| **Hegbeli v TJX Cos., Inc.** |
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| 2020 NY Slip Op 33447(U) |
| October 21, 2020 |
| Supreme Court, New York County |
| Docket Number: 160355/2016 |
| Judge: Kathryn E. Freed |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

*Justice*

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**INDEX NO.** 160355/2016

EUGENIA HEGBELI,

Plaintiff,

**MOTION SEQ. NO.** 003

- v -

THE TJX COMPANIES, INC.,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for SET ASIDE VERDICT.

A defense verdict was rendered in this personal injury action on November 20, 2019. Plaintiff Eugenia Hegbeli now moves, pursuant to CPLR 4404(a), for an order: 1) granting judgment notwithstanding the verdict; 2) for a new trial on the ground that the verdict was against the weight of the evidence; 3) for a new trial on the ground that this Court failed to give an adverse inference charge; 4) for a new trial in the interests of justice on the ground that the verdict was against the weight of the evidence; and 5) for such other relief this Court deems just and proper. Defendant The TJX Companies, Inc. opposes the motion. After consideration of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

This action arises from an incident on August 13, 2015 in which plaintiff was allegedly injured when a table on display in a Marshall's department store in Queens, which was owned or

operated by defendant, fell on her foot. The trial of this matter was conducted before the undersigned on November 13, 14, 15, 18 and 20 of 2019 and resulted in a defense verdict.

At trial, plaintiff testified that "the table was very into the other furnitures . . . which [were] behind the table" and that the furniture at the store "was very tied to each other." Doc. 73 at 7. She believed that the two legs in the back of the table were "not really standing straight to the floor." Id. At 7-8. She said that the moment she touched the price tag to see what the table cost, the table fell on her left foot. Id. She denied that she pulled on the table to cause it to fall. Id. at 11.

On cross-examination, plaintiff reiterated that she only touched the price tag before the table fell. Id. at 30-31. She insisted that the table was unstable before it fell because she "saw the table being into that crowd of furniture" and that the top of the table was a little uneven. Id. at 31. She conceded that she did not know whether any of the legs of the table were not touching the floor. Id. at 34. Although plaintiff testified that she did "everything with [her] cane" she then admitted that a picture she had posted to Facebook after the accident depicted her dancing without a cane. Doc. 73 at 23-26. She insisted that this was because she did not want anyone to see her with a cane. Id. at 24, 40.

On redirect examination, portions of plaintiff's deposition testimony were read into the record. This included her deposition testimony that she did not "think" that the rear legs of the table were on the floor. Id. at 43. When asked to clarify what she meant, she said that the rear legs of the table were "very pushed into" other furniture on display. Id. at 43-44.[1]

[1] Plaintiff annexes to her motion a photograph (Doc. 75), marked as Exhibit 1 at trial (Doc. 73 at 7-9), which she took of the table on its side after it had fallen and which, she represents, shows two legs of the table wedged between other pieces of furniture on display at the store. Doc. 73 at 20-21. However, the photograph is blurry and of extremely poor quality and, since it is black and white, the references by plaintiff's counsel to an orange table wedged into white pieces of furniture behind it are essentially meaningless. Doc. 75.

As plaintiff argues, defendant offered no testimony in its case in chief. Rather, defendant questioned Mohamed Seye, a manager at the store, who had been subpoenaed for trial by plaintiff's counsel. Doc. 74 at 89, 108. Seye recalled that the area in which the furniture was displayed was inspected throughout the day to ensure that "everything was shipshape and in order." Id. at 109-111. When Seye last passed the area in question prior to the incident, he did not see the table wedged in between other pieces of furniture. Id. at 119.

Seye responded to the scene of the accident and saw the table on the floor. Id. at 81, 120. Plaintiff advised him that the table had fallen on her foot. Id. at 85. He examined the table after the incident and found nothing wrong with it. Id. at 123. He also viewed a video of the location of the accident recorded by a camera outside the parking lot entrance, although he did not testify about what it portrayed. Id. at 121-123.

Plaintiff also subpoenaed Ty Johnson, a loss prevention officer for Marshall's, to testify at trial. Doc. 74 at 130-131. He recalled that he had watched a surveillance video taken in the store with Seye, which showed an older woman walking over to the table. Id. at 141.

On November 20, 2019, the jury rendered a defense verdict.

Plaintiff now moves, pursuant to CPLR 4404(a), for an order 1) granting judgment notwithstanding the verdict; 2) for a new trial on the ground that the verdict was against the weight of the evidence; 3) for a new trial on the ground that this Court erred in failing to give an adverse inference charge; 4) for a new trial in the interests of justice on the ground that the verdict was against the weight of the evidence; and 5) for such other relief as this Court deems just and proper. Doc. 71.

In support of the motion, plaintiff argues that she is entitled to a new trial since her testimony and the photograph marked as Exhibit 1 at trial establish that the table was negligently

displayed. Plaintiff further asserts that this Court erred in refusing to instruct the jury on the doctrine of res ipsa loquitur. Additionally, plaintiff argues that defendant either created the dangerous condition or had constructive notice that it was wedged into other furniture behind it and was thus in danger of falling forward. Next, plaintiff argues that, had defendant reviewed the surveillance video taken on the day of the incident in its entirety, it would have indicated that defendant was responsible for the allegedly dangerous condition. She also asserts that the video shown to the jury lacked a proper foundation. Further, plaintiff argues that this Court erred in refusing to give the jury a spoliation instruction in accordance with the order of this Court (Reed, J.) entered June 17, 2019 ("Justice Reed's order"). Doc. 51.[2]

In opposition, defendant argues that plaintiff's motion is untimely; that plaintiff failed to prove that defendant was negligent; that Justice Reed's order only held that a spoliation charge should be given if it was proven that there was an additional surveillance video that was missing or that was not provided by defendant; and that this Court properly refused to give a res ipsa loquitur instruction.

In reply, plaintiff argues, inter alia, that this Court erred in refusing to recognize Justice Reed's order as the law of the case and in failing to charge res ipsa loquitur, and that defendant's negligence caused the alleged incident. Doc. 82.

**LEGAL CONCLUSIONS:**

CPLR 4404(a) provides as follows:

[2] Justice Reed's order also denied defendant's cross motion for summary judgment dismissing the complaint. Doc. 51.

> **(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.

A jury verdict may not be set aside as against the weight of the evidence unless "the evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence." *Killon v Parrotta*, 28 NY3d 101, 107-108 (2016) (citation omitted).

Defendant cross-moved moved for summary judgment in this matter in March 2018. Doc. 25. In denying defendant's cross motion, Justice Reed held, inter alia, that defendant failed to show "that there is no triable issue of fact with respect to whether defendant created a dangerous condition by its positioning of the subject table for display." Doc. 51 at 4. Thus, Justice Reed determined that the issue of defendant's possible negligence was one to be determined by the trier of fact. Where, as here, "the case involves clear issues of fact and its outcome depends entirely on how the facts are resolved, the court has little choice but to accept the jury's determination and grant judgment on the verdict." David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4404:3. The grounds raised by plaintiff for setting aside the verdict, addressed seriatim below, do not warrant a contrary result.

Plaintiff argues that her trial testimony and the photograph marked as Exhibit 1 at trial establish that the table was negligently displayed. She further asserts that the only possible reason the table could have fallen is that it was negligently displayed by being placed on two legs and not on all four. Doc. 72 at par. 17. However, as noted above, plaintiff testified that "the table was very

into the other furnitures . . . which [were] behind the table"; that the furniture at the store "was very tied to each other"; that it was her "belief" that the two legs in the back of the table were "not really standing straight to the floor"; and that the table fell on her foot when she touched the price tag on it. Doc. 73 at 7-8. Thus, aside from being vague, plaintiff's testimony was speculative and the jury had the right not to credit it. Additionally, the photograph of the table taken by plaintiff after the incident does not warrant the setting aside of the verdict. Initially, as defendant asserts, and as plaintiff testified, it does not show the condition of the table prior to the occurrence. Doc.73 at 21. Thus the photograph, in and of itself, does not establish any negligence. Doc. 73 at 21. Additionally, as noted above, the black and white photograph submitted by plaintiff (Doc. 75) is of such poor quality that it cannot support any meaningful factual argument (*see Trinidad v New York City Tr. Auth.*, 60 A.D.3d 437 [1st Dept 2009]) especially where, as here, plaintiff's counsel refers in his motion papers to the color of the table and the furniture behind it.

Next, plaintiff argues that this Court erred in refusing to find that Justice Reed's order (Doc. 51), granting an adverse inference charge against defendant on the ground that it spoliated a video depicting the alleged incident, was law of the case. However, plaintiff overlooks that Justice Reed's order sets forth as its rationale the fact that "the only video provided by defendant thus far does not contain any of the images described at deposition by defendant's employees." Doc. 51 at 2. However, both Seye and Johnson testified at trial that they had exchanged the *only* video of the area of the accident taken on the date of the occurrence. Doc. 74 at 66, 121-122, 143. Thus, there was no basis on which to impose a spoliation sanction. In any event, "[a] motion court's evidentiary ruling before trial does not foreclose a related application to the trial court . . ." *Kelly v Metro-North Commuter R.R.*, 74 AD3d 483, 485 (1st Dept 2010) (citations omitted); *see also Diller v Munzer,* 141 AD3d 630, 631 (2d Dept 2016) (an evidentiary ruling, even when made "in

advance of trial on motion papers constitutes, at best, an advisory opinion . . ." (citations omitted); *Pink v Ricci*, 74 AD3d 1773, 1774-1775 (4th Dept 2010) ("[t]he admissibility of evidence at trial lies primarily within the discretion of the trial court rather than the motion court") (citations omitted). Thus, the undersigned correctly denied plaintiff's request for an adverse inference charge despite Justice Reed's order.

Plaintiff's argument that this Court erred in failing to instruct the jury on the doctrine of res ipsa loquitur is also without merit. When the accident occurred, the table "was on an open sales floor to which innumerable shoppers had access. Hence there was no basis [on which this Court could conclude] that defendant had exclusive control of the chair." *Rivera-Emerling v Fortunoff*, 281 AD2d 215, 217 (1st Dept 2001).

Next, plaintiff argues that, had defendant reviewed the surveillance video taken on the day of the incident in its entirety, it would have indicated that defendant was responsible for the allegedly dangerous condition. However, this contention is speculative and unsupported by any evidence introduced at trial.

Although plaintiff further contends that the video shown to the jury lacked a proper foundation, plaintiff's counsel admits that he "agreed to showing this meaningless video to the jury." Doc. 72 at par. 41. Therefore, plaintiff has waived any objection to the introduction of the same.

Finally, although plaintiff claims that her "veracity and the accuracy of her testimony was never seriously challenged by defendant's counsel" (Doc. 72 at par. 10), this is clearly false.[3] Plaintiff testified at trial that, as a result of the accident, she always walks with a cane, and that two of her doctors told her that she may need to use it for the rest of her life. Doc. 73 at 15-16, 23.

[3] This Court notes that, although this contention is set forth in the section of plaintiff's motion addressing how the accident occurred, plaintiff's counsel did not limit this argument only to that aspect of the case.

However, defendant confronted plaintiff with a picture posted on Facebook showing the latter dancing without a cane. Id. at 23-25. In response, plaintiff insisted that she does not "show the cane in pictures" and that, in any event, she only danced "for two minutes or so." Id. at 25. This implicated the doctrine of falsus in uno, about which the jury was instructed. The jury instruction for that doctrine, set forth in PJI 1:22, provides that:

> as to any witness that has willfully testified falsely as to any material fact, that is as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. The fact finder is not required, however, to consider such a witness as totally "unbelievable." The fact finder may accept so much of his or her testimony as one deems true and disregard what is believed as false. The fact finder, by the processes described, is the sole judge of the facts, decides which of the witnesses to believe, what portion of his or her testimony to accept and what weight to give it.

*Hayblum v Life Alert Emergency*, 2016 NYLJ LEXIS 4846, *2-3 (Sup Ct New York County 2016).

Given that plaintiff's testimony that she always used the cane was proven false, the jury was free to accept as much of her testimony as it deemed true and to reject as much of it as it deemed false. It is apparent that, in performing this function, the jury chose not to credit plaintiff's testimony regarding how the accident occurred, i.e., that the table fell over merely because she touched the price tag on it. Thus, this Court concludes that the verdict was based on a fair interpretation of the evidence. *See Killon v Parrotta*, 28 NY3d at 107-108.

In light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied in all respects; and it is further

ORDERED that counsel for defendant shall serve a copy of this decision, with notice of entry, on plaintiff's counsel within 20 days after entry of this order; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant without costs or disbursements; and it is further

ORDERED that this constitutes the decision and order of the Court.


10/21/2020
DATE

KATHRYN E. FREED, J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | | GRANTED | X | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |