SHORT FORM ORDER

INDEX No. 01-18557

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

Motion Dates: 04/18/13
Submit Date: 06/14/13
Mot. Seq 012: MD

PARVIZ NOGHREY,	:	GLEICH, SIEGEL & FARKAS
	:	Attys. For Plaintiff
Plaintiff,	:	36 So. Station Plaza
	:	Great Neck, NY 11021
-against-	:	
	:	MEYER, SUOZZI, ENGLISH
THE TOWN OF BROOKHAVEN and THE	:	Attys. For Defendants
PLANNING BOARD OF THE TOWN OF	:	PO Box 9194
BROOKHAVEN,	:	Garden City, NY 11530
	:	
Defendants.	:	

Upon the following papers numbered 1 to 7 read on this motion by the plaintiff for an order for various branches of summary judgmentpost Appellate Division decision ; Notices of motion and Supporting papers 1-3 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 4-5 ; Replying Affidavits and supporting papers 6-7 ; Other _____; and after hearing counsel in support of and in opposition to the motion in chambers on May 14, 2013, it is

ORDERED that the motion (#012) by the plaintiffs for an order pursuant to CPLR 3212 seeking various forms of summary judgment relief based upon the February 21, 2012 Order of the Appellate Division, Second Department (*see* 92 AD3d 851, 938 NYS2d 613 [2d Dept 2012]), is considered under CPLR 3212 and is denied; and it is further

ORDERED that all parties shall report to the Trial Assignment Part on **September 16, 2013** at 9:30 am at the courthouse located at 1 Court Street, Riverhead, New York in order to set a new trial date.

The instant motion arises out of the February 21, 2012 Order of the Appellate Division, Second Department (*see* 92 AD3d 851, 938 NYS2d 613 [2d Dept 2012], *lv dismissed and denied*

19 NY3d 1023, 951 NYS2d 718 [2012], *rearg denied* 20 NY3d 1022, 960 NYS2d 58 [2013]), which considered, in part, this Court's February 10, 2010 short form order that denied defendants motion for an order nullifying and vacating the jury verdict in this matter rendered on December 2, 2009 and granting defendants judgment as a matter of law pursuant to CPLR 4404. As set forth in this Court's order of February 10, 2010, while the defendants failed to set forth alternative relief in their notice of motion, in his supporting affidavit, defendants' counsel enlarged his demands for relief so as to include a claim that the jury verdict was against the weight of the evidence. This Court entertained the application and denied the relief requested. The underlying jury verdict was the result of a re-trial of the plaintiff's partial regulatory taking claims which was directed by the decision of the Appellate Division, Second Department on February 13, 2008 (*see* ***Noghrey v Town of Brookhaven***, 48 AD3d 529, 852 NYS2d 220 [2d Dept 2008]). Familiarity with all of the above mentioned decisions is presumed.

The 1989 rezoning of the plaintiff's two separate parcels of real property (referred to as the Diamond Plaza parcel and the Liberty Plaza parcel) from J-2 Business to B-1 Residence is at the center of the plaintiff's regulatory taking claims. The remaining claims to be determined by the jury were limited to whether the defendants' actions effected a partial regulatory taking of the plaintiff's properties "under federal law pursuant to the balancing of factors test articulated in ***Penn Cent. Transp. Co. v City of New York***, 438 U.S, 104, 98 S.Ct. 2646, 57 L.Ed.2d 631" (***Noghrey v Town of Brookhaven***, 48 AD3d at 531, *supra*). The jury returned a verdict in favor of the plaintiff, finding, with respect to each of his two parcels that, upon consideration of the economic impact of the rezoning and/or interference with plaintiff's distinct and reasonable investment backed expectations and/or the character of the government action that the rezoning constituted a regulatory taking. The jury also found, with respect to both parcels, that the rezoning was a substantial factor in causing the regulatory taking. The jury went to award damages with respect to the Diamond Plaza parcel in the amount of $842,000.00 and with respect to the Liberty Plaza parcel, damages in the amount of $360,000.00. As noted above, this Court denied defendants' application to nullify and vacate the jury verdict.

The February 21, 2012 determination from the Appellate Division held, in part (*see* 92 AD3d at 853), as follows:

> Contrary to the defendants' contention, the finding that the rezoning effectuated a partial regulatory taking of the two properties under federal law was supported by legally sufficient evidence (citations omitted).

That holding ended the inquiry with regard to the CPLR 4404(a) application as to whether the jury verdict, as a matter of law, was supported by sufficient evidence. Therefore, defendants' claim that the jury verdict was not supported by sufficient evidence as a matter of law was rejected,

since, to support such a claim, there must be "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (***Cohen v Hallmark Cards***, 45 NY2d 493, 499, 410 NYS2d 282 [1978]). The Appellate Division turned to the alternative claim that the jury verdict was against the weight of the evidence and found that with regard to the Diamond Plaza parcel, there was a fair interpretation of the evidence supporting the verdict (*see* 92 AD3d at 853).

However, the February 21, 2012 determination found the jury verdict with respect to the Liberty Plaza parcel "was inconsistent and contrary to the weight of the evidence" (*see* 92 AD3d at 853). The Court reasoned that since the jury was instructed that damages were to be assessed by determining the value of the properties immediately before and immediately after the rezoning, and that the lowest value offered by an expert to be ascribed to the Liberty Plaza parcel prior to the rezoning was $776,500, "there was no fair interpretation of the evidence by which the jury could have found both that the rezoning effectuated a regulatory taking of Liberty Plaza and that the plaintiff's damages as to that property were only $360,000" (*see* 92 AD3d at 853).

As set forth in the Ordered paragraph of the February 21, 2012 determination, this Court's February 11, 2010 Order was modified as follows (*see* 92 AD3d at 852):

> ...so much of the ninth and twelfth causes of action of the amended complaint as alleged a partial regulatory taking of the property known as Liberty Plaza without just compensation pursuant to 42 USC § 1983 are severed, and the matter is remitted to the Supreme Court, Suffolk County, for a new trial on those portions of the ninth and twelfth causes of action ...

The instant motion by plaintiff seeks to avoid a new trial and offers various scenarios under the guise of a summary judgment motion to either completely avoid the third trial of this action or at least the liability portion thereof. Plaintiff argues that summary judgment is possible since there is "new information" and this Court should be bound by the "law of the case" doctrine. The "new information" is, of course, the Appellate Division determination that "the finding that the rezoning effectuated a partial regulatory taking of the two properties under federal law was supported by legally sufficient evidence" (*see* 92 AD3d at 853). Plaintiff's contention is that such a finding affords the opportunity, upon review of the entire Record, for a summary judgment determination, at the very least, as to the liability issues. Moreover the granting of the application would avoid the re-reading of testimony presented the first two times and avoid bringing back witnesses for the third time to repeat exhaustively detailed direct and cross examinations.

Putting aside the untimely nature of the application (*see* CPLR 3212[a] ["...such motion shall be made no later that one hundred twenty days after the filing of the note of issue, except with leave

of court on good cause shown"]; *see also* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]), and even if plaintiff presented sufficient good cause, the application must still be denied.

Here, plaintiff attributes the Appellate Division's remanding of the Liberty Plaza claim to the fact that the jury's determination of the amount of damages did not comport with the jury's finding of liability and that the damage award was insufficient in light of the finding that the rezoning effectuated a regulatory taking of Liberty Plaza (*see* Farkas affirmation, pars. 36-37). While such may seem a logical reading of the Second Department's decision, it ignores the important differences between the two distinct inquiries as to whether a verdict is against the weight of the evidence or whether a verdict, as a matter of law, is supported by sufficient evidence. One must read then Justice Leon Lazer's holding in ***Nicastro v Park***, 113 AD2d 129, 495 NYS2d 184 (2d Dept 1985) to clearly understand the distinction between the two standards and "'[although] these two inquires may appear somewhat related, they actually involve very different standards and may well lead to disparate results'"(***Nicastro v Park***, 113 AD2d at 132, *quoting* ***Cohen v Hallmark Cards***, *supra*, at 498). As noted by Justice Lazer, under the "against the weight of the evidence" standard, "... the challenge is directed squarely at the accuracy of the jury's fact finding and must be viewed in that light" (*id* at 133-134).

In comparing the two standards in the context of a plaintiff's verdict, "... there is a real difference between a finding that no rational jury could reach a particular resolution and a finding that a jury could not have reached its conclusions on any fair interpretation of the evidence" (*id* at 133-134). It is the existence of a factual issue which justifies the granting of a new trial rather than a directed verdict.

Here, the Appellate Division, in its examination of the Record under the "against the weight of the evidence" standard, found that the damage award for Liberty Plaza "was inconsistent and contrary to the weight of the evidence." Confusion may arise if one were to simply focus on the many Second Department holdings, such as ***Acosta v City of New York***, 84 AD3d 706, 921 NYS2d 644 (2d Dept 2011), *remitted by* 15 NY3d 881, 912 NYS2d 563(2010), *revg* 72 AD3d 624, 898 NYS2d 601 (2d Dept 2010), that state the following:

> A jury verdict in favor of a plaintiff should not be set aside as contrary to the weight of the evidence unless the evidence so preponderated in favor of the defendant that the jury could not have reached the verdict by any fair interpretation of the evidence (citations omitted).

Unlike a case where the evidence preponderated in favor of the movants and their evidentiary position was particularly strong compared to that of the nonmovant (*see* ***Reilly v Ninia***, 81 AD3d 913, 917 NYS2d 652 [2d Dept 2011]), this appeal was decided on the basis of the perceived

inconsistency declared by the Second Department. While usually the holding that a jury verdict is inconsistent and against the weight of the evidence is reserved for cases where the issues of negligence and proximate cause are claimed to be inextricably interwoven (*see* ***Coma v City of New York***, 97 AD3d 715, 949 NYS2d 98 [2d Dept 2012]; ***Casella v City of New York***, 69 AD3d 549, 893 NYS2d 556 [2d Dept 2010]), here, when reviewed in the context of the court's charge, an argument can be made that the issues of liability and damages, in a ***Penn Central*** regulatory taking claim, if not intertwined, do overlap to a degree and a new trial on the issues of liability and damages is warranted (*see generally* ***Figliomeni v Board of City School Dist. of Syraccuse***, 38 NY2d 178, 379 NYS2d 45 [1975]).

Moreover, where the Appellate Division determines to remand to the trial court for a new trial on a "separable issue," such as liability (*see* ***Acosta v City of New York***, 84 AD3d 706, *supra*) or attorney's fees (*see* ***Schwartzberg v Kingsbridge Heights Care Ctr., Inc.***, 28 AD3d 466, 813 NYS2d 475 [2d Dept 2006]), the remand order clearly states so. In the instant remand order, no less than three times it is mentioned that there is to be a new trial with respect to the Liberty Plaza property ("for a new trial on those portions of the ninth and twelfth causes of actions..."). Finally, it has often been said that if the court determines that the verdict is contrary to the weight of the evidence, the proper disposition is to set aside the verdict and order a new trial (*see* Siegel, New York Practice § 406 [5th ed]; *see also* ***Harrison v Harrison***, 199 AD2d 1091, 607 NYS2d 204 [4th Dept 1993]; ***Nicastro v Park***, 113 AD2d at 133, *supra*; ***Gayle v Neyman***, 91 AD2d 75, 457 NYS2d499 [1st Dept 1983]).

The Court notes that while plaintiff now seeks, as an alternative, to limit the retrial to only the issue of damages ("pursuant to CPLR 3212[g]"), plaintiff's initial post-trial motion did not seek such limited relief. By notice of motion dated December 16, 2009, the plaintiff moved for an order pursuant to CPLR 4404 for "Judgment NOV, setting aside the verdict on damages and directing that judgment be entered in the amount of $3,572,000.00 or in an amount determined by the court." Alternatively, the plaintiff moved for an order "reinstating" the damages awarded by the jury in the first trial in the amount of $1,647,000.00. The Court cannot, at this juncture, grant a new trial on the issue of damages under the guise of a post-appeal summary judgment motion.

Finally, this Court cannot direct a bench trial, unless the terms of CPLR 4102(c) have been met. Defendants' appellate argument does not satisfy the statute.

Therefore, the motion is denied. This constitutes the decision and order of the court.

Dated 8/15/13

THOMAS F. WHELAN, J.S.C.