SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. RICHARD F. BRAUN J.S.C. Justice

PART 23

GARDNER, Venisha

-v-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

INDEX NO. 153937/12

MOTION DATE 11/3/17

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for SET ASIDE the VERDICT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 2

Answering Affidavits — Exhibits _____ No(s). 3

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this oral motion is granted to the extent of setting aside the verdict, and dismissing the Complaint in this action, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of this Court. See separate Opinion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NEW YORK, NEW YORK, DECEMBER 22, 2017

ENTER: _____, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. RICHARD F. BRAUN J.S.C. Justice PART 23

GARDNER, VENISHA

-v- CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

INDEX NO. 153937/12

MOTION DATE 12/8/17

MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for set aside the verdict

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits ____ No(s). 1, 2

Answering Affidavits — Exhibits ____ No(s). 3

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is denied.

This constitutes the decision and order of the Court. See separate Opinion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: New York, New York, December 21, 2017

ENTER: _____, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

----------X

VENISHA GARDNER,

Index No. 153937/2012

Plaintiff,

OPINION

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,

Defendant.

----------X

RICHARD F. BRAUN, J.:

This is a personal injury action due to defendant's alleged negligence. Plaintiff was injured on September 22, 2010, when she bumped into a trash bag containing discarded broken florescent bulbs at a Ricky's Halloween Costume Store where she was employed. A bifurcated trial was held between October 6, 2017 and November 3, 2017, at which plaintiff asserted that an employee of defendant Consolidated Edison Company of New York Inc. (hereinafter "Con Edison") was present and responsible for leaving the broken bulbs in the garbage bag, and thus Con Edison is liable. Con Edison introduced evidence that it does not do electrical work inside of buildings, that energy efficiency programs sponsored by Con Edison are handled by independent contractors, and that the subject location was not part of such a program. The jury found Con Edison liable and awarded plaintiff $200,000 for past pain and suffering, $26,000 for past medical expenses, $39,000 for past lost earnings, and $648,000 for 54 years of future pain and suffering. Con Edison moves for an order, pursuant to CPLR 4404 (a), to set aside the liability verdict as legally insufficient and to dismiss the complaint against Con Edison, or alternatively for a new trial because the verdict is

against the weight of the credible evidence.[1] Con Edison contends, among other things, that plaintiff failed to prove as a matter of law that Con Edison was negligent.

As the Court of Appeals explained in *Killon v Parrotta* (28 NY3d 101, 107 [2016]):

> The Appellate Division may not disregard a jury verdict as against the weight of the evidence unless "the evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]). Where the Appellate Division determines that a verdict is against the weight of the evidence, the remedy is to remit for a new trial. By contrast, where the Appellate Division intends to hold that a jury verdict is insufficient as a matter of law, it must first determine that the verdict is "utterly irrational" (*Campbell v City of Elmira*, 84 NY2d 505, 510 [1994]). To conclude that a verdict is utterly irrational, requiring vacatur of the verdict, the Court must determine that "there is simply no valid line of reasoning and permissible inferences which could possibly lead [a] rational [person] to the conclusion reached by the jury on the basis of the evidence presented at trial" (id. at 509 [emphasis omitted]). "When it can be said that 'it would not be utterly irrational for a jury to reach the result it . . . determined . . . , the court may not conclude that the verdict is as a matter of law not supported by the evidence' " (id. at 510 [emphasis omitted], quoting *Cohen*, 45 NY2d at 499).

As the First Department recently reiterated in *Piro v Demeglio* (150 AD3d 907, 908 [1st Dept 2017]):

> Pursuant to CPLR 4404(a), 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

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[1] The motion papers were improperly noticed as returnable in Part 23 rather than in the Motion Support Office Courtroom of the General Clerk's Office (Room 130), as required by Rule 13 (a) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County. Consequently, by separate decision and order of December 21, 2017, that motion was denied. However, an oral motion for the same relief was made at the close of the trial, and it was agreed that the court would await papers on the motion before deciding it. The court will address the oral motion on the merits, as argued in the papers submitted. To the extent that the court denied defendant's oral motions for a directed verdict after plaintiff rested at the close of the evidence on liability and to set aside the jury's first verdict on liability, those determinations are recalled and vacated.

Plaintiff's affirmation in opposition is 45 pages long, in violation of Rule 14(b) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County, and it cites legal authority in violation of 22 NYCRR 202.8(c) (*cf. Armendariz v Tiramisu Restaurant, Inc.*, 170 AD2d 334, 334-335 [1st Dept 1991] [in interpreting the similar Civil Court rule, the Court stated that counsel's inclusion of legal discussion in supporting affirmations, though improper, did not involve frivolous conduct such as would support sanctions under 22 NYCRR Part 130, but such conduct could support the rejection of the affirmations, or the commencement of contempt or Departmental Disciplinary Committee proceedings]).

> as a matter of law. In order for a court to do so, there must be 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, and no rational process by which the jury could find in favor of the nonmoving party (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499; *Rumford v Singh*, 130 AD3d 1002, 1003–1004). In considering such a motion, "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" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Rumford v Singh*, 130 AD3d at 1004).

Evidence that there was a Con Edison hard hat on the ground and that the person working on the light bulbs was wearing a blue hard hat and a Con Edison tag/I.D. was sufficient to allow the jury to reasonably conclude that an individual that worked for Con Edison was present, and responsible for removing the light bulbs and leaving them in the trash bag. However, that evidence was not sufficient to show that the individual was acting within the scope of his employment, i.e. that he was performing acts in furtherance of his employer's business. "[T]he doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment" (*Riviello v Waldron*, 47 NY2d 297, 302 [1979]). As *Riviello v Waldron* (*id.* at 303) explains:

> Among the factors to be weighed [to determine whether the conduct of a particular employee falls within the ambit of employment] are: the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated

As the First Department stated in *Davis v City of New York* (226 AD2d 271, 271–272 [1st Dept 1996]):

> The rule is well settled that when a plaintiff invokes the doctrine of respondeat superior, the plaintiff has the burden of establishing by a fair preponderance of the credible evidence that the act complained of occurred while the defendant's employee was acting within the scope of his employment ... (*McDowell v City of*

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