| **Frederic v City of New York** |
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| 2011 NY Slip Op 34165(U) |
| December 22, 2011 |
| Supreme Court, Kings County |
| Docket Number: 39372/06 |
| Judge: Larry D. Martin |
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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at Civic Center, Brooklyn, New York, on the 22nd day of December, 2011.

PRESENT:

HON. LARRY MARTIN,

Justice.

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EZIELKIL FREDERIC,

Index No. 39372/06

Plaintiff,

- against -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, P.O. JUSTIN PRIETO AND P.O. PATRICK FALLON,

Defendants.

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The following papers numbered 1 to 4 read herein:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1 |
| Opposing Affidavits (Affirmations) | 3 |
| Reply Affidavits (Affirmations) | 4 |
| Affidavit (Affirmation) | |
| Other Papers Memorandum of Law | 2 |

Upon the foregoing papers, defendants the City of New York, the New York City Police Department (NYPD), P.O. Justin Prieto and P.O. Patrick Fallon move, after trial, for an order pursuant to CPLR 4404 (a) setting aside the jury verdict and dismissing the action against the defendants for failure to prove a prima facie case or, in the alternative, setting aside the verdict on liability and damages against such defendants, and granting a new trial on the ground that the verdict is inconsistent, and contrary to the weight of the evidence.

## Background

Plaintiff was arrested for driving without a license. At the police station plaintiff claims he was sprayed with pepper spray and physically assaulted by police officers. The police officers involved deny plaintiff's claims. Thereafter plaintiff commenced an action against the City of New York and the NYPD and subsequently commenced a separate action against Officers Prieto and Fallon. The cases were consolidated for trial.

### The Evidence At Trial on Liability

The trial of this action commenced on May 18, 2010. Plaintiff Ezielkil Frederic was stopped by the police on August 10, 2006, and charged with driving with a suspended license. He was taken to the 44th Precinct in the Bronx where he was arrested and placed in a holding cell. Plaintiff testified that while in the cell, he was not given any food or water and that his requests to call someone to bring him his medication for a stomach condition were ignored for many hours. He maintains that he became upset and began clanging on the bars of the cell door to get the attention of the police officers. Plaintiff further testified that Police Officer Prieto pointed a taser gun at him, and threatened to use it on him if he did not stop yelling. He claims that Officer Prieto and five other officers then entered his cell, handcuffed him and moved him to a different cell. Plaintiff testified that he continued trying to get the attention of the police officers in an attempt to get his medication. According to plaintiff, while he was still handcuffed, Officer Fallon sprayed pepper spray in his eyes and

mouth causing him to fall to the ground, hit his head, and momentarily lose consciousness. Plaintiff then claims that Officer Fallon picked him up from the ground by his thumbs.

Officer Prieto testified that he was not authorized to carry a taser gun and denied threatening plaintiff with one. Officer Fallon testified that plaintiff was yelling uncontrollably in the cell for over half an hour and refused his command to quiet down and turn around so that he could be handcuffed in order to be transported to the hospital for treatment of his stomach ailment. Officer Fallon testified that he used the pepper spray, as opposed to using physical force upon plaintiff to get him to calm down so that he could be handcuffed. Officer Fallon denied lifting plaintiff by his thumbs.

Plaintiff was taken to Lincoln Hospital where his eyes were flushed out and he was given Prilosec for his stomach condition. The hospital record states that plaintiff complained of right hand numbness due to his having to wear handcuffs for an extended time.

Evidence at Trial on Damages

At the trial, Dr. Jeffrey Lubliner testified that plaintiff sustained a permanent right thumb ligament injury as a result of the incident. Dr. Robert Goldstein, plaintiff's psychiatric expert, testified that based upon his examination of plaintiff, which occurred in September 2007, and his review of the records in this case, including the records of the Bheuler Therapist Center where plaintiff was treated for psychological injuries, Dr. Goldstein concluded that plaintiff was suffering from post traumatic stress disorder and depression.

## The Verdict

After hearing all of the testimony and evidence presented and deliberating thereon, the jury, on May 21, 2010, rendered its verdict finding that Officer Fallon committed a battery with excessive force against plaintiff which was a substantial factor in causing plaintiff's injuries. The jury also found that Officer Prieto committed assault with excessive force, but that such force did not cause plaintiff's injuries. The jury awarded plaintiff $300,000 for past pain and suffering and $150,000 for future pain and suffering; $1.0 million punitive damages against Officer Fallon and $500,000 punitive damages against Officer Prieto.

## Defendants' Motion

Defendants now make this post trial motion seeking to dismiss the case against them arguing that plaintiff failed to establish a prima facie case. Defendants argue that the jury only found that the use of the pepper spray by Officer Fallon caused damage and they contend that the City is entitled to common law immunity for this discretionary decision by Officer Fallon to use the pepper spray while trying to cuff plaintiff for transport to the hospital. Additionally, defendants maintain that punitive damages were not warranted as no proximate causation was proven as to any claimed damages. Moreover, they argue that plaintiff's claims for punitive damages were barred as plaintiff never plead punitive damages in his pleadings and was precluded from making said claim by order of Judge Robert J.

Miller, dated May 16, 2008. In pertinent part, Judge Miller's order stated;"Plaintiff may not amend his complaint to add an additional cause of action alleging punitive damages."

Alternatively, defendants seek an order setting aside the verdict and ordering a new trial on the grounds that the verdict was : (1) inconsistent; (2) contrary to the weight of the evidence; and (3) excessive. Plaintiff also seeks a new trial on the ground that plaintiff's counsel made improper arguments throughout the trial.

In opposition, plaintiff argues that the motion to set aside the verdict must fail because it is impossible to conclude that the jury's verdict was utterly irrational or could not have been reached on any fair interpretation of the evidence. Specifically, plaintiff argues that the jury could have reasonably found, based upon his trial testimony, that Officer Fallon acted unreasonably when he sprayed the pepper spray into plaintiff's eyes and mouth while in a cell, with his hands cuffed behind his back, and pulled plaintiff up by his thumbs to lift him off the floor while he was handcuffed.

Additionally, plaintiff contends that it was proper for the court to allow the jury to consider punitive damages against Officers Prieto and Fallon inasmuch as Judge Miller's prior order on this matter barred plaintiff from pleading punitive damages in his amended complaint in his action as against the City and the NYPD and cannot be interpreted to extend to the separate case that he initiated against Officers Prieto and Fallon merely because the cases were both consolidated for trial. With regard to this issue, the court finds that Judge Miller's order applied only to plaintiff's action as asserted against the City and the NYPD

and that therefore plaintiff was not prohibited from pleading punitive damages against Officers Fallon and Prieto.

In addressing defendants' instant motion, it is noted that CPLR 4404(a) provides that after a trial of an action, the court, upon the motion of a party, may set aside a jury verdict 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 . . . where the verdict is contrary to the weight of the evidence. . ." "To be entitled to judgment as a matter of law pursuant to CPLR 4401, the defendant has the burden of showing that, upon viewing the evidence in the light most favorable to the plaintiff, the plaintiff has not made out a prima facie case" (*Nichols v Stamer*, 49 AD3d 832, 833 [2008]; *see also Godlewska v Niznikiewicz*, 8 AD3d 430, 431 [2004]; *Lyons v McCauley*, 252 AD2d 516, 517 [1998]; *Hughes v New York Hosp.-Cornell Med. Ctr.*, 195 AD2d 442, 443 [1993]; *Colozzo v LoVece*, 144 AD2d 617, 618 [1988]).

A trial court should exercise its discretionary power to set aside a jury verdict, pursuant to CPLR 4404(a), only where the jury could not have reached the verdict on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]; *Harris v Marlow*, 18 AD3d 608, 610 [2005]; *Ruscito v Early*, 253 AD2d 461, 462 [1998]; *Abrahams v King St. Nursing Home*, 245 AD2d 251, 251 [1997]). In order to be entitled to judgment as a matter of law pursuant to CPLR 4401, the court "must determine that by no rational process could the trier of fact find in favor of the nonmoving party on the evidence presented" (*Alameldin v Kings*

*Castle Caterers, Inc.*, 53 AD3d 514, 514 [2008]; *see also Maplewood, Inc. v Wood*, 21 AD3d 933, 934 [2005]; *Halbreich v Braunstein*, 13 AD3d 1137, 1138 [2004]).

"In considering such a motion, the evidence must be construed in the light most favorable to the nonmoving party, and the motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of the witnesses is in question" (*Cathey v Gartner*, 15 AD3d 435, 436 [2005]; *see also Alameldin*, 53 AD3d at 514-515; *Cameron v City of Long Beach*, 297 AD2d 773, 774 [2002]). "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Jean-Louis v City of New York*, 86 AD3d628 [ 2011]; *citing Exarhouleas v Green 317 Madison, LLC*, 46 AD3d 854, 855 [2007 ]; see Salony v Mastellone, 72 AD3d 1060, 1061 [2008]).

Here, the jury was presented with two different accounts of what transpired in the holding cell. Plaintiff testified that he was pepper sprayed while inside a jail cell with his hands cuffed behind his back. In contrast, Officer Fallon testified that he pepper sprayed plaintiff, who was yelling uncontrollably, in an effort to calm him down so that he could handcuff him. Additionally, plaintiff testified that Officer Prieto threatened him with a taser gun, while Officer Prieto testified that he did not threaten plaintiff with the taser, and was not even authorised to be in possession of such a weapon. Based upon the verdict rendered, it is clear that the jury found plaintiff's account of what transpired while he was in police

custody credible and determined that the testimony of the police officers lacked credibility. Notably, the jury found that Officer Fallon's use of pepper spray on plaintiff while handcuffed was not an exercise of reasonable discretion, but rather, was excessive force under the circumstances.

Thus, a valid line of reasoning exists based on the evidence at trial to support the jury's verdict finding that Officer Fallon committed a battery against plaintiff with excessive force and that Officer Prieto committed assault against plaintiff with excessive force (*see generally Acosta v City of New York*, 15 NY3d 881 [2010];*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

Moreover, the court does not find that the City is entitled to common law immunity for the discretionary decision of Officer Fallon to use pepper spray upon plaintiff.

While it is true that in some instances a municipal defendant such as the City is immune from liability for conduct involving the exercise of discretion and reasoned judgment (*see Mon v City of New York*, 78 NY2d 309 [1991]) the "professional judgment rule" does not apply where a police officer's actions are so unprofessional that they demonstrate a total failure to exercise reasonable discretion (*see Haddock v City of New York*, 75 NY2d 478, 485 [1990]). This immunity extends to the actions of police officers engaged in law enforcement activities, provided that the officers' actions are not undertaken in bad faith or without a reasonable basis (*see Arias v City of New York*, 22 AD3d 436 [2005]; *Lubecki v City of New York*, 304 AD2d 224, [2003]; *Rodriguez v City of New* York, 189 AD2d 166, 177-178

[1993]). Here, given that the jury determined that Officer Fallon's act of pepper spraying plaintiff while handcuffed was an excessive use of force, the professional judgment rule is inapplicable.

Defendants further argue that plaintiff failed to make out a prima facie case that Officer Fallon's actions were the proximate cause of plaintiff's injuries and thus, that the jury's verdict in that regard is not supported by the weight of the evidence. Specifically, defendants maintain that the damage award relating to plaintiff's thumb and psychological injuries in the amount of $350,00 for past pain and suffering and $150,000 for future pain and suffering is unreasonable compensation inasmuch as no credible proof was adduced at trial related to these injuries. They note that while Dr. Lubliner, plaintiff's expert orthopedist who examined him two years after the incident, diagnosed plaintiff with a partially disabled right hand, there is no evidence that this was related to the incident at the jail. In this regard, defendants note that plaintiff refused to stay at the hospital for medical attention on the day of the incident, and never had any surgery on his thumb or hand. Further, they point out that plaintiff was only treated with a doctor two times and went to physical therapy for only about six months. Defendants conclude that the evidence failed to establish that it was the actions of the officers that proximately caused plaintiff's injuries.

As to plaintiff's psychological injuries, defendants point to the testimony of Dr. Goldstein, a psychiatrist who examined plaintiff one year after his arrest, and diagnosed him with post traumatic stress disorder as a result of this incident. Defendants argue that Dr.

Goldstein only examined plaintiff on this one occasion and that plaintiff has not received further psychiatric treatment for this alleged disorder.

Defendants further argue that compensatory damages are designed to reflect actual losses proven at trial, not speculative damages grounded in conjecture and that the $350,00 awarded for past pain and suffering and $150,000 for future pain and suffering is speculative and excessive

As a general matter, "in reviewing the record to ascertain whether the verdict was a fair reflection of the evidence, great deference is accorded to the fact-finding function of the jury, as it is in the foremost position to assess witness credibility" (*Teneriello v Travelers Companies*, 264 AD2d 772, 772-3 [1999]; see *Kaplan v Miranda*, 37 AD3d 762 [2007]; *Kihl v Pfeffer*, 47 AD3d 154 [2007]; *Taino v City of Yonkers*, 43 AD3d 401 [2007]; *Evers v Carroll*, 17 AD3d 629 [ 2005]). "Indeed, the court must cautiously balance the great deference to be accorded to the jury's conclusion... against the court's own obligation to assure that the verdict is fair (citations omitted), and the court may not employ its discretion simply because it disagrees with a verdict, as this would unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty (citations omitted)"( *McDermott v Coffee Beanery*, Ltd., 9 AD3d 195 [2004]; see *Mitchell v Yueh S. Wu*, 38 AD3d 507 [2007]). "'[T]he 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 benefits of a favorable jury verdict' (*Nicastro v Park*, 113 AD2d 129, 133 [1985]).

"For a court to conclude that a jury verdict is unsupported 'by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' (citation omitted)" *Kaplan v Miranda*, 37 AD3d 762 [2007]; see *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, [2007]; *Soto v New York City Transit Authority*, 6 NY3d 487 [2006]; *Abenante v Star Gas Corp.*, 13 AD3d 405 [2004]). "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'"( Soto v New York City Transit Authority, 6 NY3d 487, 492 [2006]).

Based upon the foregoing principles of law, the court finds that defendants' claim that the jury's finding of proximate cause for plaintiff's injuries was not supported by the credible evidence lacks merit. It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor (*see Tornello v Gemini Enterprises, Inc.*, 299 AD2d 477 [ 2002)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had an opportunity to see and hear the witnesses]; *Cirami v Taromina*, 243 AD2d 437 [1997]; *Darmetta v Ginsburg*, 256 AD2d 498 [1998]). Here, the jury, well within its province, credited the testimony of plaintiff and his medical experts, Drs. Lubliner and

Goldstein that plaintiff's thumb injury and post traumatic stress disorder resulted from Officer Fallon's actions..

Turning to defendants argument that the amount of damages awarded by the jury was excessive, the court notes that where, as here, the jury's determination of damages is at issue, it is well settled that the amount of damages is principally a question of fact to be resolved by the jury (*see Coker v Bakkal Foods, Inc.*, 52 AD3d 765 [2008]; *Crockett v Long Beach Medical Center*,15 AD3d 606 [2005]; *Day v Hospital for Joint Diseases Orthopaedic*, 11 AD3d 505 [2004]; *Stylianou v Calabrese*, 297 AD2d 798 [2002]). The jury's determination of damages, nevertheless, may be set aside where the record indicates that an award deviates so materially from what would be reasonable compensation, that the verdict could not have been reached on any fair interpretation of the evidence (*see Giugliano v Giammarino*, 37 AD3d 533 [2007]; *Fryer v Maimonides Medical Center*, 31 AD3d 604 [2006]; *Zukowski v Gokhberg*, 31 AD3d 633 [2006]; *Stylianou v Calabrese*, 297 AD2d 798 [2002]; *Britvan v Plaza At Latham LLC*, 266 AD2d 799 [1999]). Therefore, unless the evidence militates against upholding the amount of damages awarded, "considerable deference should be accorded to the interpretation of the evidence by the jury" (*Duncan v Hillebrandt*, 239 AD2d 811, 814 [1997]; *see Nash v Sue Har Equities*, LLC, 45 AD3d 545, 545 [2007]).

The cases cited by defendants in support of their contention that the damages awards are excessive fail to demonstrate that the amount of damages awarded for plaintiff's injuries deviates materially from what could be considered reasonable compensation. Initially, the

court notes that the cases cited by defendants were all decided at least ten years ago and the amounts awarded for injuries similar to those sustained by plaintiff herein are actually comparable to the damage award in this case when the passage of time is taken into account. Accordingly, the court declines to set aside the verdict and order a new trial on the issue of damages.

Turning to the issue of punitive damages, at the outset the court notes that plaintiff concedes that the punitive damages award of $500,000 against Officer Prieto cannot stand as it was inconsistent with the jury's finding that Officer's Prieto's assault was not a substantial factor in causing plaintiff's injury. Accordingly, that award is vacated.

Punitive damages may be awarded where a defendant's conduct is "grossly negligent, or wanton or so reckless as to amount to a conscious disregard of the rights of others" (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 201 [1990]; *see Trudeau v Cooke*, 2 AD3d 1133, 1134 [2003]; *Rinaldo v Mashayekhi*, 185 AD2d 435, 436 [1992]). "The purpose of punitive damages goes beyond simply punishing the perpetrator for the morally culpable act committed (*see Home Ins. Co.*, 75 NY2d at 203), but is also intended to deter repetition of such acts" (*Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043 [2007]);*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). Here, the jury awarded punitive damages after determining that Officer Fallon's actions in pepper spraying a handcuffed individual were so egregious that it warranted the imposition of a significant

sanction in order to deter such actions by police officers in the future. The court finds the award to be consistent with the evidence presented at trial and rationally based.

Based upon the foregoing, defendants' motion is denied in its entirety except to the extent that the $500,000 punitive damage award as against Officer Prieto is vacated.

The foregoing constitutes the decision and order of the court.

ENTER,

DEC 2 2 2011 J. S. C.

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HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT