Lavyne v MTA/New York Tr. Auth.

2012 NY Slip Op 31509(U)

June 4, 2012

Sup Ct, NY County

Docket Number: 117182/08

Judge: Donna M. Mills

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SCANNED ON 6/7/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT: DONNA M. MILLS
Justice

PART 58

MURIEL LAVYNE,

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendant.

INDEX NO. 117182/08

MOTION DATE ______

MOTION SEQ. NO. 005

MOTION CAL NO. ______

The following papers, numbered 1 to ____ were read on this motion to ______

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: ______ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
JUN 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/4/12

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

MURIEL LAVYNE,

Plaintiff,

- against -

MTA/NEW YORK CITY TRANSIT AUTHORITY, MABSTOA and SATTAUR MOHAMED,

Defendants.

INDEX NO. 117182/08

DECISION/ORDER

DONNA MILLS, J.:

In this action, Plaintiff Muriel Lavyne, commenced this suit against the Defendants MTA/New York City Transit Authority, MABSTOA and Sattaur Mohamed ("NYCTA"). Plaintiff alleged that on June 29, 2008, she fell from the lift of a bus operated by NYCTA as she attempted to board the bus with a walker, due to the fact that the bus operator raised the lift before she had an opportunity to hold on to the handrails, and because the bus operator never instructed her to make use of the handrails on the lift.

The trial of this matter began with jury selection on January 12, 2012. On January 24, 2012, the jury returned a verdict in favor of plaintiff, and awarded a total of $350,000. The jury awarded $150,000 for past pain and suffering and $200,000 for future pain and suffering. Defendant now makes this motion pursuant to CPLR § 4404(a), to set aside the verdict or in the alternative, for a new trial in the interest of justice.

During the trial, defendant bus operator Sattaur Mohamed testified that he observed plaintiff board the lift with the walker, and that he observed her grab on to the handrails of the lift after boarding the lift. Mr. Mohamed further testified that as he operated the lift in an upward direction, he observed plaintiff become startled, let go of the handrail, lose her balance and fall backwards.

Following the accident, Mr. Gore, a supervisory employee of NYCTA arrived at the

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scene and conducted an investigation. An accident report was generated by Mr. Gore sometime after his investigation of the scene. The accident report contained a statement written by Mr. Gore after he had spoken to Mr. Mohamed. Defendant objected to introduction of the accident report in to evidence, on the grounds that Mr. Mohamed was not the author of the report, in essence arguing a lack of proper foundation. NYCTA thus argues that the admission into evidence of the accident report was prejudicial to defendant, and as such, it is entitled to have this Court set aside the verdict pursuant to CPLR §4404(a), and order a new trial in the interest of justice.

A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise (see Matter of De Lano, 34 A.D.2d 1031, 1032, 311 N.Y.S.2d 134, affd. 28 N.Y.2d 587, 319 N.Y.S.2d 844, 268 N.E.2d 642; see also Rodriguez v. City of New York, 67 A.D.3d 884, 885, 889 N.Y.S.2d 220; Gomez v. Park Donuts, 249 A.D.2d 266, 267, 671 N.Y.S.2d 103). The trial court must decide whether substantial justice has been done, and must look to common sense, experience, and sense of fairness in arriving at a decision (see Micallef v. Miehle Co., Div. of Miehle–Goss Dexter, 39 N.Y.2d 376, 381, 384 N.Y.S.2d 115, 348 N.E.2d 571; Bush v. International Bus. Machs. Corp., 231 A.D.2d 465, 647 N.Y.S.2d 468).

Section 4518 of the Civil Practice Law and Rules permits the introduction of a business record as an exception to the hearsay rule. Pursuant to section 4518 (a):

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction,

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occurrence or event, or within a reasonable time thereafter ...."

The purpose of this rule is to permit a writing or record, made in the regular course of business, to be received in evidence without the necessity of calling as witnesses all of the persons who had any part in making it. (Johnson v Lutz, 253 NY 124 [1939].) Police accident reports have been held to fall within the purview of a "business record" under section 4518 (a) of the Civil Practice Law and Rules. (Silfverchiold v Hut Cab Corp., 251 AD2d 121 [1st Dept 1998].) However, certain requirements must be met before such records may be admitted into evidence.

In order for the record to be admissible as proof of the facts recorded therein, it must be demonstrated that: (1) the entrant of those facts was the witness, or (2) the person giving the entrant the information was under a business duty to relate the facts to the entrant. (Wright v McCoy, 41 AD2d 873 [3d Dept 1973].) If neither of these two requirements is satisfied, the record may not be admitted as a business record. (Toll v State of New York, 32 AD2d 47 [3d Dept 1969]).

In the instant case, the entrant of the facts was a NYCTA supervisor who was unable to testify, and who did not witness the event, however, the person who gave the supervisor the information was the defendant bus driver, who is under a "business duty" to relate the facts surrounding the accident to the supervisor. Therefore, the accident report, as offered, could be introduced into evidence as a business record under section 4518 (a) of the Civil Practice Law and Rules.

Even if this Court were to find that the accident report was mistakenly admitted into evidence, I would then have to find that substantial justice was not done before ordering a new trial. As mentioned previously, this may occur when "the trial court erred in ruling on admissibility of the evidence, there is newly discovered evidence, or there has been misconduct on the part of attorneys or jurors" (Matter of De Lano, at 1032). In the present

case none of these factors existed.

Accordingly it is

ORDERED that defendant's motion to set aside the verdict and order a new trial is denied.

Dated: 6/4/12

ENTER:

J.S.C.

DONNA M. MILLS. J.S.C.