Boyd v City of New York

2014 NY Slip Op 33876(U)

May 20, 2014

Supreme Court, Kings County

Docket Number: 7000/10

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 20th day of May, 2014

HONORABLE FRANCOIS A. RIVERA

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MILDRED BOYD,

Plaintiff,

DECISION & ORDER
Index No. 7000/10

- against -

THE CITY OF NEW YORK, NYCPD, DETECTIVE SELWIN FONROSE, DETECTIVE ROBERT SIMMS, DETECTIVE CAROL, DETECTIVE MARK CALLAO, SERGEANT ANGEL GOMEZ and "JOHN DOES" and "JANE DOES", SAID NAMES BEING FICTITIOUS AND PRESENTLY UNKNOWN,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on defendants' the City of New York, Detective Selwin Fonrose, Detective Robert Simms, Detective Mark Callao and Sergeant Angel Gomez (the hereinafter the moving defendants) motion filed on January 28, 2014, under motion sequence number five, for an order pursuant to CPLR 4404 (a): (1) setting aside the jury's verdict for plaintiff and entering judgment for defendants as a matter of law based on plaintiff's failure to make a prima facie showing that her alleged injuries were proximately caused by the municipal defendants; or (2) setting aside the verdict for plaintiff and ordering a new trial on all issues as the jury's liability verdict is contrary to the weight of the evidence; or (3) setting aside the verdict and ordering a new trial based on the prejudicial statements during summation and comment on matters not in evidence.[1]

- Notice of Motion

[1]The notice of motion is limited to the instant relief requested however the affirmation of counsel seeks the same relief based on additional reasons. Plaintiff's counsel opposed all of the additional reasons in the affirmation in opposition. Therefore, the Court will consider the additional arguments for the relief of setting aside the verdict or directing a verdict.

- Attorney Affirmation
- Exhibits A -H
- Affirmation in Opposition
- Exhibit N
- Reply Affirmation

BACKGROUND

On March 19, 2010, Mildred Boyd (hereinafter Boyd) commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office. On August 19, 2011, plaintiff filed a supplemental summons and complaint. By answer dated September 7, 2010, the defendants have joined issue.

This is an action to recover monetary damages for personal injuries suffered by the plaintiff as the result of injuries allegedly sustained due to the excessive force of the defendants while they were conducting a search of her residence pursuant to a search warrant on August 15, 2009, at approximately 6:00 a.m. On the date of the occurrence Boyd, who was 72 at the time of the occurrence was in her bed at her home located at 731 East 49th Street, Brooklyn, New York (the premises) when the defendants Detective Fonrose, Detective Simms, Detective Carol, Police Office Callao, and Sergent Angel Gomez entered her home to execute a no-knock search warrant. During the execution of the search warrant plaintiff allegedly sustained personal injuries.

The verified amended complaint contains one hundred and sixty eight allegations of fact in support of nine causes of action. The first cause of action is for violations of USC §§ 1983, 1985, 1986 and 1988. The second cause of action alleges false arrest. The

third cause of action is for intentional infliction of emotional distress. The fourth cause of action is for malicious prosecution. The fifth cause of action alleges illegal search and seizure. The sixth cause of action alleges excessive force. The seventh cause of action alleges abuse of process. The eighth and ninth causes of action allege vicarious liability and negligent hiring and supervision.

By order dated June 24, 2013, Justice Ash dismissed plaintiff's claims for illegal search and seizure, false arrest, malicious prosecution, intentional infliction of emotional distress, and the plaintiff's Federal Claims pursuant to USC § 1983. The remaining issue for trial was whether the officers who executed a valid no-knock warrant, used excessive and unreasonable force.

A jury trial commenced on September 23, 2013 and concluded on October 14, 2013. The jury returned a verdict in favor of the plaintiff finding that Sergeant Angel Gomez was liable for use of excessive force and awarded plaintiff a verdict of $766,920.80, comprised of $500,000.00 in past pain and suffering, $250,00.00 in future pain and suffering and for $16,920.80 in medical expenses.

LAW AND APPLICATION

Rule 4404 provides for post-trial motions and specifically states:

> (a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon 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 or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

To set aside the verdict as against the weight of the evidence, the court must determine "whether the jury could have reached their conclusion upon any fair interpretation of the evidence" (*Kennedy v New York City Health & Hosps.*, 300 AD2d 146, 147 [1st Dept 2002], *quoting Bernstein v Red Apple Supermarkets*, 89 NY2d 961 [1997]; *Jamal v New York City Health & Hosps*., 280 AD2d 421, 422 [1st Dept 2001], *accord Roseingrave v Massapequa Gen. Hosp.*, 298 AD2d 377 [2nd Dept 2002]). Courts have been repeatedly cautioned to sparingly exercise their discretion to set aside a jury verdict in order to avoid usurping the jury's role and depriving a successful litigant of an otherwise favorable verdict. The Appellate Division, Second Department, reiterated in *Kiley v Almar*, 1 AD3d 570 [2nd Dept 2003] that: It is well settled that 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" (*Nicastro v Park*, 113 AD2d 129, 132 [2nd Dept 1985] *quoting Cohen v Hallmark Cards*, 45 NY2d 493, 499[1978]). Moreover, a jury verdict will not be set aside as against the weight of the evidence unless it could not have been reached on any fair interpretation of the evidence (*see Nicastro v Park*, supra at 134).

It is for the trier of fact to make determinations as to the credibility of the witnesses, and great deference is accorded to the fact-finders, who had the opportunity to see and hear the witnesses" (*Saber v 69th Tenants Corp.* 107 AD3d 873 [2nd Dept 2013] *citing Fekry v New York City Tr. Auth.*, 75 AD3d 616, 617 [2nd Dept 2010]). Moreover, a trial court has the discretionary power to set aside a verdict and grant a new trial (*Kaplan v Miranda*, 37 AD3d 762, 830 NYS2d 755 [2nd Dept 2007]). A Judge's background and professional acumen determines when granting a motion for a new trial is the correct choice (*Pire v Otero*, 123 AD2d 611, 506 NYS2d 772 [2nd Dept 1986]). A Judge may not set aside a verdict, merely because he disagrees with it (*Nicastro v Park*, 113 AD2d 129, 133; 495 NYS2d 184 [2nd Dept 1985]). To do so, would be to usurp the fact-finding role of the jury (*Id.*). The Court should not set aside the verdict unless it could not be reached upon any fair interpretation of the evidence, with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom (*Wertzberger v City of New York*, 254 AD2d 352, 680 NYS2d 260 [2nd Dept 1998]). A court must review the evidence in the light most favorable to the prevailing party in determining whether the jury's verdict was against the weight of the credible evidence (*Zieker v Town of Prchard Park*, 75 NY2d 761 [1989]).

The motion for a judgment notwithstanding the verdict is a higher standard than granting a motion for a new trial. A court must find that the jury decision is unsupported by sufficient evidence, thus requiring judgment for the adversary (*Soto v New York City*

Transit Authority, 6 NY3d 487, 492 [2006]). A court is charged with deciding whether there is any 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 (*Id.*). If the verdict is not irrational, the court may not conclude that the verdict as a matter of law is not supported by the evidence (*Id.*).

Plaintiff's Testimony

The underlying facts of the incident according to Boyd was that on the day of the occurrence she was 72 years old and sleeping in her home, in a tee-shirt and underwear, when she was woken up by very loud banging. She jumped out of bed and went to investigate the noise. At that point she was confronted by eight to ten plainclothes men dressed in dark clothing and wearing bullet proof vests. All of them were pointing guns at the plaintiff, had flashlights and were yelling at her to "get down." She was grabbed by one of the officers by her arm and put on the floor. She was then handcuffed with her hands behind her back. Plaintiff repeatedly asked "what was going on" and "what's wrong." Boyd was kept handcuffed and detained in her home for approximately three hours while the police searched the home. Boyd's daughter was alerted that an incident was occurring at her mother's house by the burglar alarm. She arrived at the premises but she was not permitted to speak with her mother nor was Boyd notified that her daughter was there or permitted to speak with her. Boyd was not permitted to use the restroom by herself and instead a female police officer accompanied her and remained in the bathroom

standing over her while she used the restroom. The police also utilized drug sniffing dogs to search the entire house and brought the dogs passed Boyd who testified that she is terrified of dogs.

After the police left the plaintiff's home she was not feeling well and her heart was racing. Plaintiff decided to go to Beth Israel Hospital where she was admitted and kept for observation for three days. After she was released she went to her private physician who refereed her to have a cardiac test and also sent her to see a psychiatrist. After the incident the plaintiff continued to have crying episodes, was depressed, and fearful. Boyd took prescriptions for her anxiety and continues to suffer currently from many of the symptoms.

As to the plaintiff's injuries, the plaintiff testified as to her lasting subjective complaints of stress, sleeplessness, depression and fear. Dr. Romanelli testified that Boyd suffered both physical injuries as well as psychiatric injuries. Specifically, chest pain, elevated blood pressure, anxiety and depression, and exhibited signs of post traumatic stress disorder (PTSD). She was referred to a cardiologist by Dr. Romanelli and she was given a blood thinner and aspirin. Dr. Romanelli gave her the anti-depressant Lexapro, as well as, Xanax for anxiety. He further testified that prior to the incident Boyd suffered only from hypertension and arthritis, however, this occurrence triggered her anxiety and depression. He further testified that after the incident she suffered from chest pain, diabetes, elevated blood pressure, depression, anxiety and

exhibited signs of PTSD.

Additional Trial Evidence

At the trial the city defendants offered evidence as to the circumstances leading up to the search. Prior to the date of the incident, officers from the 67th Precinct conducted a pre-warrant investigation of the premises through four controlled buys by an informant during June, July and August of 2009. The officers learned through the use of that confidential informant that drugs were being sold from the location. Justice Mandelbaum issued a "no-knock" search warrant for the premises based on the information from the confidential informant. An individual named "JD Butch" was noted in the search warrant. The tactical plan to effectuate the search warrant included a notation that an elderly person was possibly inside the premises.

Defendants motion to set aside the verdict, for a new trial and for a directed verdict

The defendant essentially asserts three arguments in support of the relief requested, first that the plaintiff has not proven sufficient injury, second that defendants' actions were not the proximate cause of plaintiff's injuries, third that the individual officers are entitled to government function immunity and to qualified immunity.

The issue of qualified immunity is a threshold issue because if the defendants were entitled to the defense then the remaining issues are academic. It is well established that a "warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is

conducted" (*Michigan v Summers*, 452 US 692, 705 [1981]). "[A]uthorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention" (*Muehler v Mena*, 544 US 93, 98-99 [2005]; *see Graham v Connor*, 490 US 386, 396 [1989]). Therefore, an officer executing a search warrant is privileged to use reasonable force to effectuate the detention of the occupants of the place to be searched (*see Graham v Connor*, 490 US at 394-395; *cf. Moore v City of New York*, 68 AD3d 946, 947 [2009]; *Eckardt v City of White Plains*, 87 AD3d 1049 at 1052 [2nd Dept]). The reasonableness of the use of force by police should be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" *(Graham v Connor*, 490 US at 396; *see Rivera v City of New York*, 40 AD3d 334, 341 [2007]). The determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest (*Vizzari v Hernandez*, 1 AD3d 431, 432 [2nd Dept 2003], *quoting Graham*, 490 U.S. at 396). In the instant matter, the defendants were privileged to enter the apartment due to the search warrant, however, that privilege does not immunize the defendants for their conduct while in the apartment.

As the standard for an officer who is privileged to enter and search an area by a search warrant is "reasonable force" this Court cannot, as a matter of law find that putting a 72 year old woman on the ground, handcuffing her when she was obviously not armed

and detaining her for approximately three hours incommunicado, prohibiting her from going to the bathroom by herself and permitting large drug-sniffing dogs to walk past her several times was reasonable.

The defendants also argue that plaintiff failed to establish her prima facie burden of sufficient injury and proximate causation. A plaintiff seeking damages must prove some injury, even if insignificant, to prevail in an excessive force claim *(Knight v Caldwell*, 970 F2d 1430, 1432 (5th Cir.1992), *cert. denied*, 507 US 926, 113 S.Ct. 1298, 122 L.Ed.2d 688 (1993); *Roundtree v City of New York*, 778 F.Supp. 614, 620–623). Emotional pain and suffering are insufficient injuries to recover under a theory of excessive force (*see Id.*). However, there is no threshold of injury required to be plead (*see Id.*).

In the instant matter the plaintiff alleged a slew of physical injuries in the bill of particulars and presented evidence at trial of plaintiff's hospital admission and attendant medical treatment of injuries proximately caused by the defendants. In reviewing the trial testimony the Court must give every favorable inference to the prevailing party (*see Zieker*, 75 NY2d 761 [1989]). The record reflects that Boyd testified about significant psychological symptoms, as well as, physical internal injuries, such as, accelerated heart rate and stomach pains. Boyd also testified that she was admitted to the hospital for three days and continues to have anxiety and other symptoms of PTSD. Dr. Romanelli testified to plaintiff's injuries that were proximately caused by the trauma of the

occurrence and her medical treatment that was necessary. Accordingly, viewed in the light most favorable to plaintiff, the jury could have reached their conclusion upon a fair interpretation of the evidence. Furthermore, as the verdict was supported by a fair interpretation of the evidence and the evidence did not so preponderate in favor of the defendants, it necessarily cannot be found as unsupported by the evidence (*see* Soto, 6 NY3d 487 [2006]).

Defendants motion to set aside the jury verdict as excessive

With respect to damages, if a jury award deviates materially from what would be reasonable compensation (see CPLR 5501 [c]), a trial court may order a new trial limited to the damages only (CPLR 4404 [a]; *see Inya v Hyundai, Inc.*, 209 AD2d 1015 [4th Dept]). The trial court uses the same material deviation standard as an Appellate Court in reviewing damage verdicts. It is not necessary for a moving party to prove to the court that the damage award shocks the conscience, either in terms of adequacy or inadequacy. The current standard of material deviation from reasonableness provides courts with more flexibility in the analysis of damage verdicts. In regards to personal injury awards, especially those for pain and suffering, since they are not subject to precise quantification, courts look to comparable cases to determine at what point an award deviates materially from what is considered reasonable compensation (*Po Yee So v Wing Tat Realty, Inc.*, 259 AD2d 373 [1st Dept 1999]). Although courts have reviewed awards in other cases involving similar injuries, any given award depends on a unique set of facts and

circumstances (*see Miller v Weisel*, 15 AD3d 458 [2nd Dept 2005]).

The defendants have submitted six cases in support of the instant motion. None of the six cases discusses damages based on excessive force. Instead the causes of action are battery, false imprisonment and malicious prosecution. Adiditonally, the damages alleged in the cases are not the same or similar to the plaintiff's claimed injuries. Accordingly, the defendants have failed to establish that the jury award was excessive and that portion of the motion is denied.

Defendants' motion to set aside the verdict based on prejudicial statements

Defendant also seeks to set aside the verdict based on prejudicial comments by plaintiff's counsel based on certain statements in summation. Defendants argue that the plaintiff's recitation of the "first, they came for the Jews" and stating that the plaintiff was diagnosed with post-traumatic stress disorder were materially prejudicial and is a basis for setting aside the jury verdict and ordering a new trial. "When misconduct of counsel in summation so violates the rights of the other party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned" (*Steidel v County of Nassau*, 182 AD2d 809 [2nd Dept 1992][internal citations omitted]).

Contrary to the plaintiff's contention defense counsel's summation comments were not so inflammatory or prejudicial as to deprive the plaintiff of a fair trial (*Jun Suk Seo v Walsh*, 82 AD3d 710 [2nd Dept 2011]; (*cf. McArdle v Hurley*, 51 AD3d 741 [2nd Dept

2008]; *Vassura v Taylor*, 117 AD2d 798 [2nd Dept 1986]). Defendants basically argue that the statement was the beginning of a poem and is an *ad hominem* attack as it was meant to compare the defendants to Nazis. Defense counsel objected immediately to the statement and the Court sustained the objection. In order to warrant a mistrial, an *ad hominem* attack must be extreme and pervasive (*Selzer v New York City Transit Authority*, 100 AD3d 157, 164 [1st Dept 2012]). The Court notes that as the plaintiff only recited six words of a statement and it is pure speculation as to whether the plaintiff was going to recite the entire poem referenced by the defendant. Furthermore, as the six words do not include any *ad hominem* attacks and an objection was made and sustained immediately any possible inference is insufficient to warrant a new trial. ***(Judge: defense counsel asked for a mistrial a few pages later and you did not make any statements to the jury regarding the sentence but did sustain the objection)***

Defendants also assert that plaintiff's counsel alluded to matters not in evidence, specifically that plaintiff was diagnosed with PTSD. While reference to matters not within evidence is never justified, in the instant matter Dr. Romanelli had testified that the plaintiff exhibited signs of PTSD (*see Aurnou v Craig,* 184 AD2d 1048[4th Dept 1992]). Therefore, the reference to PTSD was fair comment as it was in evidence through Dr. Romanelli's testimony. The reference that she was "diagnosed" with PTSD rather than exhibited signs is a minor error.

Defendant motion to set aside the verdict based on evidentiary rulings

Defendants assert that the Court erred in permitting evidence concerning the pre-warrant investigation to be presented to the jury and for precluding Ronnie Boyd's criminal history. Defendants essentially argue that while the evidence may have been relevant, the inclusion of the pre-warrant investigation confused the issues. Defendant also asserts that the exclusion of Ronnie Boyd's criminal history was an error, as the jury was not able to consider whether the defendants' actions were reasonable in light of the possibility of Ronnie Boyd's presence in the apartment.

Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It tends to convince that the fact sought to be established is so. Relevance, however, is not always enough, since "even if the evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties" (*People v Davis*, 43 NY2d 17 [1977] *quoting* Richardson, Evidence [Prince--10th ed], § 147, p 117; *People v Harris*, 209 NY 70, 82; McCormick, Evidence [2d ed], § 185, pp 438-440).

The evidence of the pre-warrant investigation was relevant and necessary to the trial as it explained and formed the mind set and knowledge of the police officers which

effectuated the search warrant. The evidence of Ronnie Boyd's criminal history was not relevant as the defendants were not searching for Ronnie Boyd nor did they have an arrest warrant for him but rather an individual named "JD Butch." Accordingly, the inclusion of the criminal history of Ronnie Boyd had no relevance to the issues and had the potential to be prejudicial.

CONCLUSION

The defendants' motion to direct a verdict or in the alternative to set the verdict aside and order a new trial is denied.

The foregoing constitutes the decision and order of this Court.

Enter:

J.S.C

HON. FRANCOIS A. RIVERA
J.S.C.

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