Kramer v MABSTOA
2013 NY Slip Op 33390(U)
December 20, 2013
Supreme Court, New York County
Docket Number: 104564/10
Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS *Justice* **PART 58**

ALAN S. KRAMER,

Plaintiff,

-v-

MABSTOA,

Defendant.

INDEX NO. 104564/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3
Replying Affidavits	4

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

PARTIES ARE DIRECTED TO APPEAR FOR A CONFERENCE IN PART 58 OF THIS COURT ON FEBRUARY 13, 2014 AT 11:00 A.M.

Dated: 12/20/13

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: IAS PART 58

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ALAN S. KRAMER,

Plaintiff,

-against-

MABSTOA,

Defendant.

----------X

Index No. 104564/10

MILLS, J.:

Plaintiff Alan S. Kramer (Kramer or plaintiff) was injured on June 23, 2009, when he fell upon exiting a bus operated by defendant MABSTOA. Kramer maintains that he was discharged from the bus onto a pothole in the street, in violation of MABSTOA rules, and, as a result, sustained serious and permanent injury. The case was tried before a jury from April 24, 2013 through April 30, 2013. The jury brought in a verdict in favor of defendant, although it found that defendant was negligent. Plaintiff now moves, pursuant to CPLR 4404 (a), for an order setting aside the jury verdict and setting this matter down for a trial on damages only, or, alternatively, setting aside the jury verdict and setting this matter down for a trial on liability. Among other arguments, plaintiff maintains that the jury deliberations were tainted by outside interference. Defendant opposes the motion both on substantive grounds, and because

defendant maintains that the motion is untimely.

FACTS

On the day of the accident, Kramer had returned home from work, and was planning to attend a free concert in Central Park. He boarded an M15 bus at Second Avenue and 86th Street, intending to take the bus to Second Avenue between 71st and 70th Street, and then walk up to the 72nd Street entrance to the park. Kramer tr at 62. When the bus reached the stop, Kramer exited through the rear door. *Id.* at 65. There was a large man in front of him, so he could not see anything other than the man. *Id.* at 67. When he stepped off the bus, his right foot entered a "crater of the hole" and he collapsed on the street. *Id.* at 69. He did not see the hole until he fell, because his vision was blocked by the person in front of him. *Id.* at 70. Kramer testified that his foot went into approximately the middle of the hole. Kramer identified a photograph as portraying the hole into which he fell. *Id.* at 77. He estimated that the distance from the rear door of the bus to the curb was approximately three to three and a half feet. *Id.* at 71. He landed at an angle to the curb, with his head more toward the back of the bus. He could not get up, and he crawled toward the curb. The man who exited the bus in front of him assisted him to get up. *Id.* at 73. Kramer was in severe pain. The bus driver did not come out of the bus. The driver hesitated and then pulled away. *Id.* at 75. Kramer saw

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the driver through the bus's side view mirror, and had the impression that the driver was male and either white or Hispanic. *Id.* at 74. A bystander called an ambulance, but the ambulance did not come, so Kramer took a cab to the hospital. The man who had gotten off the bus in front of him hailed the cab, and he and another man helped Kramer into the cab. The fellow passenger accompanied Kramer to the hospital, and saw that he was brought into the emergency room in a wheelchair. *Id.* at 76-77.

At the hospital, Kramer had his leg x-rayed, and the doctors gave him a list of surgeons to call. He was given crutches, and the doctors braced his leg so that it was immobilized. *Id.* at 83-84. The following day, he was able to get an appointment with a surgeon at the Hospital for Special Surgery. He underwent surgery to reattach the tendons to the four quadriceps muscles that night. He was in the hospital for two days, and when discharged had some prescriptions, and later began physical therapy. *Id.* at 84-85. At the time of trial, Kramer was still doing the exercises that he was taught in physical therapy, which takes him about an hour and a half. *Id.* at 148, 154. Although Kramer can walk, he can no longer do the type of running he did before the accident, nor can he walk as quickly as he used to. Further, he often has pain when he is walking. *Id.* at 152-153. While he is able to swim about the same distance as he was able to before the accident, he now is slower and has pain while

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swimming. *Id.* at 155. He can no longer run at a speed of seven or eight on the treadmill, and is usually limited to a speed of four. *Id.* at 156.

Because Kramer has a senior transit fare card, defendant traced the fare card that he was using on the date of the accident. This tracing did not occur until a couple of weeks prior to trial. Defendant contends that it was able to trace Kramer's usage of the card, but acknowledged that the bus route number was incorrect. The information that was obtained indicated that Kramer used bus route M106, rather than M15. MABSTOA maintains that this incorrect information was due to data corruption, but that the remaining information is correct. Leong tr at 196. As a result of tracing Kramer's usage of his card, and defendant's records, defendant concluded that Angelica Pattishaw (Pattishaw) was the driver of the bus. She had no specific recollection of the day in question, or of the condition at the bus stop on that day. Nor did she recall any incident of a passenger falling after exiting the bus. Her testimony conflicted in some respects with Kramer's. Specifically, Kramer thought that the driver was male, not female. Additionally, Kramer testified that the bus that he was on was a regular bus, not extended, while Pattishaw testified that she was driving an articulated bus, and that all the buses on the M15 route were articulated at the time of the accident. Pattishaw tr at 215.

Pattishaw acknowledged that there were potholes along Second Avenue between 70th and 71st Street, and that it would not be safe to discharge passengers through the rear doors in front of a pothole. If she could not place the bus so the rear door would clear the pothole, she would advise passengers to exit through the front of the bus and warn them of the obstruction. *Id.* at 225-226.

The jury found that MABSTOA was negligent, but that its negligence was not a substantial factor in causing plaintiff's injuries. Hence, the verdict was in favor of defendant.

DISCUSSION

Timeliness

Defendant contends that this motion should be denied as untimely. The motion was not made within 15 days of the verdict, as required by CPLR 4405. Defendant maintains that, although counsel received an email advising him that plaintiff was asking the court to extend the time for making the motion, he never was advised of the result, despite requesting such information.

Plaintiff responds that counsel received a telephone call from the judge's secretary saying that the judge granted the request for an extension of time.

Defendant does not deny that plaintiff sought an extension of time to make the motion. It merely states that it was unaware of the result of the request. Defendant does not suggest that it

contacted chambers to ascertain the status of the request, or that it was in any way prejudiced by the granting of the extension. Thus, since an extension was granted, there is no reason to deny the motion as untimely.

Outside Interference

Plaintiff seeks to set aside the verdict on the ground that the jury failed to effectively deliberate by reason of what he terms outside interference. The purported interference consisted of a member of the jury allegedly abusing his status as an attorney to mislead his co-jurors as to the applicable law. In support of his allegation of juror misconduct, plaintiff provides affidavits of two of the jurors who sat on the trial, who state that one of the jurors wrongfully advised his fellow jurors that any negligence on the part of plaintiff precluded any recovery by him in the action. That same juror led the deliberation discussions, and the other jurors deferred to him. The affidavits further state that all the jurors agreed that both plaintiff and defendant bore partial responsibility for the accident, but rather than follow the judge's instructions concerning apportionment, the jury did not proceed past its conclusion that plaintiff was partially responsible, due to the juror's undue influence.

Plaintiff acknowledges that there is a general rule in this state that jury verdicts should not be impeached by affidavit or

testimony of the jurors after the verdict is returned. *See People v Redd*, 164 AD2d 34, 38 (1st Dept 1990). However, plaintiff argues that where a patent injustice to a party is present, a verdict may be impeached. *See People v De Lucia*, 20 NY2d 275, 280 (1967).

Plaintiff's position is without merit. The essential difference between this case and those that plaintiff relies upon is that here there was no outside influence. Rather, the allegedly undue influence was that of a juror. This is not a situation where the jury looked to matters outside the court for information, e.g., looked in a dictionary to define an essential term (*Olshantesky v New York City Tr. Auth.*, 105 AD3d 600, 600-601 [1st Dept 2013]), engaged in an unauthorized visit to the crime scene (*People v Redd*, 164 AD2d at 39-40), or reenacted the crime at the crime scene (*People v De Lucia*, 20 NY2d at 279), any of which would mandate setting aside the jury verdict. Here, plaintiff is seeking to challenge the deliberative process itself, specifically how one juror may have influenced the other jurors. There is a long history in New York holding that such a challenge cannot be the basis for setting aside a verdict. *See discussion in Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD2d 570, 574-575 (2d Dept 1985); *see also People v Redd*, 164 AD2d at 37. The fact that one juror may have mistakenly understood the law, and convinced his fellow jurors of the correctness of his

understanding, does not constitute outside influence. It involves the deliberative process that occurs in the jury room, and is not subject to collateral attack. Therefore, this ground cannot form the basis for setting aside the jury verdict.

Verdict Against the Weight of the Credible Evidence

Plaintiff also seeks to set aside the verdict and direct a verdict in his favor, or to order a new trial, pursuant to CPLR 4404 (a), based upon the verdict being against the weight of the credible evidence.

If a verdict is not supported by sufficient evidence as a matter of law, the court should direct a verdict without resubmitting the case to a jury. However, in determining whether a verdict is against the weight of the evidence, the court engages in a discretionary and factual determination, for which the weight of the evidence necessary is less stringent. *Nicastro v Park*, 113 AD2d 129, 134-135 (2d Dept 1985). Nonetheless, a jury verdict should not be set aside, and a new trial ordered, unless the jury could not have reached the verdict on any fair interpretation of the evidence. *Id.*

Here, the jury found that defendant was negligent, yet found that the negligence was not a substantial factor in causing the injury. The negligence involved was, apparently, stopping the bus to discharge passengers in front of a pothole. No other negligence was alleged. Plaintiff fell into the pothole and

sustained injury. This is the precise danger that is meant to be averted by avoiding discharging passengers where there is a pothole. Consequently, it is difficult to reconcile the jury's finding of negligence with its determination that the negligence was not a substantial factor in the accident. This is especially true because there is no evidence that there was any interruption between defendant's negligent action and the accident, or that there was any intervening cause of plaintiff's injury. *Cf. DeAngelis v Kirschner,* 171 AD2d 593, 595 (1st Dept 1991); *Yalkut v City of New York,* 162 AD2d 185, 187-189 (1st Dept 1990). Under these circumstances, a new trial is warranted.

While plaintiff requests that the court grant him a directed verdict, such relief is unwarranted. The evidence presented does not establish that there is no reasonable view that plaintiff was contributorily negligent. Thus, it is appropriate for a jury to determine what percentage of fault, if any, should be attributed to plaintiff.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and the jury verdict in this action rendered in favor of defendant on April 30, 2013 is set aside; and it is further

ORDERED that a new trial will be held on the issues of both liability and damages; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry on the Trial Support Office and on the County Clerk.

Dated: 12/20/13

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.