SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

----------X

TINWINDE NASSA,

Plaintiff,

- v -

1512 LLC and HOWARD F. PLOTKIN,

Defendants.

----------X

INDEX NO. 154922/2016

MOTION DATE 10/29/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

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

ORDER

Upon the foregoing documents, it is

ORDERED that motion of defendant 1512 LLC/Howard F. Plotkin pursuant to CPLR 4404(a) (1) to set aside, as against the weight of the evidence, the verdict of liability in favor of plaintiff and against defendant and to order a new trial or; (2) to direct a judgment in favor of defendant notwithstanding the verdict, is DENIED; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 30 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General

Clerk's Office (60 Centre Street, Room 119) and such Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

DECISION

In the liability phase of this bifurcated trial, on December 14, 2019, the jury rendered a unanimous verdict (6-0) in favor of the plaintiff and against defendant, answering (1) "Yes" to the interrogatory, "Was the defendant 1512 LLC/Howard F. Plotkin negligent?"; and (2) "Yes" to the interrogatory: "Was the negligence of defendant 1512 LLC/Howard F. Plotkin a substantial factor in causing plaintiff Tinwinde Abdoul Nassa's accident?"; and (3) "No" to the interrogatory: "Was plaintiff Tinwinde Abdoul Nassa negligent?"

The defendant now moves pursuant to CPLR 4404 for an order (1) setting aside the jury verdict on the grounds that the verdict is against the weight of the evidence and directing a new trial, or (2) directing a judgment in favor of defendant, as a matter of law. The plaintiff opposes the motion.

The court shall deny the motion of defendant in all respects.

To set aside the verdict as against the weight of the evidence and order a new trial, the court must determine that the evidence so greatly preponderates in the moving party's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. See Pavlou v City of New York, 21 AD3d 74, 76 (1st Dept 2005). It is axiomatic that in its evaluation, the judge "cannot interfere with a jury's fact-finding process simply because [she] disagrees with its finding or would have reached a contrary conclusion based on different credibility determinations." See Cholewinski v Wisnicki, 21 AD3d 791 (1st Dept 2005). Likewise, this court concurs with plaintiff that:

> "On a challenge to the sufficiency of the verdict in favor of a plaintiff, the evidence in support thereof must be accepted as true and viewed in the light most favorable to the plaintiff".

Mirand v City of New York, 190 AD2d 282, 287 (1st Dept 1993), affd 84 NY2d 44 (1994).

The court may set aside a verdict and order a new trial in the "interest of justice", where there was harmful error or some form of judicial or counsel misconduct. However, such relief is limited to circumstances where the error likely affected the verdict or where the misconduct was prejudicial. See Gilbert v Luvin, 286 AD2d 600, 600-601 (1st Dept 2001).

For defendant to establish entitlement to a judgment notwithstanding the verdict pursuant to CPLR 4404(a), defendant must show that "there is simply 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" (Cohen v Hallmark Cards, Inc, 45 NY2d 493, 499 [1978]). Continued the Court of Appeals in Cohen, supra:

> "It is a basic principle of our law that 'it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. Similarly, in any case in which it can be said the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court many not conclude that the verdict is as a matter of law not supported by the evidence' (citations omitted)."

The decision in Turuseta v Wyassup-Laurel Glen Corp. (91 AD3d 632, 633 [2d Dept. 2012]), which involved the claim that "plaintiff allegedly was injured when she was caused to fall after the heel of her boot became caught in a hole in concrete near the entrance door of the defendants' building", is instructive. As the appellate court stated in Turuseta:

> "Initially, the defendants' argument that the alleged defect was trivial and, thus, not actionable, is properly before this Court, as they raised this specific objection at the close of evidence on the issue of liability (cf. Love v Rockwell's Intl. Enters., LLC, 83 AD3d 914 [2011]; Alston v Sunharbor

> Manor, LLC, 48 AD3d 600, 602-603 [2008]). Generally, the issue of whether a dangerous condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (see Trincere v County of Suffolk, 90 NY2d 976 [1997]). However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (see Hagood v City of New York, 13 AD3d 413 [2004]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury" (Trincere v County of Suffolk, 90 NY2d at 978 [internal quotation marks omitted]). There is no "minimal dimension test" or "per se rule" that a condition must be of a certain height or depth in order to be actionable (id. at 977; see Milewski v Washington Mut., Inc., 88 AD3d 853 [2011]; Ricker v Board of Educ. of Town of Hyde Park, 61 AD3d 735 [2009]).
>
> "Upon our scrutiny of the photographs authenticated by the plaintiff and the defendants' fact witness and the description of the plaintiff's fall, and upon our consideration of the appearance of the alleged defect and the time, place, and circumstances of the accident, we conclude that the evidence does not support the conclusion urged by the defendants that the defect was trivial and, thus, not actionable (see Felix-Cortes v City of New York, 54 AD3d 358 [2008]; Ain v Three School St., 8 AD3d 413 [2004]; Stachowski v City of Yonkers, 294 AD2d 489 [2002]), or that there was no rational process by which the jury could have found in favor of the plaintiff with respect to this issue."

As the appellate court in Turuseta, this court finds that an examination of the photographs admitted at trial, plaintiff's testimony as to his fall, and consideration of the appearance of the alleged defect, which defendant characterized as a door saddle, but plaintiff as a raised uneven condition, as well as

the circumstances of the lighting of the area, it cannot be said that the condition was trivial and not actionable or that there was no rational basis upon which the jury could have found in favor of the plaintiff (see also Argenio v Metropolitan Transportation Authority, [277 AD2d 165 (1st Dept. 2000)] and Dominguez v OCG, IV, LLC [82 AD3d 434 (1st Dept. 2011)]).

In connection with defendant's argument that this court erred in sustaining plaintiff's objections to the admission of defendant's offer into evidence of photographs and measurements therein, there was no dispute that such photographs were never produced per pre-note of issue discovery orders or demands. As defendant never disclosed such photographs before trial, this court's ruling was proper (see Holloway v Station Bar Corp., 112 AD3d 784 [2d Dept., 2013]).

Defendant's argument that this court improperly sustained, as hearsay, objections to entries made as to history in the Harlem Hospital record, is likewise unavailing. The several inconsistent statements about the place of his accident that plaintiff purportedly made to various translators from English to French and vice versa constitute inadmissible hearsay. Literally past the eve of trial, i.e. after the impaneling of the jury, defense counsel made application for an order directing plaintiff to provide authorizations to defendant so defendant could subpoena certain Harlem Hospital nurses who

rendered care to plaintiff so that they might authenticate such statements. During the offer of proof, outside of the presence of the jury, no such care giver witness gave testimony that contradicted the references in the hospital record that plaintiff communicated through a translator service provided by the hospital. The entire Harlem Hospital record, including such entries, were disclosed to defense counsel and were in all counsel's possession for at least one year before this action was placed on the trial calendar. Defense counsel offered no excuse for having made no effort to discover the identity of such translators during the pre-note of issue discovery phase, so that such witnesses could be called to lay a proper foundation for the admission of such statements (see Guadino v New York City Housing Authority, 23 AD2d 838 [1st Dept. 1965]; and Nava-Juarez v Moshulu Fieldston Realty, LLC, [167 AD3d 511, 512-513 (1st Dept. 2018)]).

Nor persuasive is defendant's argument that the court improperly permitted the admission of evidence and charged the jury as to the alleged lighting conditions at the situs of the accident. Plaintiff is correct that defense counsel was served with the Supplemental Bill of Particulars in September 2018, and extensively cross-examined plaintiff about lighting at the time of the accident during his examination before trial (see Murray v City of New York, 43 NY2d 400, 405 ["When a variance develops

between a pleading and proof admitted at the instance or with the acquiescence of a party, such party cannot later claim that he was surprised or prejudiced and the motion to conform should be granted".)

With respect to improper comments made on summation by plaintiff's counsel, this court sustained defense counsel's objections, and at times on its own motion, admonished plaintiff's counsel. In each such instance, the court delivered curative instructions to the jury, correcting any possible prejudice (see Reilly v Wright, 55 AD2d 544 [1st Dept. 1976]).

Defendant has failed to demonstrate either that there is an absence of viable evidence that exists to support the jury verdict (see Lolik v Big V Supermarket, Inc., 86 NY2d 744, 746 [1995]), that the court committed serious error, or that plaintiff counsel engaged in misconduct so prejudicial that it tainted the jury's deliberations. Nor has defendant shown that reasonable minds could not differ about the correctness of the conclusion reached by the jury in light of the evidence presented and the law charged.

12/22/2020
DATE

DEBRA A. JAMES, J.S.C.

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