SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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KAREN HOLLANDER,

Plaintiff,

-against-

ELIZABETH HILZENRATH, BERNARD HILZENRATH and MARK HILZENRATH

Defendants.
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Index No.: 520016/2016
Motion Date: 7-27-20
Mot. Seq. No.: 3

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the plaintiff, Karen Hollander, moves for an order pursuant to CPLR §4404(a) setting aside a jury verdict and directing a new trial.

Plaintiff brought this action against the defendants to recover for injuries sustained on October 31, 2015 resulting from a slip and fall on what she was a defective interior stairway located in her apartment. The plaintiff was a tenant in a two-family home owned by the defendants. Plaintiff's chief theory of liability was that the risers and treads of the stairs were not built in accordance with the New York City Building Code ("Building Code"). A jury trial on the issue of liability concluded on July 3, 2019. The first question on the verdict form was "Were the defendants negligent in failing to keep the interior stairs of 2162 East 70th Street, Brooklyn, New York in a reasonably safe condition?" The jury's answer to this question was

"No." Plaintiff now seeks to set aside the jury verdict claiming that the verdict was contrary to the weight of the evidence. Plaintiff also claims that she was denied a fair trial because of certain improper comments made by defendants' counsel and a series of erroneous evidentiary rulings.

"[T]he standard for determining whether a jury verdict is against the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence" (*Torres v. Esaian*, 5 A.D3.d 670, 671; *see generally Schiskie v. Fernan*, 277 A.D.2d 441; *Nicastro v. Park*, 113 A.D.2d 129). Plaintiff failed to make such as showing. Plaintiff's contention that the verdict was contrary to the weight of the evidence because the trial evidence undisputedly demonstrated that the stairs violated the building code is without merit. The fact that the stairs may have violated the Building Code did not entitle the plaintiff to a verdict in her favor on this issue of liability as a matter of law. A violation of the Building Code is not negligence *per se* and only constitutes some evidence of negligence (see *Elliot v. City of New York*, 95 N.Y.2d 730; *Major v. Waverly & Ogden, Inc.*, 7 N.Y.2d 332; *Huerta v. New York City Transit Authority*, 290 A.D.2d 33). Accordingly, even if the trial evidence undisputedly demonstrated that the stairs did not strictly comply with the Building Code, the jury was free to consider all the trial evidence and find that the stairs were reasonably safe.

Plaintiff's contention that certain comments made by defendants' attorney during the proceedings denied her a fair trial is without merit. CPLR 4404(a) provides that, "after a trial ... by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict ... and ... may order a new trial ... in the interest of justice." A motion to set aside a verdict in the interest of justice pursuant to CPLR 4404(a) should not be granted unless the movant presents

evidence to establish that "substantial justice has not been done, as would occur, for example, where the trial court erred in ruling on the admissibility of evidence, … or there has been misconduct on the part of attorneys or jurors" (*Gomez v. Park Donuts,* 249 A.D.2d 266, 267 [citations omitted]; *see Lucian v. Schwartz,* 55 A.D.3d 687; *Langhorne v. County of Nassau,* 40 A.D.3d 1045).

While the Court should grant a new trial in the interest of justice where the comments of an attorney for a party's adversary deprived that party of a fair trial or unduly influenced a jury (*see Huff v. Rodriguez,* 64 A.D.3d 1221, 1223), this relief is only warranted it is established that the misconduct of opposing counsel was so wrongful and pervasive as to constitute a fundamental error and a gross injustice (*Bermingham v. Atlantic Concrete Cutting*, 159 A.D.3d 634). In considering a motion for a new trial on this ground, "'[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision'"(*Heubish v. Baez*, 178 A.D.3d 779 [citations omitted]). The Court must also consider that an attorney's right to comment on the trial is broad. The right to fair comment has been described as follows:

> "It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege is most important to preserve and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense * * * The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause."

(Braun v. Ahmed, 127 A.D.2d 418, 421–22, *citing Williams v. Brooklyn El. R.R. Co., supra,* 126 N.Y. 96 at 102–103, 26 N.E. 1048).

Applying these principles, the Court finds that the comments made by defendant's counsel that plaintiff claims were improper did not go beyond fair comment and were certainly not so wrongful and pervasive as to constitute a fundamental error and a gross injustice so as to deny the plaintiff a fair trial.

Lastly, the Court stands by the propriety of the evidentiary rulings that plaintiff claims were erroneous. The Court has considered plaintiff's remaining augments in favor of a new trial and find them unpersuasive.

Accordingly, it is hereby

ORDRED that plaintiff's motion is in all respects **DENIED.**

This constitutes the decision and order of the Court.

Dated: December 10, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020