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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

MICHAEL C. DIGENNARO,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY (MTA) and "JOHN DOE",

Defendants.

Index No.: 112249/07

Motion Date: 09/28/10

Motion Seq. No.: 02

The following papers, numbered 1 to 3 were read on this motion to set aside a jury verdict rendered on October 30, 2009.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2
Replying Affidavits - Exhibits	No(s).	3

Cross-Motion: ☐ Yes ☒ No

The court shall grant the plaintiff's motion for an order setting aside the jury verdict since the finding that the defendant was negligent and that defendant's negligence was not a substantial factor in bringing about plaintiff's injuries was internally inconsistent and contrary to the evidence and a new trial is warranted pursuant to CPLR 4404(a).

Plaintiff Michael C. DiGennaro ("DiGennaro"), a 60 year old, had worked as a concierge for a high rise building on Manhattan's west side for seventeen years, where he commuted daily by express

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

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

bus from his home in Staten Island. On March 13, 2007, he finished work, went to the bus stop where he and other passengers boarded the express bus owned and operated by defendant New York City Transit Authority ("TA").

At the trial, he testified that on that day while in the aisle and holding the overhead handrails, he headed toward the rear of the bus to take a seat. As the bus pulled out of the bus stop it suddenly and unusually jerked. A fellow passenger, who was seated on the bus when he observed plaintiff boarding, testified that the stop was "unusual" and "very violent . . . very sharp;" "to the degree that I was sliding out of the seat and had to put my hands in front of me to the other seat." As plaintiff tried to grab the handles on top of the seats, he fell and struck the left side of his head on the handle or arm rail of one of the aisle seats, and then struck the right side of his head on the floor of the bus.

Plaintiff did not return to work after that day. His treating neurologist/psychologist testified that in the fall plaintiff suffered a subarachnoid hematoma resulting in an epileptic seizure disorder condition that renders him permanently disabled and unable to return to work. Defendant's examining physician also testified that DiGennaro was totally disabled as a result of his neurological injuries.

The bus driver testified that he recalled no incident involving the plaintiff or any unusual event on the day in question. There was no evidence of the traffic conditions on the date or time in question. Nor did anyone complain or report the incident to the driver or the TA. Finally, the deposition testimony of the commuter eyewitness and plaintiff, read by defense counsel to the jurors, raised an issue whether plaintiff was holding onto the overhead handrail before the bus made the sudden stop.

The court instructed the jury as to proximate cause and duty of care of the TA, a common carrier as follows:

> An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about an injury. That is, if it had such an affect in producing the injury that reasonable people would regard it as a cause of the injury. There may be more than one cause of an injury but to be substantial it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.
>
> The bus company is a common carrier. A common carrier such as a bus company owes a duty to use reasonable care for the safety of its passengers. However, because stopping, slowing, or starting may not always be done smoothly, and occasionally there may be some jolting, a carrier is not liable to a passenger when that happens. A passenger must also use reasonable care for his or her own protection. But in the absence of any emergency, the carrier must avoid sudden, unusual and violent stops, lurches or jerks.
>
> If you find that the movement or stop of the bus was unnecessarily sudden, unusual or violent, or if necessary it resulted from an emergency created or contributed to by the carrier's own conduct, then you will find that the carrier was negligent. If, however, you find that the stop or movement was not sudden, unusual or that such a

> stop or movement was made necessary because of an emergency and that such emergency was not created by or contributed to by the carrier, your finding will be that the carrier was not negligent.

On October 30, 2009, with one juror dissenting on each interrogatory, the jury determined that the TA was negligent, but that TA's negligence was not a substantial factor in bringing about plaintiff's injuries.

Plaintiff now moves for an order pursuant to CPLR § 4404(a) setting aside the jury verdict and granting a new trial arguing that the verdict is inconsistent and against the weight of the evidence.

The court shall grant plaintiff's motion.

"A jury verdict should not be set aside as inconsistent and against the weight of the evidence as long as there is at least one fair interpretation of the evidence to support it, the court's disagreement with the jury's findings or unhappiness with the harshness of the result being of no consequence." Gatson v Viclo Realty Co., 215 AD2d 174 (1st Dept 1995) (citation omitted). Moreover,

> A jury's finding that a party was at fault but that that fault was not a proximate cause of the accident is inconsistent and 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'.

Almestica v Colon, 12 AD3d 627, 628 (2d Dept 2004).

Here, the jury's finding that the TA bus driver was at fault in operating the bus but that such fault was not a substantial factor in bringing about plaintiff's injuries was inconsistent and against the weight of the evidence as the issues were inextricably intertwined to the point that the jury could not logically find the bus driver negligent without finding proximate cause. Analogous on its facts is the decision in Bucich v City of New York (111 AD2d 646 [1st Dept 1985]), which involved a passenger who tripped and fell on a threshold of a vessel's washroom and suffered injuries. The Appellate Division determined that the jury's finding that the defendant was negligent in allowing a defective condition to exist without correction or warning was irreconcilable with its finding that the condition was not the proximate cause of plaintiff's injuries. Likewise, in the matter of bar, the jury's finding that the driver moved or stopped the bus in an unnecessarily sudden, unusual and violent manner (see Grant v New York City Transit Authority, 61 AD3d 422 [1st Dept 2009]) was inextricably interwoven with the cause of plaintiff's fall. As in Bucich where there was testimony to the effect that plaintiff was not looking where he was going, the issue whether plaintiff failed to hold on to the handrails was pertinent to the issue of comparative negligence, and "does not equate with a lack of

proximate cause." Bucich, supra, at 648; Cubeta v York Intl Corp, 60 AD3d 612 (2d Dept 2009).

It is impossible to unravel the jury's deliberations with respect to its answers to the interrogatories in order to direct a verdict to either side, so this action must be set down for a new trial. Nathan v Helmsley-Spears, 50 NY2d 507, 518 (1980); Toner v Constable, 61 Misc2d 591 (App Term, 1st Dept 1969).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to set aside the jury verdict rendered on October 30, 2009 is GRANTED pursuant to CPLR § 4404(a); and it is further

ORDERED that the Clerk is directed to RESTORE this action to the calendar for a new trial.

This is the decision and order of the court.

Dated: July 28, 2011 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.