Yac v County of Suffolk
2018 NY Slip Op 33146(U)
December 4, 2018
Supreme Court, Suffolk County
Docket Number: 10313/2011E
Judge: William B. Rebolini
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Rita Yac, as Administrator of the Estate of Demetrio Efrain Yac, and Rita Yac, individually,

Plaintiff,

- against -

County of Suffolk, Marilyn Shellabarger, South Brookhaven Family Health Center, Shirley Health Clinic, Suffolk County Department of Health Services, and Edmee Henriquez, M.D.

Defendants.

Clerk of the Court

Motion Sequence No.: 002; MOTD
Motion Date: 6/27/18
Submitted: 8/22/18

Index No.: 10313/2011E

Attorney(s) for Plaintiff:

Gentile & Associates
401 Park Avenue South, 10th Floor
New York, NY 10016

Cartier Bernstein
Auerbach & Steinberg, P.C.
(Trial Counsel)
100 Austin Street - Building 2
Patchogue, NY 11772

Attorney for Defendants:

Law Office of Vincent D. McNamara
Tower Square
1045 Oyster Bay Road, Suite 1
East Norwich, NY 11732

Upon the **E-file document list** numbered 36 to 92 read on plaintiff's motion for an order pursuant to CPLR 4404 setting aside the verdict and directing a judgment in plaintiff's favor on liability or for a new trial; it is

ORDERED that plaintiff's motion pursuant to CPLR 4404 is granted to the extent that the jury verdict is set aside and a new trial is ordered.

Plaintiff Rita Yac, as administrator of the estate of Demetrio Yac, and individually, commenced this action against defendants County of Suffolk, Marilyn Shellabarger South Brookhaven Family Health Center, Shirley Health Clinic, Suffolk County Department of Health

Services, Brookhaven Memorial Hospital Medical Center s/h/a Brookhaven Memorial Hospital and Medical Center ("Brookhaven Memorial"), Henrique Rodriguez, M.D. and Edmee Henriquez, M.D., to recover damages for injuries for medical malpractice and wrongful death. The gravamen of the complaint is that on February 17, 2010, defendants failed to diagnose plaintiff's decedent, Demetrio Yac, with an infection and instead misdiagnosed him with a muscle spasm. Plaintiff further alleges, among other things, that defendants failed to timely refer the decedent to a specialist, failed to perform a proper clinical examination of the decedent, failed to take an adequate history of the decedent, and failed to order immediate antibiotic therapy and hospitalization of the decedent. Defendant Brookhaven Hospital moved for summary judgment and by decision dated May 12, 2016, this Court granted its motion and all claims asserted against Brookhaven Hospital were dismissed. Thereafter, the action was continued as against all other defendants.

The case was tried before a jury commencing on February 1, 2018 and concluding on March 2, 2018 with a jury verdict in favor of defendants County of Suffolk and Edmee Henriquez, M.D. ("Dr. Henriquez") by a vote of 5-1, finding that there was no departure from accepted medical practice by Dr. Henriquez on February 17, 2010.

The following facts are not in dispute. Plaintiff's decedent Demetrio Yac presented to the Marilyn Shellabarger South Brookhaven Family Health Center, Shirley Health Clinic ("South Brookhaven Family Health Center") on February 17, 2010 with complaints of increased back and neck pain reported to be at a level of 10 out of 10. The medical records indicated Mr. Yac's temperature to be 98.9, his blood pressure at 93/58, and a pulse of 99 beats per minute. Dr. Henriquez took the decedent's history, examined him and diagnosed him with upper back pain/strain and sent the decedent home with a prescription for a muscle relaxant and pain medication. Two days later, Demetrio Yac died of septic complications of acute pyelonephritis.

Plaintiff now moves pursuant to CPLR 4404 to set aside the verdict and direct a judgment in favor of plaintiff on the issue of liability, as the jury verdict could not have been reached by any fair interpretation of the evidence or for a new trial, as the jury verdict was against the weight of the evidence. Plaintiff further argues that improper defense strategies tainted the jury process and deprived plaintiff of a fair trial, that the inclusion of a comparative fault charge in the jury instructions was in error, that the defense expert's testimony was not entitled to any weight and consequently, plaintiff's proof of malpractice was not refuted, entitling plaintiff to a jury verdict on the issue of liability. Defendants oppose the motion, plaintiff replies and defendant sur-replies.

For a court to conclude as a matter of law that a jury verdict should be set aside as not supported by sufficient evidence, the court must find that, on the basis of the evidence presented, there is no valid line of reasoning and permissible inferences which would lead rational persons to the conclusions reached by the jury (***Cohen v. Hallmark Cards, Inc.,*** 45 NY2d 493, 498, 410 NYS2d 282 [1978]; *see also*; ***Kaplan v. Miranda,*** 37 AD3d 762, 830 NYS2d 755 [2d Dept. 2007]; ***Nicastro v. Park,*** 113 AD2d 129, 132, 495 NYS2d 184 [2d Dept. 1985]). If there is a question of fact and "it would not be utterly irrational for a jury to reach the result it has determined upon...the court may not conclude that the verdict is as a matter of law not supported by the evidence" (***Cohen v. Hallmark Cards, Inc.,*** *supra,* 45 NY2d at 499).

For a court to set aside a verdict as against the weight of the credible evidence, which is a factual determination to be made, the court must conclude that "the jury could not have reached the verdict on any fair interpretation of the evidence" (***Ahmed v. Port Auth. of N.Y. & N.J.,*** 131 AD3d 493, 495, 14 NYS3d 501 [2d Dept. 2015]; ***Landau v. Rappaport,*** 306 AD2d 446, 446-47, 761 NYS2d 325 [2d Dept. 2003]; ***Kravis v. Horn,*** 254 AD2d 462, 678 NYS2d 784 [2d Dept. 1998] ***Grassi v. Ulrich,*** 87 NY2d 954, 641 NYS2d 588 [1996]). The power to set aside a jury verdict and order a new trial when it is against the weight of the evidence or in the interest of justice is an inherent one of the trial court as codified in CPLR 4404 (a) (*see* ***Nicastro v. Park,*** 113 AD2d 129, 137, 495 NYS2d 184 [2d Dept. 1985] ***McCarthy v. Port of N.Y. Authority,*** 21 AD2d 125, 127, 248 NYS2d 713 [2d Dept. 1964]). Setting aside a verdict as against the weight of the evidence requires a discretionary balancing of many factors (***Cohen v. Hallmark Cards, Inc.,*** 45 NY2d at 499). The "fair interpretation" standard for setting aside the verdict as being against the weight of the evidence, mandates that the verdict be given great deference unless it appears, upon review of the trial record, that the jury verdict was not a fair reflection of the evidence presented (***Nicastro v. Park,*** 113 AD2d 129, 137, 495 NYS2d 184 [2d Dept. 1985]). It is not whether the jury erred in weighing the evidence, rather, it is whether any viable evidence exists to support the verdict (*see* ***Lolik v. Big V Supermarkets, Inc.,*** 86 NY2d 744, 631 NYS2d 122 [1995]). While the fact-finding function of the jury is accorded great deference (*see* ***Obrien v. Barretta,*** 1 AD3d 330, 766 NYS2d 871 [2d Dept. 2003]), the Supreme Court's power to exercise its discretion to set aside the verdict as against the weight of the evidence is broad and is exercisable to ensure that justice is done (*see* ***Aunchman v. Palen,*** 186 AD2d 104, 587 NYS2d 710 [2d Dept. 1992]; *see also* ***Harris v. Marlow,*** 18 AD3d 608, 795 NYS2d 608 [2d Dept. 2005]; ***Nicastro v. Park,*** 113 AD2d 129, 132, 495 NYS2d 184 [2d Dept. 1985]). Indeed, "the 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 benefit of a favorable jury verdict" (***Nicastro v. Park,*** 113 AD2d 129, 133, 495 NYS2d 184 [2d Dept. 1985]). In determining a post-trial motion to set aside the verdict, the court must afford the non-moving party every inference that properly may be drawn from the facts presented, which are to be considered in a light most favorable to the non-moving party (***Szczerbiak v. Pilat,*** 90 NY2d 553, 556, 664 NYS2d 252 [1997]; ***Bernstein v. City of New York,*** 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Raso v. Jamdar,*** 126 AD3d 776, 5 NYS3d [2d Dept. 2015]).

In a medical malpractice action, the plaintiff is required to prove by expert testimony that the defendant deviated from good and accepted practice and that the deviation was a proximate cause of the injury or damage (***Rivera v. Greenstein,*** 79 AD3d 564, 568, 914 NYS2d 94 [2d Dept. 2010]; ***Monroy v. Glavas,*** 57 AD3d 631,870 NYS2d 371 [2d Dept. 2008]; ***Thompson v. Orner,*** 36 AD3d 791, 828 NYS2d 509 [2d Dept. 2007]; ***Sohn v. Sand,*** 180 AD2d 789, 580 NYS2d 458 [2d Dept. 1992]; ***Martinelli v. Hessekeil,*** 132 AD2d 691, 578 NYS2d 169 [2d Dept. 1987]; ***Keane v. Sloan Kettering Institute,*** 96 AD2d 505, 464 NYS2d 548 [2d Dept. 1983]). To meet this burden the plaintiff ordinarily presents expert testimony, as such testimony is necessary to establish a deviation from the requisite standard of medical care and in most cases, to establish proximate cause (*see* ***Deadwyler v. North Shore University Hosp. at Plainview,*** 55 AD3d 780, 866 NYS2d 306 [2d Dept. 2008]; ***Zak v. Brookhaven Mem. Hosp. Med. Ctr.,*** 54 AD3d 852, 863 NYS2d 821 [2d Dept. 2008]). To establish proximate cause, the plaintiff must present "sufficient evidence from which a reasonable person might conclude that it was more probable than not that the defendant's deviation was a substantial factor in causing the injury" (***Johnson v. Jamaica Hosp. Med. Ctr.,*** 21 AD3d 881, 883,

800 NYS2d 609 [2d Dept. 2005]; *see also* ***Alicea v. Ligouri,*** 54 AD3d 784, 864 NYS2d 462 [2d Dept. 2008]; ***Holton v. Sprain Brook Manor Nursing Home,*** 253 AD2d 852, 678 NYS2d 503 [2d Dept. 1998]).

At bar, Dr. Henriquez testified at trial on February 2, 2018 and on February 16, 2018. Dr. Henriquez testified that she was aware that Mr. Yac's back pain was severe and was recorded as being a 10 on a scale of 1 to 10. Dr. Henriquez further testified it would be important to inquire of a patient presenting with severe back pain what their job description was and how it was that they came to be suffering from back pain. However, Dr. Henriquez testified that she did not inquire about Mr. Yac's job description. Dr. Henriquez further testified that the standard of care in assessing where the patient's back pain is coming from includes asking the patient what they do on the job and further that the standard of care when presented with a patient suffering from severe back pain would be to know the functions performed by the patient at their job in assessing what caused the back pain. Dr. Henriquez, however, did not ask Mr. Yac about his job description or what his job duties were. Dr. Henriquez testified that she did not ask Mr. Yac if he was going to work or not, if he was able to drive a car or not, or generally about any limitations he may have been experiencing as a result of his back pain. Dr. Henriquez did not inquire of Mr. Yac with regard to what he could not do as a result of his severe back pain. Dr. Henriquez further admitted that the standard of care with respect to the diagnosis of any back pain would be to ask the patient if the back pain was radiating and to ask the patient the nature of his or her pain. Dr. Henriquez testified that she did not recall asking Mr. Yac about the nature of his pain and whether it was radiating and there is no indication in the medical records of Mr. Yac that any of these questions were asked by Dr. Henriquez. Dr. Henriquez testified that she inquired if Mr. Yac was taking any medication but she did not ask Mr. Yac if he had used or placed any type of heat patch on his back to alleviate the pain. Dr. Henriquez testified that it would have been important to know if Mr. Yac had been applying heat patches to his back in order to address his severe pain. Dr. Henriquez, however, never made any such inquiry of Mr. Yac. Dr. Henriquez testified that a differential diagnosis was not done on Mr. Yac in order to determine if there were any other possible causes for Mr. Yac's pain. Dr. Henriquez testified that she "did not rule out anything." Dr. Henriquez testified that she did not rule out that Mr. Yac could have been suffering from an infection or sepsis. However, Dr. Henriquez testified that she would consider all possible causes for a patient's condition or pain, yet this was not done with Mr. Yac. Dr. Henriquez did not inquire of Mr. Yac's overall physical condition during the prior two days that reported suffering from severe back pain. Dr. Henriquez never asked Mr. Yac if his back pain changed from the night before or if it was in any way different at any time during the two days that he reported to be suffering from severe back pain. Dr. Henriquez never asked Mr. Yac if he had a fever or chills over the two days prior to his presentation or if he had any other symptoms. Dr. Henriquez testified that had she been aware that Mr. Yac had a fever or chills during the two days prior to his visit, she would have considered this information significant, as it would have indicated that Mr. Yac's condition was something other than her diagnosis of a back sprain or strain. Dr. Henriquez testified that it would be important to know if Mr. Yac had a fever or chills within the two days prior to his visit, as this would have indicated that Mr. Yac was likely to have an infection, which would need to be investigated further. Had such information been known, Dr. Henriquez testified that she would have ordered an essential blood count test to determine if Mr. Yac's white blood count was elevated, which could be caused by an inflammation, infection, or cancer. Dr. Henriquez further testified that if she knew Mr. Yac had a fever or chills in the two days prior to his presentation, then she would have done a urinalysis and a urine culture to determine if Mr. Yac had some type of infection. Again,

Dr. Henriquez did not inquire of Mr. Yac as to whether he experienced any fever or chills since the onset of his severe back pain. In addition, Dr. Henriquez testified that she did not do a differential diagnosis of Mr. Yac and thus Dr. Henriquez did not consider that Mr. Yac was suffering from an infection or from sepsis and pyelonephritis. Two days after his visit with Dr. Henriquez, Mr. Yac passed away from septic shock.

Based upon the above, Dr. Henriquez testified that there were deviations in the standard of medical care with respect to her inquiries and diagnosis of Mr. Yac and thus, a deviation in the standard of care with respect to the care and treatment of Mr. Yac. As a result of the admissions made by Dr. Henriquez in this regard, the jury verdict that Dr. Henriquez did not depart from good and accepted medical practice in the care and treatment of Demetrio Efrain Yac on February 17, 2010 is set aside as not supported by sufficient evidence, being that there is no valid line of reasoning and permissible inferences which would lead rational persons to the conclusions reached by the jury (*see* ***Cohen v. Hallmark Cards, Inc.,*** 45 NY2d 493, 498, 410 NYS2d 282 [1978]). In addition, the conceded deviations in the standard of medical care by Dr. Henriquez during her testimony allow this Court to also set aside the jury verdict as against the weight of the credible evidence in that the jury could not have reached the finding that Dr. Henriquez did not depart from good and accepted medical practice on any fair interpretation of the evidence (***Reilly v. Ninia,*** 81 AD3d 913, 917 NYS2d 652 [2d Dept. 2011]; ***Ahmed v. Port Auth. of N.Y. & N.J.,*** 131 AD3d 493, 495, 14 NYS3d 501 [2d Dept. 2015]; ***Landau v. Rappaport,*** 306 AD2d 446, 446-47, 761 NYS2d 325 [2d Dept. 2003]).

Plaintiff's demand for setting aside the verdict and scheduling a new trial in the interests of justice, however, is without merit (*see* CPLR 4404; ***Said v. 109 Indus. Co., LLC,*** 69 AD3d 834, 892 NYS2d 767 [2d Dept. 2010]). Such relief is only available when it is established that, due to misconduct or other improper intrusions into the trial, substantial justice has not been done (*see* ***LaChapelle v. McLoughlin,*** 68 AD3d 824, 891 NYS2d 428 [2d Dept. 2009]). To warrant a new trial, the complained of misconduct must be such as to prejudice the movant with respect to his or her substantial rights (*see* ***Weiner v. Davidson,*** 61 AD3d 1030, 403 NYS2d 99 [2d Dept. 1978]). Plaintiff asserts the jury verdict should be set aside based on purported improper and inflammatory remarks by defendants' counsel during the course of the defense summation. Defense counsel's proffered commentary on the evidence presented by plaintiff was within the great latitude afforded counsel in closing statements and comments that attack the nature of plaintiff's proof, and thus, did not deprive plaintiff of a fair trial (*see* ***Chappotin v. City of New York,*** 90 AD3d 425, 933 NYS2d 856 [1st Dept. 2011]; *see also* ***Acosta v. City of New York,*** 153 AD3d 765, 61 NYS3d 559 [2d Dept. 2017]). Plaintiff's counsel was afforded ample opportunity to seek relief at the time of trial for any purported inflammatory or inappropriate comments made by defense counsel. To the extent that plaintiff's counsel failed to properly object or seek a curative instruction or move for a mistrial on that ground, plaintiff has waived the right to seek relief herein by way of a post-trial motion (***Id.***; ***Lucian v. Schwartz,*** 55 AD3d 687, 865 NYS2d 642 [2d Dept. 2008]; *see also* ***Kamen v. City of New York,*** 169 AD2d 705, 564 NYS2d 190 [2d Dept. 1991]). In addition, there were instructions to the jury at the conclusion of the trial that were curative in nature. In particular, the jury was advised to render their verdict on the basis of the facts and the credibility of the witnesses, not ill-advised comments by counsel, which are not evidence or dispositive. To the extent a more specific curative instruction was not requested nor was a motion for a mistrial proffered, plaintiff has waived this issue (*see* CPLR 4402; ***Kamen v. City of New York,*** 169 AD2d 705, 564 NYS2d 190 [2d Dept.

[* 6]

1991]). Furthermore, plaintiff's claim that the inclusion of a comparative fault charge to the jury is grounds for setting aside the verdict is without merit. Plaintiff's counsel was specifically questioned by the court regarding the jury charges during the charging conference and no objections were made by plaintiff's counsel. Indeed, plaintiff acquiesced in the comparative fault charge to the jury, without exception. Nevertheless, the comparative fault charge is not grounds for setting aside the verdict, as the jury responded 5-1 in favor of the defendants on the very first question posed to the jury on the verdict sheet, finding there was no departure or deviation from good and accepted medical practice by Dr. Henriquez in the care and treatment of the decedent on February 17, 2010. Any fault on the part of the decedent went to the issue of causation, not negligence. As the jury never reached the causation issue, the inclusion of a comparative fault charge is rendered academic (*see* ***Reilly v. Ninia,*** 81 AD3d 913, 917 NYS2d 652 [2d Dept. 2011]).

The Clerk is directed to remit the matter to the Calendar Control Part for purposes of setting a new trial date.

This constitutes the ***Decision*** and ***Order*** of the Court.

Dated: 12/4/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

______ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION