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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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KAREN URQUHART,

Plaintiff,

-against-

TOWN OF OYSTER BAY and THE LONG ISLAND RAILROAD

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 014215/05
Motion Seq. No.: 04

DECISION AND ORDER

Papers Read on this Motion:

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Defendant, Town of Oyster Bay, moves for an Order, pursuant to CPLR §4404 (a) setting aside the verdict finding it liable for plaintiff's injuries in a slip and fall accident, on the grounds that plaintiff failed to prove a *prima facie* case or for alternative relief in granting defendant a new trial on the grounds that the verdict was against the weight of the competent evidence; the Town was prejudiced by the improper admission of evidence; and the charge to the jury was inadequate regarding the plaintiff's burden of proving a *prima facie* case. The plaintiff opposes the Town of Oyster Day's application.

Plaintiff, Patricia Urquhart, commenced this action sounding in negligence against the defendants, the Town of Oyster Bay ("Town") and the Long Island Rail Road ("LIRR"). The matter was heard by a jury at a trial before this Court on June 21 through June 23, 2010. The first question relating to each defendant on the jury verdict form was whether they were negligent, and, as to the Town the jury's answer was "yes," and as to the LIRR, the jury's answer was "no." The jury was also

instructed that if it answered the negligence question affirmatively with respect to any defendant, it was to determine whether the negligence of that defendant was a proximate cause of plaintiff's injuries. The jury found that the Town's negligence was the proximate cause of plaintiff's injuries and apportioned liability as follows: Town, 65%; LIRR, 0%; and plaintiff, 35%.

Upon hearing the jury's verdict, defendants moved to set it aside and alternatively for a new trial pursuant to CPLR §4404 (a). The Court denied the motion.

FACTS

On March 9, 2005 at about 9:30 a.m., plaintiff, during the performance of her duties for the Nassau County Police Department as a Parking Enforcement Aide, was issuing parking citations to illegally parked vehicles in the Massapequa Long Island Rail Road Parking Lot M11, located at Ocean and Veterans Avenues in Massapequa, NY. The Town is responsible for the snow removal, parking services including the issuance of parking permits and parking enforcement, and overall maintenance of the lot. The outdoor temperature was below the freezing point and it had snowed the day before, and plaintiff alleged that the lot surface was covered with ice. She drove her vehicle around the lot to check for illegally parked cars and had pulled her vehicle next to two such vehicles for the purpose of issuing traffic citations. She exited her vehicle, issued the summons to the vehicles, and then attempted to reenter her vehicle when her feet slipped on the ice. Although she held on to her car door, she fell and the weight of her body landed on her arm. Plaintiff, as a result, sustained injuries, including a dislocation of her shoulder.

DISCUSSION

SETTING ASIDE VERDICT PURSUANT TO CPLR §4404 (a).

CPLR §4404(a) provides in relevant part:

> ...[a]fter 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 [or] in the interest of justice...

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury, on the basis of the evidence presented at trial. The result of such a determination leads to a directed verdict terminating the action *(* see *Nicastro v. Park,* 113 AD2d 129 [2d Dept 1985]; *Kaplan v. Miranda*, 37 AD 2d 762 [2d Dept 2007]). Said another way, such relief should not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence (see *Kunsman v. Baroody*, 60 AD3d 1369 [4th Dept 2009], quoting *Dannick v. County of Onondaga*, 191 AD 2d 963 [4th Dept 1993]). The evidence presented at trial, the meteorological records filed in the National Climatic Data Center, indicated that it had snowed between the hours of 12:00 a.m. and 9:45 p.m. on March 8, 2005; however, accumulation was less than one (1) inch. There was no further precipitation from that time and up until March 10, 2005. The defendant's witness, Joseph Tricarico, Town Commissioner of Highways, testified that on March 8, between the hours of 1:00 p.m. and 3:00 p.m., the Town sanded and salted Lot M11 for the purpose of providing traction and melting the snow. The lot was not plowed as the Town's policy precludes plowing when accumulation is less than three inches. The March 9, 2005 weather report indicated that for the entire day, temperatures were below the freezing point. Further, there had been no further salt and sand activity by the Town on that date.

Other evidence presented at trial showed that plaintiff was performing her duties as a Police Aide in the parking lot on the morning of March 9, 2005 when she noticed that the lot was icy and the surface of the lot was resultantly uneven. She was appropriately dressed for the weather, including her footwear. Plaintiff attempted to access her vehicle, which was parked in the lot, and she held on to the side of the car to brace herself as she noticed that her feet were slipping underneath her. Notwithstanding her efforts, she slipped and fell.

In addition, the Town's witness testified that he saw asphalt on the surface of the lot on March 9, 2010 and the practice of his department was not to perform any salt and sand treatment in that case. However, the Town performed salt and sand treatment on March 10, 2005, although there was no additional precipitation since the snowfall on March 8, 2005. It is important to note that the jury heard the Town's witness affirm his March 9, 2005 inspection of Lot M11 after several conflicting responses to the direct examination by plaintiff's counsel.

It is also noted that defendants, in cross examining the plaintiff, attempted to undermine her testimony regarding her representation as to how the accident occurred. However, on a motion to set aside a jury verdict, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant (see *Tapia v. Dattco, Inc*, 32 AD3d 842 [2nd Dept 2006]; quoting *Hand v. Field,* 15 AD3d 542 [2d Dept 2005]). Viewing the facts in the light most favorable to the plaintiff, the evidence adduced at trial was at least sufficient to establish a *prima facie* case that the plaintiff's injuries were the result of the defendant's actions.

When a party, as the defendant, by its affirmative acts of negligence has created or increased a

dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in negligence (see *Gene v. Metro-North Commuter RR*, 261 AD2d 211 [1st Dept 1999]). Here, the evidence, seen in a light most favorable to plaintiff, is clearly sufficient to allow the jury to draw the inference that the Town, in sanding and salting the parking lot after the March 8 snowfall, created or increased the hazardous icy condition as its actions caused the snow and ice to melt and refreeze.

As to defendants' argument that testimony of subsequent treatment of Lot M11 after plaintiff's accident should not have been entered into evidence, the courts have recognized exceptions where the evidence is offered to show control, impeachment or feasibility of precautionary measures (see *Shvets v. Landau*, 121 Misc2d 34 [Kings County Sup. Ct. 1983]). Here, the evidence regarding the Town's salting and sanding of the lot was not offered to demonstrate the existence of a defective condition, as it was to impeach Mr. Tricarico's testimony that he saw asphalt on the surface of M11 lot on March 9, 2005, obviating the need to treat the lot. Yet, after admitting that there was no precipitation on that day or the following day, March 10, 2005, he salted and sanded the very lot where he claimed to have seen asphalt.

The defendant Town's reliance on and arguments regarding its Town Law requiring prior written notice of a defective condition of its highway and/or streets is also unavailing. There are two exceptions to the statutory rule requiring prior written notice of a sidewalk defect, namely, where the municipality created the defect or hazard through an affirmative action of negligence and where a special use confers a special benefit upon the municipality (see *Lopez v. G & J Rudolph Inc.*, 20 AD3d 511 [2d Dept 2005]). The jury's verdict that the Town affirmatively created and/or exacerbated the icy condition by its actions, so as to preclude it from relying on prior written notice law, was not against the weight of the evidence and accordingly, will not be set aside as matter of law (see NY CPLR

§4404(a); *Desposito v. City of New York*, 55 AD3d 659 [2nd Dept 2008]).

Finally, since the weather on the morning of plaintiff's accident had been clear, no further precipitation could have caused the icy condition. It would not, under such circumstances, be unreasonable for the jury to infer that the ice on which plaintiff slipped was the result of the Town's March 8, 2005 salt and sand operations and that, had the Town performed its duties with due care, the ice condition would not have been present (see *Figueroa v. Lazarus Burman Associates*, 269 AD2d 215 [1st Dept 2000]).

CHARGE TO JURY INADEQUATE.

The relevant section of CPLR § 4110-b provides in part;

> ...[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. When no timely and specific objection is taken to a jury instruction, the law as stated in instruction becomes the law applicable to the determination of the rights of the parties in the litigation, and thus establishes the legal standard by which the sufficiency of the evidence to support the verdict must be judged...

As to defendants' argument that the charge to the jury, as issued by the Court, is inadequate, the record indicates that the parties participated in a charge conference where the defendant had input and even made modifications to the proposed jury instructions. Moreover, the Court gave the charge to the jury and then inquired of the parties as to whether there was any objection to such charge. The defendant's counsel responded in the negative.

Defendant did not, in any way, demonstrate his discontent with the charge before the jury retired, although the opportunity to do so was presented. This inaction and abject failure to object, constituted a waiver of defendants right to raise the issue (see *Emmons v. County Lincoln Mercury Sales*, 111 AD2d 213 [2d Dept 1985], *Gerdyil v. Rizzo*, 67 AD3d 637 [2d Dept 2001]).

CONCLUSION

The Court has reviewed the Town's remaining contentions and have found them to be without merit. Accordingly, its motion is **denied** in its entirety.

This constitutes the Decision and Order of the Court.

DATED: December 10, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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