King v Shannon
2021 NY Slip Op 33205(U)
November 23, 2021
Supreme Court, Orange County
Docket Number: Index No. EF009694-2017
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

----------X

LINDA KING,

Plaintiff,

- against –

PAMELA SHANNON, LINDA SHANNON and LEROY SMITH,

Defendants.

----------X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF009694-2017

DECISION AND ORDER

Motion Date: October 5, 2021

The following papers numbered 1 to 6 were read and considered on a motion by the Plaintiff, pursuant to CPLR § 4040(a), to set aside the verdict after trial.

Notice of Motion- Cepler Affirmation- Exhibit A- Memorandum of Law	1-4
Affirmation in Opposition- Gross	5
Affirmation in Reply- Cepler	6

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied.

Introduction

The Plaintiff commenced this action alleging that she was attacked by a pitbull owned by the Defendants Linda Shannon and Leroy Smith.

After a trial, the jury found that an "attack" had not occurred, and found in favor of the Defendants.

The Plaintiff moves to set aside the verdict.

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The motion is denied.

Factual/Procedural Background

In support of her motion to set aside the verdict, the Plaintiff submits an affirmation from counsel, Craig Cepler.

As factual background, Cepler argues as follows.

The action at bar concerns compensation for debilitating injuries that the Plaintiff sustained when she was attacked, on August 18, 2017, by a 60-pound pitbull, Nyia, owned by Smith and Linda Shannon. As a result of the attack, the Plaintiff suffered a fractured fibula and missed months of work.

At trial, he argues, the jury heard the testimony of the Plaintiff, who "meticulously recounted the terrifying attack by Nyia." Yet, he asserts, the jury "implausibly" concluded that Nyia did not, in fact, attack King.

Indeed, he argues, because "all competent evidence overwhelmingly demonstrated that [the Plaintiff] was attacked by Nyia," the "jury's verdict must have been based on conjecture and speculation."

Second, he asserts, as evidenced by the jury's note and questions asking for the meaning of the word "attack," it is clear the jury was confused. "It likely believed that because the incident began when King came upon Nyia, Nyia could not have 'attacked' King. The jury therefore erroneously concluded – against the clear and consistent testimony – that Nyia did not attack King."

Third, he argues, throughout the trial, "Smith repeatedly lied about myriad issues. These lies likely distracted the jury from the clear facts presented through the witnesses' testimony."

Cepler asserts that the Court should not countenance Smith's "serial mendacity," but should order a new trial.

As background, Cepler contends that the following relevant evidence was adduced at trial.

Nyia is a pitbull who weighed approximately sixty to seventy pounds and had a loud bark, which the Plaintiff characterized as "vicious" (Id. at 208:1-5, 211:22-24.)

Indeed, he notes, according to Smith and Shannon, Nyia was the family guard dog, and was kept in the basement whenever there was a visitor in the house. (Tr. at 119:14 -120:13.)

Further, people were not permitted to pet Nyia (Id. at 81:20-21), and Smith told the Plaintiff that Nyia had once killed a neighbor's cat. (Tr. at 208:13-18, 214:13-21.)

In addition, a Facebook video taken by Smith shows Nyia barking loudly and aggressively at dogs passing on the sidewalk. (See Exhibit 3.)

Indeed, Cepler notes, when the Plaintiff worked for Smith, she was never in the same room, or even on the same floor, of the house at Nyia. (Tr. at 210:21-211:7.) Further, she never touched or petted Nyia. (Id. at 211:12-15.)

On the date of the incident, August 18, 2017, the Plaintiff arrived at Smith's house at 7:00 a.m. (Tr. at 217:17-19.) The day was a "normal" day until the incident at approximately 2:30 p.m. (Id. at 217:25-218:1, 218:5-11.)

According to the Plaintiff, after putting some medication in the house for Smith, she started walking to the kitchen to wash her hands. However, unbeknownst to her, Nyia had been let out of the basement. As she walked toward the kitchen, she came upon Nyia, who was laying on her dog bed in the living room. (Id. at 220:25- 221:5.)

Nyia started to get up when she saw the Plaintiff (Tr. at 221:8-11, 224:9-11.) The Plaintiff testified that she tried to slowly retreat from the room, but that Nyia "rushed towards" her and "slammed" into her legs, "cut[ting]" under the Plaintiff. (Id. at 221:10-13, 224:20-24, 225:4-10, 225:22-24.) The Plaintiff fell, and Nyia slid under the hospital bed in Smith's room. (Id. at 221:13-14, 225:11-12.) Immediately, the Plaintiff's ankle started hurting. (Id. at 225:13-17.)

Further, the Plaintiff testified, while she was lying on the ground, unable to get up from the ankle injury, Nyia started biting her buttocks and pants, leaving a hole in her pants. (Id. at 227:15-19; Exhibit 4.) Eventually, she testified, Nyia released her and went away for a moment. (Tr. at 221:17-18.)

She tried to get up and run away, but she could not bear weight on her leg. (Tr. at 221:19-21, 228:13-14.) At that point, she testified, Nyia attacked her again, biting her elbow. (Id. at 221:22-24, 228:25-229:9.) After she was able to pull her elbow from Nyia's mouth, Nyia tried to bite her face and neck. (Id. at 221:24-222:8, 230:4-15.) She fought back and was able to get the dog off her. (Id. at 222:6-8, 231:18-22.)

Eventually, she testified, Nyia retreated back to the living room. (Id. at 222:9, 230:16-18.)

The Plaintiff then crawled to the front door and onto the porch, where she yelled for help. (Tr. at 222:9-13, 230:19-21.)

The first person to come to her aid was one of Smith's friends, who came from across the street to help. (Id. at 222:14-16.) When Smith arrived, she told him, "your dog just attacked me." (Id. at 222:17-19.)

Smith testified that, during the attack, he heard Nyia bark and the Plaintiff scream. (Tr. at

95:16-96:4, 111:21-112:5.)

During cross-examination of the Plaintiff, defense counsel asked about a "second incident." (See Tr. at 262:8-11.) However, Cepler objected, and the Court confirmed that the Plaintiff's "testimony indicates it's all part of the same occurrence." (Id. at 262:16-21.)

At the time of the attack, Smith's son, Dontae Pelzer ("Pelzer"), was in the basement. (Tr. at 179:1-3.) Pelzer testified that he heard "a boom and a scream," as well as a "thump." (Id. at 179:6-14.) The "scream" sounded like someone was in pain. (Id. at 179:22-180:1.) Pelzer believed it was the Plaintiff who had yelled. (Id. at 180:12-14.)

After the attack, the Plaintiff told Smith to call "911" because she was unable to walk. However, she testified, Smith refused, stating that the police would "put his dog down." (Tr. at 232:19-22.) Smith told her that Pelzer would drive her to the hospital. (Id. at 232:25-233:2.)

Cepler asserts that, later, when Smith recounted the incident to Linda Shannon, he admitted that Nyia had chased the Plaintiff. (Tr. at 136:8-16.)

Prior to going to the hospital, the Plaintiff changed her pants. (Tr. at 233:18-25.)

When the Plaintiff arrived at the hospital, Pelzer told the triage nurse that Nyia had bitten the Plaintiff. (Id. at 237:15-17.) The nurse asked for Nyia's shot records. (Id. at 237:18-19.) The Plaintiff called Smith to ask for them. (Id. at 237:19-23.) However, Smith refused to provide the records, stating that "nobody is getting my dog's shot records. Forget that. I don't care what she says. Nobody is getting my dog's shot records." (Id. at 237:22-25.)

Smith eventually arrived at the hospital after being told to do so by one of his friends. (Id. at 238:6-7, 238:12-20.) He did not bring any veterinary or shot records with him. (Id. at 239:3-8.) Instead, Smith told the Plaintiff that Nyia is part of their family and implored her to

protect Nyia so that she would not be put down. (Id. at 240:1-6.)

At the hospital, it was confirmed that The Plaintiff fractured her right fibula. (Id. at 240:13-16.) She was given a soft cast and told to follow up with an orthopedist. (Id. at 240:20-241:2.)

Smith and the Plaintiff spoke approximately one week later. (243) During that conversation, Smith asked the Plaintiff to come back to work for him. The Plaintiff responded that she would not return if Smith did not get rid of Nyia. (243-244.)

Because of her injuries, the Plaintiff was unable to work for eleven weeks. (Tr. at 245:14-16.)

During the jury deliberations, Cepler notes, it sent a note to the Court that read: "Your Honor, the jury respectfully requests the definition of attack and does it encompass the entire incident." (Tr. at 376:18-21.) In response, the Court instructed the jury:

> In the Court's view, because of the testimony, attack is to be considered the entire interaction that the testimony reflects between the plaintiff and dog in question. The Court is cognizant of the fact that the plaintiff's testimony indicated there were certain points in time during the engagement where the interaction changed, but from the [jury's] perspective in terms of determining and rendering a decision on the first question that has been posed on the verdict sheet and that is: was the plaintiff Linda The Plaintiff attacked by the defendant Leroy Smith and Linda Shannon's dog Nyia on August 18, 2017, you may consider the entire incident that occurred from the moment she entered the residence bringing the medication I believe that was the testimony. So it's one integrated incident in that regard.

(Tr. at 376:22-377:15.)

The jury then again requested clarification on the meaning of the word "attack." (Tr. at 378:6-7.) The Court instructed the jury:

> Attack is going to be construed in its ordinary and normal meaning that the term attack is typically utilized. To be interpreted in light of the other factors, whether the dog lunged

> at, ran toward, knocked over; all of these go into the consideration of whether an attack occurred. In the Court's view, attack would imply that the contact between the plaintiff and the dog in question would have to have been initiated by the dog. Does that address -- I know you are wrestling with the concept. That is usually why we have two sides to the evidence. As I mentioned in my jury instructions, if there is testimony in terms of two versions of what transpired on the day in question and what the witnesses observed or did, then your first job is to determine whether the two stories can be reconciled. And in making that determination, putting it all together and having it reconciled. If you cannot reconcile them, again pursuant to my instructions, then you will have to decide which of the two stories is more credible. And that is where we come into the burden of proof here by a preponderance of the credible evidence.

(Tr. at 378:8-379:11.)

After this instruction, the jury returned its verdict.

The first question on the verdict form was: "Was the Plaintiff, Linda The Plaintiff, attacked by Defendants Leroy Smith and Linda Shannon's dog, NYIA, on August 18, 2017?"

The jury answered this question in the negative. Therefore, it did not answer any additional questions on the verdict form.

As to legal issues, Cepler argues as follows.

During the trial, the Plaintiff presented overwhelming evidence that she was attacked by Defendants' vicious pitbull, to wit: that she was knocked down and then bitten by the dog. In fact, he asserts, there was no competent testimony rebutting that evidence. To the contrary, he argues, the Plaintiff's testimony was echoed by Pelzer, who heard the Plaintiff scream from the first floor of the house, and by Linda Shannon, who testified that Smith told her that the Plaintiff fell while being "chased" by Nyia. (Tr. at 136:8-23.)

Indeed, he contends, defense counsel's approach at trial was not to proffer contrary evidence, but rather was to seek to impeach the Plaintiff's credibility on ancillary issues (such as rabies) with testimony that was entirely speculative. That is, defense counsel argued that the

Plaintiff was not credible because the hospital discharged her even though Smith did not provide shots records. (Tr. at 293:18-294:15.)

Thus, Cepler asserts, the jury's verdict finding that Nyia did not attack the Plaintiff was contrary to the weight of the evidence.

Further, he asserts, the jury was apparently confused by the word "attack." Indeed, he argues, had the jury properly understood the Court's instructions as to the word "attack," it would have concluded Nyia attacked the Plaintiff.

Cepler asserts that the jury's verdict suggests it may have believed that, because the Plaintiff first came upon Nyia, Nyia could not have "attacked" her.

However, he argues, such a conclusion is contrary to the Court's instructions and demonstrates confusion.

Indeed, he asserts, applying the Court's instruction, the jury should have concluded that Nyia "attacked" the Plaintiff. That is, at a minimum, Nyia lunged at the Plaintiff, knocking her down.

Cepler argues that no reasonable jury could have refused to find there was an attack based on the testimony.

Finally, he asserts, a new trial should be held "because of the sheer scope of the lies told by Smith during trial. These lies, in light of the jury's erroneous verdict, cannot be sanctioned. Allowing the implausible verdict to stand despite his statements would reward Smith's serial mendacities."

Cepler argues that Smith told at least five significant substantive lies that likely affected the jury's deliberations and led to the erroneous verdict.

First, Smith testified that he let the Plaintiff pet Nyia on one occasion (Tr. at 48:11-49:7.)

However, Smith previously testified that he never "introduce[d]" the Plaintiff to Nyia (Tr. at 82:12-83:1.)

Second, Smith testified that Nyia's dog bed in the living room was too heavy to move. (Tr. at 103:9-104:4.)

However, Linda Shannon testified the bed was light and mobile, and that she moved it each morning when she brought Nyia to the basement. (Tr. at 133:23-134:23.)

Third, Smith testified that, while he and the Plaintiff were on the front porch, his daughter Tonae came home from school and let Nyia out of the basement. (Tr. at 86:13-19, 95:2-10, 105:1-24.)

However, at his deposition, Smith testified that he directed his daughter Shakoya to bring Nyia up from the basement. Further, he testified that Tonae was in school when the incident happened on August 18, 2017, even though New York schools were not in session at that time (Tr. at 106:3 -108:21.)

Fourth, Smith testified that, after the Plaintiff crawled through the front door following the attack, he called Pelzer on telephone to come up from the basement, which he did. (Tr. at 104:5- 17.)

However, Pelzer came upstairs when he heard the Plaintiff scream, and never received any telephone call from Smith, or anyone else. (Tr. at 179:1-8, 180:4-11.)

Fifth, Smith testified that the Plaintiff returned to work after "maybe a week." (Tr. at 98:8- 99:23.)

However, the Plaintiff could not work for 11 weeks after her injury, and never again

worked for Smith after the incident. (Tr. at 243:13-245:16.)

In addition to the foregoing lies, Cepler notes, Smith was also asked about statements he made in a video he posted to Facebook, including statements referring to a neighbor's dog as "lunch meat." (Tr. at 39:9-15 & Ex. 3.) Cepler asserts that Smith, "when faced with his clearly inculpatory statements that evidenced how he reinforced Nyia's vicious propensities," tried to downplay their significance by referring to them five times as "figures of speech." (See Tr. at 39:9-15, 66:5-13 (calling neighbor's dog "lunch meat" was a "figure of speech); 51:8-17 (claiming his statement that Pamela Shannon does not like Nyia was a "figure of speech"); 63:6-25 (trying to downplaying his statement that Nyia would take a "bite out of [another dog's] ass" as a "figure of speech"); 68:9:25 (statement that there was "a lot of meat this morning" was a "figure of speech"); 71:11-14 (yelling at neighbor to "get the fuck off my block" was a "figure of speech").)

Cepler argues that, "when a party-witness is so bold as to assert serial falsehoods, the Court should reject an erroneous verdict in his favor and order a new trial. He should not be permitted to use his lies to 'win.'"

Here, he asserts, the "frequency and pervasiveness of Smith's lies tainted the entire proceedings. Smith's statements demonstrated his disdain with the litigation process and likely affected the jury's deliberations. The jury may have wrongly believed, based on Smith's incredulous testimony that he introduced [the Plaintiff] to Nyia, that [the Plaintiff] was familiar with Nyia, and that Nyia was friendly to [the Plaintiff] despite the overwhelming evidence that they never were 'introduced' and that Nyia was vicious. Smith's (fictitious) claim that he called Pelzer on the telephone to come to the front porch may have wrongly led the jury to downplay

the severity of [the Plaintiff's] screams when she was hurt, which screams were heard in the basement by Pelzer and outside by Smith. In addition, the jury may have been so infected by Smith's conduct while testifying that it refused to engage in the trial, and thus unfairly and improperly rejected [the Plaintiff's] compelling testimony. His actions should not be countenanced, and, given the fact that the verdict was against the weight of the evidence as recounted above, Smith's conduct under oath further militates in favor of granting [the Plaintiff] relief."

In opposition to the motion, the Defendants submit an affirmation from counsel, Robert Gross.

Initially, Gross argues, the evidence at trial supported a determination that there never was a dog attack.

Indeed, he asserts, there were numerous inconsistencies, contradictions and misrepresentations in Plaintiff's testimony, as well as the other evidence presented, that severely undermined the Plaintiff's credibility.

Gross argues that the following relevant testimony was adduced at trial.

The Plaintiff testified she became aware of Nyia about a week or two after she began take care of Smith, when she rang the doorbell and heard what she described as "vicious barking from behind the door." (Id. at p. 205:18-25; 206:1).

When the Plaintiff was asked at trial as to her understanding why Nyia was always in the basement, she replied "because she bites." However, she admitted that she came to that conclusion herself, after Smith told her of an incident involving Nyia and a neighbor's cat. (Id. at p. 208:1-18).

Further, he notes, the Plaintiff admitted that, prior to August 18, 2017, Nyia had never growled at her, and that she had only heard Nyia bark once in a while through the floor while she was working or when she rang the doorbell upon arrival. (Id. at pp. 212:6-23).

Further, he notes, the Plaintiff admitted she panicked when she saw Nyia. She testified that she took three steps back, and then turned and tried to run, when Nyia rushed her legs, sending her up in the air.

Further, she testified, Nyia bit her buttocks and elbow, and put her teeth on her cheek.

However, he notes, when she was asked whether Nyia had left any marks on her buttocks, elbow or cheek, she testified that "there was just some scratches, nothing deep". (Id. at p.230:22-25). Aslo, that there was no bleeding, "just marks." (Id. at p. 231:1-2).

Further, during cross-examination, the Plaintiff admitted:

That she had not been made aware by her employer that Smith was in a wheelchair or had a dog prior to her showing up on the site. (Id. at p. 250:3-7).

That she was working for two weeks and never heard any dog. (Id. at p. 250:19-23; 251:8-11).

That the barking by Nyia in a video shown to the jury was not what she would consider a loud bark. (Id. at p. 251:15-25).

That her agreement with Smith was that she would arrive, ring the bell, and allow them to put the dog away before she entered (Id. at p. 253:13-21; 254:2-5).

Further, Gross asserts, the Plaintiff admitted that when she first heard Nyia, it did not rush her or attack her or anything like that. (Id. at p. 254:2-10).

In addition, he notes, the following colloquy was read from the Plaintiff's examination

before trial.

"Question: After you took three steps back, you tried to run?

"Answer: I did."

"Question: While you were trying to run, Nyia bit you?

"Answer: When I was trying to run, she rushed me."

"Question: When you say she rushed you, she slammed?

"Answer: Slammed"

"Question: When you say she rushed you, what did you mean?

"Answer: She rushed her whole body into me, and I went up in the air."

* * *

"Question: Did Nyia bite you multiple times?

"Answer: Arm, face"

"Question: Just yes or no; did she bite you multiple times?

"Answer: Yes".

"Question: So that was all part of that same incident?

"Answer: Okay"

When asked if Plaintiff felt teeth on her skin, face and neck, the Plaintiff responded, "That is correct". (Id. at pp. 263-265:1-23).

In addition, Gross asserts, non-party witness Dontae Pelzer, the son of Linda Shannon, testified he did not witness the attack, but heard a boom and/or thump, and a scream. (Id. at p. 179:6-14). Pelzer testified that he did not initially respond to the thump but turned down his music, heard a scream, and then went upstairs on his own. When he arrived, he saw the Plaintiff

on the floor holding her ankle. (Id. at p. 180:12-25, 181:1-3). Pelzer testified that "she told him that she was 'going to walk into the kitchen, saw Nyia, ran away and tried to jump on the bed or something,' and that is where he guessed she hurt herself where I heard the thump and scream after. That is when I went upstairs." (Id. at p.181:7-19).

On cross examination, he testified that when he went up he saw Nyia sitting at the top of the stairs in the kitchen looking confused.

Further, he testified, the Plaintiff was "super upset and apologetic" and stated, "I am sorry. I don't know what happened. I tried to jump on the bed…for whatever reason… my ankle hurts now. I'm not sure what to do."

Pelzer suggested that they call 911, but the Plaintiff said, "No, I don't think I have enough money to pay for it." He told her, "Hey, I will take you. No problem. Let me just go grab my keys."

On the way to the hospital, he testified, the Plaintiff was apologetic and stated, "I am sorry. I don't know what happened. It's no one's fault. I feel bad."

At the hospital, he testified, the Plaintiff told the staff, "I hurt my ankle running from a dog. I broke it." When the hospital personal asked if it was an emergency, and/or if she was bleeding, or bitten, she responded, "No, I was not bitten. I am okay. It's just my ankle hurts really bad."

When asked directly if the Plaintiff made any mention of being bitten, Pelzer testified, "No, definitely no."

He saw no blood.

In sum, Gross argues, the jury's verdict was proper in all respects and supported by the

evidence.

Thus, he asserts, the Plaintiff's motion should be denied.

In reply, the Plaintiff submits an affirmation of counsel, Craig Cepler.

Initially, he argues, although the Defendants claim that the Plaintiff's testimony had numerous inconsistencies, contradictions and deliberate misrepresentations that severely or fatally undermined her credibility with the jury, they did not identify the same. Indeed, he asserts, this is because they do not exist.

Further, he argues, the Defendants do not directly address the Plaintiff's arguments that the jury's verdict should be set aside based on Smith's extensive intentional lies under oath.

In sum, he argues, there is only one reasonable conclusion to be reached from the evidence presented, to wit: that the Plaintiff was attacked by a vicious pitbull.

Discussion/Legal Analysis

In relevant part, CPLR 4404(a) provides that a 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 [or] in the interest of justice."

To set aside a verdict as against the weight of the evidence, the court must find that the evidence so preponderates in favor of the movant that the verdict could not have been reached upon any fair interpretation of the evidence. *Abbene v. Conetta*, 198 A.D.3d 849 [2nd Dept. 2021]; *Raso v. Jamdar*, 126 A.D.3d 776 [2nd Dept. 2015]. Resolution of the motion does not involve a question of law, but rather requires a discretionary balancing of many factors. *Abbene v. Conetta*, 198 A.D.3d 849 [2nd Dept. 2021]; *Raso v. Jamdar*, 126 A.D.3d 776 [2nd Dept. 2015].

Moreover, great deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses. *Abbene v. Conetta*, 198 A.D.3d 849 [2nd Dept. 2021]; *Raso v. Jamdar*, 126 A.D.3d 776 [2nd Dept. 2015]. Thus, where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view. *Raso v. Jamdar*, 126 A.D.3d 776 [2nd Dept. 2015].

A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise. *Heubish v. Baez*, 178 A.D.3d 779 [2nd Dept. 2019]; *Morency v. Horizon Transp. Services, Inc.*, 139 A.D.3d 1021 [2nd Dept. 2016]. In considering such a motion, the 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. *Micallef v. Miehle Co., Div. of Miehle–Goss Dexter*, 39 N.Y.2d 376; *Heubish v. Baez*, 178 A.D.3d 779 [2nd Dept. 2019]; *Morency v. Horizon Transp. Services, Inc.*, 139 A.D.3d 1021 [2nd Dept. 2016]. This is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein. *Heubish v. Baez*, 178 A.D.3d 779 [2nd Dept. 2019].

Finally, a motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as a matter of law will be granted where there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial. *Cohen v. Hallmark Cards, 45 N.Y.2d 493*; *Kirwan v.*

New York City Transit Authority, – AD3d – [2nd Dept. Nov. 17., 2021]. In determining such a motion, a court must accept the nonmoving party's evidence as true, and accord the non-moving party the benefit of every favorable inference which can reasonably be drawn from the evidence presented at trial. *Kirwan v. New York City Transit Authority*, – AD3d – [2nd Dept. Nov. 17., 2021]. A jury verdict must be based on more than mere speculation or guesswork. *Bernstein v. City of New York*, 69 N.Y.2d 1020; *Kirwan v. New York City Transit Authority*, – AD3d – [2nd Dept. Nov. 17., 2021].

Here, the Plaintiff did not demonstrate entitlement to relief under any of these standards.

Initially, it is noted, contrary to the Plaintiff's contentions, she did not present essentially unrebutted evidence that Nyia had vicious propensities. Rather, there was evidence from which the jury could have reasonably found that Nyia in fact not vicious.

In any event, even assuming, *arguendo* that the Plaintiff demonstrated that Nyia had vicious propensities, the Plaintiff did not demonstrate that the jury's determination that she was not "attacked" by Nyia was against the weight of the evidence. Rather, there was a reasonable view of the evidence that the injury to the Plaintiff (at least to her ankle) did not arise from an "attack," but rather occurred in the chaos and confusion that was created when Nyia was startled by the Plaintiff being panicked and her attempt to flee the area. Indeed, the testimony of the Plaintiff could reasonably support a finding that Nyia did not react at all when the Plaintiff first encountered her; it was only when she attempted to run that the dog reacted. As noted *supra*, where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view.

Further, the Court notes, although the Plaintiff testified that she was also bitten by Nyia in

the "attack," there is no record of any treatment for a dog bite or puncture wound. Indeed, by the Plaintiff's own testimony, she suffered only "scratches" or "marks" from the alleged biting. The jury could have reasonably concluded that such injuries were not consistent with the described "attack" by a vicious 60 pound pitbull.

As noted *supra*, the jury's determination of the facts, and the credibility of the witnesses, is entitled to great deference. Similarly, the Plaintiff also did not demonstrate that the verdict should be set aside in the interest of justice.

Initially, the Court notes, the Plaintiff does not argues that there were errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, newly discovered evidence, or surprise. Rather, she argues only, in effect, misconduct by Smith due to "serial lies." However, all of the arguments raised concerning the same go the credibility of Smith, and to the weight to be accorded his testimony, which were issues for the jury to decide.

Otherwise, the Court notes, it finds that substantial justice has been done.

Finally, the Plaintiff did not demonstrate that there was no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial.

Accordingly, and for the reasons stated herein, it is hereby,

ORDERED, that the motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 23 , 2021
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, J.S.C.