

Youssef v New York City Trans. Auth.

2017 NY Slip Op 32453(U)

November 17, 2017

Supreme Court, New York County

Docket Number: 156533/2013

Judge: Erika M. Edwards

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

DAVID YOUSSEF,

Index No.: 156533/2013

Plaintiff,

DECISION/ORDER

-against-

Motion Sequence: 002

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION
AUTHORITY, and MTA BUS COMPANY,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memo of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

ERIKA M. EDWARDS, J.S.C.:

Plaintiff David Youssef (“Plaintiff”) moves to set aside the jury verdict in favor of Defendants New York City Transit Authority, Metropolitan Transportation Authority and MTA Bus Company (collectively “Defendants”) on the issue of liability and for a judgment as a matter of law in Plaintiff’s favor, or in the alternative, to set aside the verdict as contrary to the weight of the evidence, or in the interests of justice, and for a new trial. Defendants oppose the motion. For the reasons set forth herein, the court denies Plaintiff’s motion in its entirety.

A jury trial in this matter was conducted from March 28, 2017 to March 31, 2017, at the conclusion of which the jury found that Defendants were not negligent. Four witnesses testified at trial, including Plaintiff, Anthony Toapha, Jr. (Transit Supervisor), Dr. Larry Bloomstein (Plaintiff’s expert orthopedic surgeon) and Dr. Maury Harris (Defendants’ orthopedic expert). The bus operator at the time of the accident, Joseph Pitta, retired and moved out of state. Although he did not appear to testify at trial, both attorneys read portions of his deposition testimony to the jury during the trial.

Plaintiff testified in substance that he was injured on March 13, 2013, during the morning rush hour at the vicinity of Madison Avenue and 51st Street, New York, New York, while he was a passenger on a Defendants’ express bus from Staten Island to midtown Manhattan. The bus was operated by Joseph Pitta. Madison Avenue is a one-way northbound street. While traveling

in the second lane to the right, which was the left bus lane, the operator was rapidly accelerating and driving at about 40 miles per hour after the heavy traffic opened up once they passed 42nd Street. Plaintiff planned to exit the bus at 53rd Street. Plaintiff stood up and walked towards the front of the bus while holding onto the handrail and there was one person standing in the aisle ahead of him. The operator slammed on the brakes and came to a sudden stop which caused Plaintiff to be violently thrown like a projectile for 15 feet from the middle of the bus to the front of the bus, past the person in front of him, causing Plaintiff to land on the floor of the bus approximately two to three feet from the driver.

Defendants relied on the emergency doctrine. The operator, Mr. Pitta, testified in substance at his deposition that he was scanning the street back and forth and he was traveling at about 5 miles per hour in the second lane from the right. There were two taxicabs blocking the bus lane to his right. Mr. Pitta testified that he had to stop short and apply his brakes hard to avoid hitting and killing a female pedestrian near the vicinity of 50th and Madison Avenue. The woman had walked out into the street while she appeared to be talking on a cell phone. Mr. Pitta testified that he first saw her when she was approximately ten feet in front of the bus toward the front, right side of the front of the bus. The pedestrian had come from his right side.

The operator's supervisor, Anthony Toapha, testified in substance that he interviewed Mr. Pitta after the incident and prepared a report. According to the report, Mr. Pitta told him that he saw the pedestrian crossing in front of the bus from his left to his right, instead of from his right to his left, but Mr. Toapha admitted that it was possible that he mistakenly wrote down the wrong direction. Mr. Toapha testified that the bus operators are taught that when they see a pedestrian crossing outside of the crosswalk their first response must be to avoid striking and killing the pedestrian. Additionally, passengers are supposed to remain seated until the bus stops and although he could not recall whether there was a sign with this instruction in Mr. Pitta's bus, he has seen such signs in the front of other buses. The operators are allowed to proceed even if passengers get up and walk towards the front while the bus is moving.

Plaintiff argues in substance that the verdict must be set aside as it was against the weight of the evidence and in the interests of justice because the only rational conclusion that could be reached was that the operator's failure to see the pedestrian earlier contributed to the emergency and the operator failed to appear and trial to explain the alleged emergency. Plaintiff further argues that the court erred by charging the jury that for Plaintiff to recover, the jury had to find that the bus operator was speeding and that he failed to keep a proper lookout. Pursuant to PJI 2:161 regarding a common carrier's duty to its passenger, speeding is not an element required to find the operator negligent. The error was exacerbated because the court re-read the charge in response to a jury note. Additionally, Plaintiff argues that the court erred by failing to charge *res ipsa loquitur* when the charge applied to the facts and if provided, could have resulted in the jury finding Defendants liable for Plaintiff's injuries. Therefore, Plaintiff argues that the court's instruction was a fundamental error, which does not require a prior objection, and the verdict must be set aside and new trial ordered.

Defendants argue in substance that the court must deny Plaintiff's motion because, pursuant to CPLR 4110-b, Plaintiff's arguments regarding PJI 2:161 are unpreserved as Plaintiff

failed to object to the charge either during the charge conference or after the charge was read to the jury. At best, the alleged incorrect charge was harmless error and there was no prejudice to Plaintiff because the charge accurately stated Plaintiff's allegations. Plaintiff now incorrectly attempts to equate driving at an unsafe speed, which depends on the circumstances, with speeding. Defendants also argue that the court correctly refused to charge *res ipsa loquitur* because Plaintiff failed to establish that his injuries were caused by an instrumentality within the exclusive control of Defendants when the evidence showed that the emergency doctrine applied and that the sudden stop was caused by a pedestrian crossing the street in front of the bus. Additionally, the evidence demonstrated that it was possible that Plaintiff was comparatively negligent for causing his injuries because passengers were supposed to remain seated while the bus was in motion. Defendants further argue that the verdict was not against the weight of the evidence because there was ample evidence that the jury could rationally conclude that Defendants were not negligent based on the emergency doctrine and Mr. Pitta's testimony regarding his efforts to avoid hitting the pedestrian. Defendants also argue that Plaintiff improperly attempts to argue credibility issues, which are within the province of the jury.

CPLR 4404(a) permits a trial court to set aside a jury 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 can order a new trial 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 a reasonable time as determined by the court (CPLR 4404[a]).

For a court to determine that as a matter of law a jury verdict is not supported by sufficient evidence, the court must find that based on the evidence presented at trial, "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). It requires the court to view the evidence in the light most favorable to the prevailing party, for the movant to assume the facts testified to by the prevailing party's witnesses to be true and to grant all favorable inferences flowing from the evidence to the prevailing party (*see S. Kornblum Metals Co. v Intsel Corp.*, 38 NY2d 376 [1976]). Judgment notwithstanding the verdict is not appropriate where issues of credibility are involved as matters of credibility and the weight to be accorded the testimony are within the province of the jury (*Bodlovich v Carucci*, 38 AD2d 699, 700 [1st Dept 1972]).

The court is also permitted to set aside a verdict and order a new trial where the jury's verdict is against the weight of the evidence and it "involves what is in large part a discretionary balancing of many factors" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978] [internal citations omitted]). Since a plaintiff has the burden of proof, when there is a defense verdict, the court should not grant a plaintiff's motion to set aside the verdict unless the evidence preponderated so greatly in the plaintiff's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence (*Niewieroski v National Cleaning Contractors*, 125 AD2d 424, 424-425 [1st Dept 1987]; *Tannenbaum v Mandell*, 378 NYS2d 468, 469-470 [2d Dept 1976]).

When alleging that the court erred in its jury instructions, a movant's failure to object, take exception or propose contrary requests to charge fails to preserve the claimed error, requires the law as stated in that charge to become the law applicable to the determination of the rights of the parties in the case and establishes the legal standard by which the sufficiency of the evidence to support the verdict must be judged (*Harris v Armstrong*, 64 NY2d 700, 702 [1984] [internal citation omitted]). However, in the absence of a timely objection, a court may review an issue in the interests of justice where the error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 563 [1st Dept 2009] [internal citations and quotations omitted]; *Horney v Tisyl Taxi Corp.*, 93 AD2d 291 [1st Dept 1983]).

The doctrine of *res ipsa loquitur* permits an inference of negligence to be drawn from the very occurrence of a certain type of accident and the defendant's relation to it (*Pavon v Rudin*, 254 AD2d 143 [1st Dept 1998]). The charge is only warranted when a plaintiff can establish that 1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*Dermatossian v New York City Transit Authority*, 67 NY2d 219, 226-227 [1986]).

When applying these legal principles to the evidence presented at trial, the court determines that the jury's verdict was not against the weight of the evidence and that the court's instructions were proper and did not constitute a fundamental error to require the court to set aside the verdict and order a new trial.

Plaintiff failed to demonstrate that the jury's verdict was against the weight of the evidence by showing that the evidence preponderated so greatly in the plaintiff's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. Here, there was ample evidence to support the jury's verdict in favor of Defendants based on the emergency doctrine after considering the credibility of the witnesses and the reasonable inferences drawn from the evidence in favor of Defendants. The bus operator testified at his deposition that he was forced to suddenly stop the bus to avoid striking and possibly killing the pedestrian who walked in front of the bus while attempting to cross the street. Plaintiff failed to present any evidence to rebut this claim, except to argue inconsistencies to impeach the operator's credibility. As mentioned above, issues of credibility and the weight to be given to testimony are within the province of the jury and cannot be a basis to set aside a verdict. Therefore, based on the evidence, Plaintiff failed to demonstrate that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational jurors to conclude that Defendants were not liable for Plaintiff's injuries.

Furthermore, the court did not err in its charge pursuant to PJI 2:161 regarding a common carrier's duty to its passenger and Plaintiff's arguments are unpreserved. The court adopted both parties' version of their assertions and instructed the jury as follows:

[T]he plaintiff claims in substance that while he was a passenger on a bus operated by Joseph Pitta . . . Mr. Pitta acted negligently when he traveled at an unsafe speed, failed to timely notice an alleged pedestrian had walked in front of the bus and then slammed on his brakes . . .

Now, defendants deny that the bus operator Mr. Pitta was negligent and claim in substance that an emergency occurred and Mr. Pitta had no choice but to slam on his brakes to avoid hitting and possibly killing a woman who was walking across the street in front of the bus . . .

[I]n order for plaintiff to recover from defendants, plaintiff must prove five things. One that he was a passenger on defendants' bus; two, that the operator of the bus traveled at an unsafe speed and then slammed on his brakes causing plaintiff's injuries; three defendants' employee failed to use reasonable care in operating defendants' bus; four, plaintiff was injured; and five, defendants' employee's failure to use reasonable care in operating defendants' bus was a substantial factor in bringing about plaintiff's injury . . .

Additionally, the court granted Plaintiff's requests to charge certain regulations and sections of the Vehicle and Traffic Law regarding the applicable speed limits. Plaintiff failed to object to the charge during the trial after having several opportunities to do so. Plaintiff failed to object during the multiple charge conferences, failed to take exception to the charge after it was first read to the jury and failed to object to it when the court discussed with the parties how best to respond to the jury's note regarding the charge and decided to re-read the charge to the jury.

Furthermore, not only did Plaintiff fail to preserve this argument, but the court recalls that it adopted the allegedly erroneous language of the charge regarding "unsafe speed" from the exact language proposed by Plaintiff in his assertions. The court discussed the charge with the parties during a charge conference and the court accepted and included Plaintiff's proposed language of his assertions regarding Defendants' negligence in its charge. The next day, on March 31, 2017, the court provided the parties with a written draft of its final instructions for review and discussion during a continuation of the charge conference. As to PJI 2:161, the court initially included that Mr. Pitta acted negligently when he "accelerated" and then slammed on his brakes, but based on Plaintiff's proposed version, the court changed the language throughout the charge to "traveled at an unsafe speed" and then slammed on his brakes. Even after receiving the draft of the charge, proposing the exact language accepted by the court, and failing to object to the charge, Plaintiff now essentially argues that the court erred in using Plaintiff's version of his assertions of negligence in its final charge the jury. Such argument is without merit.

Although, the court could still set aside the verdict and order a new trial without Plaintiff's preservation of the argument if it was a fundamental error, here, Plaintiff failed to establish that the error was so fundamental and the language in the charge was the same language used in Plaintiff's assertions. Plaintiff alleged throughout the trial that the bus operator was negligent in failing to use reasonable care in his operation of the bus because he was traveling at an unsafe speed and had to slam on his brakes because he failed to see the pedestrian crossing in

front of the bus sooner. The court's instructions correctly charged the jury on this issue based on the law and based exactly on Plaintiff's agreed upon assertions.

Finally, the court correctly refused to grant Plaintiff's request to charge *res ipsa loquitur* because Plaintiff failed to demonstrate that the evidence presented at trial supported each element required by the charge. Here, the evidence presented at trial failed to establish the second element that the accident was caused by an agency or instrumentality within the exclusive control of defendant, since the evidence showed that the operator slammed on his brakes to avoid hitting a pedestrian who was crossing the street in front of the bus. Additionally, even though the jury did not have to determine the issue of Plaintiff's comparative negligence because they found Defendant was not negligent, the evidence failed to support the third element because a reasonable jury could have found that Plaintiff was also negligent by failing to remain seated while the bus was in motion.

Furthermore, the facts in the instant matter are distinguishable from the facts set forth in *Rountree* and the other cases relied upon by Plaintiff in support of the charge (*Rountree v Manhattan and Bronx Surface Operating Auth.*, 261 AD2d 324 [1st Dept 1999]). In *Rountree*, the bus operator drove off and then stopped short as plaintiff was walking to his seat after boarding the bus without giving plaintiff sufficient time to get to his seat (*id.*). Additionally, the driver denied stopping, but said he slowed down, and he could not recall anything about the traffic or road conditions which made him stop short (*id.*). Therefore, there was no evidence that the driver's actions were caused by someone or something outside of the defendants' exclusive control. Also, in *Rountree*, plaintiff's version of the sudden stop was corroborated by another passenger (*id.*).

In the instant matter, the defense relied on the emergency doctrine and the driver's testimony, corroborated in part by his initial statement to his supervisor, that he had to stop short to avoid hitting and killing a pedestrian who attempted to cross the street in front of the bus. Additionally, plaintiff voluntarily stood up and walked toward the front of the bus while the bus was in motion as opposed to him not being able to reach his seat upon boarding the bus before the operator drove off. Thus, the facts in the instant matter are distinguished from the facts in *Rountree* and do not support a charge of *res ipsa loquitur*.

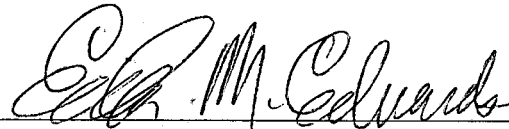
Therefore, for the foregoing reasons, the court denies Plaintiff's motion in its entirety with prejudice.

As such, it is hereby

ORDERED that the court denies Plaintiff David Youssef's motion to set aside the jury verdict in favor of Defendants New York City Transit Authority, Metropolitan Transportation Authority and MTA Bus Company on the issue of liability and for a judgment as a matter of law in Plaintiff's favor, or in the alternative, to set aside the verdict as contrary to the weight of the

evidence, or in the interests of justice, and for a new trial in its entirety with prejudice and without costs.

Date: November 17, 2017



HON. ERIKA M. EDWARDS