

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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CLARA GARRETT,

INDEX NO. 152892/2013

Plaintiff,

MOTION SEQ. NO. 003

- v -

NEW YORK CITY TRANSIT AUTHORITY,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 47, 48, 49, 50, 51, 52, 53, 54, 57, 58

were read on this motion to/for SET ASIDE VERDICT

Upon the foregoing documents, it is ordered that the motion is denied.

Defendant New York City Transit Authority moves for an order: 1) pursuant to CPLR 4401 and 4404, setting aside the jury verdict rendered against it and dismissing the action, or, in the alternative; 2) granting defendant a new trial on the ground that the verdict was contrary to the weight of the evidence and excessive; or 3) conditionally reducing the damages awarded to plaintiff. Plaintiff Clara Garrett opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on September 26, 2012 in which plaintiff, approximately 65 at the time; was injured when she slipped and fell on a defective stairway located at the Union Square subway station. Doc. 1.¹ Following a trial held on July 26, 28, and 31, 2017, a jury determined that defendant was liable because it had constructive notice of an unsafe condition on the stairway and awarded plaintiff \$40,000 for past pain and suffering and \$160,000 for future pain and suffering. Docs. 45, 48.

Plaintiff, the sole witness to the accident, testified at trial that the accident occurred at approximately 12:30-12:45 p.m. when, while she was about to descend the stairway, she stepped off the landing with her right foot into a “cake like substance”, “started to slip between the first and second step” and, although she was upright by second step, she slipped off third step. Doc. 49, at p. 13, 15, 18. She then fell and her wrist struck the stairs. Doc. 49, at p. 17. She maintained that the edge of the third step was worn and shiny and that a photograph of the stairs marked as an exhibit at trial reflected that the step was in that condition. Doc. 49, at p. 14-15. The photograph of the stairs was taken “right around the incident or a couple of months afterwards.” Doc. 49, at p. 13. According to plaintiff, the photograph was taken by an investigator or a good Samaritan. Doc. 49, at p. 14, 78.

After the incident, plaintiff was taken to the hospital, where she learned her wrist was fractured, and doctors reset the bone in her wrist, causing her a great deal of pain. Doc. 49, at p. 22-23. She was discharged from the hospital that evening at approximately 11 p.m. Doc. 49, at

¹ Unless otherwise indicated, all references are to the documents filed with NYSCEF in this matter.

p. 22. She wore a cast on her dominant hand for approximately 2-3 months. Doc. 49, at p. 23, 25. While she wore the cast, she had a lot of pain, could not drive, and needed assistance with basic activities such as cleaning and bathing. Doc. 49, at p. 24-26. Although plaintiff admitted that she went on a cruise approximately 2 months after the incident, she maintained that she went with a friend who assisted her with activities of daily living. Doc. 49, at p. 27-28.

Approximately 2-3 weeks after the accident, plaintiff visited Dr. Fragner, an orthopedist. Doc. 49, at p. 26. She saw Dr. Fragner every 2-3 weeks for a total of 5-6 visits. Doc. 49, at p. 27. She also went to physical therapy for several months. Doc. 49, at p. 30.

Prior to the accident, plaintiff, a right-handed retired teacher, played tennis as a hobby. Doc. 49, at p. 6-7. Since the accident, plaintiff has been unable to play tennis. Doc. 49, at p. 32. She wears a wrist brace for support every day except when she bathes or sleeps. Doc. 49, at p. 32. Plaintiff continues to have pain in her wrist, takes Aleve as needed, and still has difficulty performing certain tasks. Doc. 49, at p. 33-34.

On cross-examination, plaintiff admitted that, at her 50-h hearing, she stated that she fell because she slipped on cake which was on the steps, and that she did not see that food before her fall. Doc. 49, at p. 40, 44. She also admitted that, at her deposition, she said that she had cake on her right shoe but was not certain whether there was cake on her left foot. Doc. 49, at p. 59-60. She conceded that the cake contributed to the accident but did not cause it. Doc. 49, at p. 58. Plaintiff further stated that, although she could not drive for 2 ½ months after the incident, she was thereafter able to drive again. Doc. 49, at p. 48.

Plaintiff conceded that she did not know exactly when the photograph of the stairway was taken but said she believed she was there when it was taken. Doc. 49, at p. 56, 76. Plaintiff then stated that she was not certain whether she was present when the photograph was taken. Doc. 49, at p. 77-79. She was not certain whether the photograph was taken at the time of the accident or “a couple [of] months later.” Doc. 49, at p. 57. However, she maintained that the photograph depicted the stairway she fell on. Doc. 49, at p. 79.

Surgery has never been performed on plaintiff’s right wrist and she last visited a doctor for the wrist in 2015. Doc. 49, at p. 61.

Plaintiff’s expert, Robert Schwartzberg, a licensed professional engineer, testified that stairs are comprised of risers, treads, and nosing. Doc. 50, at p. 15. The riser is the vertical face of a step. Doc. 50, at p. 9. The tread is the horizontal part of the step. Doc. 50, at p. 9. The nosing, or “forward most part” of a step, is the part one’s foot usually lands on and is supposed to provide good traction. Doc. 50, at p. 12-13, 15. If the nosing is slick or slippery, one can slide off of it. Doc. 50, at p. 15.

When Schwartzberg measured the treads and risers, he found that they were not of uniform size and thus violated reasonably accepted engineering standards. Doc. 50, at p. 19-21. He further observed that the treads were not level, which could cause an individual to lean forward when descending the steps. Doc. 50, at p. 22. Additionally, Schwartzberg measured the coefficient of friction on the third tread down, where plaintiff allegedly fell, and found it to be between .39 and .47, below the accepted standard of .5. Doc. 50, at p. 24-25.

Schwartzberg opined, based on the photograph of the stairway marked into evidence, that the nosings on the steps were worn, uneven and irregular. Doc. 25, at par. 26. He postulated that, if plaintiff stepped in cake with her right foot on the first step down, and then tried to regain her balance by placing her left foot on the third step down, she would slide off of the third step since it had a low coefficient of friction and was on an angle. Doc. 25, at p. 27. He further opined, based on the photograph and his measurements, that the condition of the stairs existed for “many years” prior to the accident. Doc. 25, at p. 28.

In rendering his opinion, Schwartzberg relied on the photograph of the stairway, the notice of claim, the bill of particulars, and his inspection of the stairway on August 3, 2014. Doc. 50, at p. 3, 6, 8. His inspection revealed that nothing more than “cosmetic changes” to the stairs between the time the photograph was taken after the accident and the date of his inspection. Doc. 50, at par. 17.

CONTENTIONS OF THE PARTIES:

Defendant argues that the verdict must be set aside as against the weight of the evidence because the testimony of plaintiff and Schwartzberg were incredible as a matter of law and failed to establish that it had constructive notice of the alleged defect. It further asserts that the damages awards for past and future pain and suffering must be set aside since they are excessive and contrary to the weight of the evidence.

In opposition, plaintiff argues that the jury had sufficient evidence to conclude that the unsafe condition of the third step prevented her from recovering from her fall after stepping into

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