority without limiting instructions, and based upon plaintiff's counsel improper conduct "including acting as an unsworn witness, vouching for the credibility of his own witnesses, accusing defense witnesses of lying and accusing a defense medical expert of lying for pay." 174 AD2d at 276.

While in these cases, the Appellate Division cites comments by attorneys intimating that expert witnesses were "hired guns," or attorneys vouching for witnesses as part of the basis for reversal, in none of these cases are comments of this nature are the sole basis for setting aside the verdict. Plaintiffs do not argue any legal errors or other basis for setting aside the verdict, other than improper comments by defense counsel about plaintiffs' expert being "a hired gun," and defense counsel's vouching for witnesses. Thus, these cases are factually distinguishable and not controlling.

With respect to plaintiffs' argument that defense counsel improperly asked the jury in summation which doctor they would chose, while such statement is clearly improper, it is distinguishable from the facts in Liosi v. Vaccaro, 35 AD2d 790 (1st Dept 1970), cited by plaintiffs, where the court instructed the jury to ask what he [or she] would take for discomfort, pain and suffering. Nor does Wilson v. City of New York, 65 AD3d 906, 909 (1st Dept 2009) mandate a different result, where the court found that plaintiffs' counsel's suggestion that "the jury put itself in plaintiffs' shoes" was not so egregious as to warrant setting aside the verdict.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion to set aside the verdict is denied.

DATED: May 2, 2017

J.S.C.