

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK Index No.: 300939/2010
COUNTY OF BRONX

ANYOLINA MATA,

Plaintiff,

Present:
HON. NORMA RUIZ

-against-

NEW YORK CITY TRANSIT AUTHORITY

Defendant.

The following papers numbered 1 to 3 Read on this motion Set Aside
Noticed on and duly submitted as No. 24 on the Motion Calendar of 12/3/12

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
	Notice of Motions and Affidavits Annexed.....	1- 2
	Notice of Cross Motion and Answering Affidavits.....	3
	Replying Affidavits	
	Memorandum of Law	

Other:

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

The defendant New York City Transit Authority ("NYCHA") moves to set aside the jury's verdict on numerous grounds. Upon a review of the moving papers and opposition submitted thereto the motion is denied for the reasons set forth below.

In this negligence action, it is alleged that on October 30, 2009 at approximately 8:00 a.m. the plaintiff was crossing the Grand Concourse and tripped and fell over a defect located on a portion of the median that was adjacent to a metal grate that was installed and maintained by the NYCTA causing her to sustain injuries.

This action was tried before this Court and a jury rendered a verdict in favor of the plaintiff. The defendant failed to annex a copy of the jury's verdict sheet. It states, however, in the moving papers that the jury found liability 100% in favor of the plaintiff and awarded the plaintiff \$2,500,000.00 for past pain and suffering, \$3,500,00.00, \$100,000.00 for past medical expenses and \$100,000.00 for future medical expenses.

Defendant now moves to set aside the verdict on the grounds that the verdict was contrary to the weight of the evidence, an unjust result, and excessive. The Court notes that the only exhibits annexed to the moving papers were (1) the trial transcript of the plaintiff's testimony; (2) the trial transcript of the testimony of the plaintiff's expert, Mr. Nicolas Bellizzi's ("Bellizzi"); (3) the Preliminary Conference Order and; (4) a compilation of cases in which Bellizzi was retained as an expert.

In the moving papers, the defendant contends that the plaintiff lied about a material fact at trial. That she concealed from all parties, until cross examination at trial, that she had a life long medical condition that causes dizziness, blurred vision and hallucinations when raising her head from a lowered position to a raised position. Movant further contends plaintiff testimony (or lack thereof) constitutes perjury and as such, the verdict should be set aside.

The Court read the plaintiff's entire trial testimony and finds no merit to this argument. When confronted with questions regarding her thyroid condition, which causes the above symptoms, the plaintiff admitted it was true. She denied being deceitful and attributed any inconsistencies to not being asked if she suffered from "dizzy spells" or "blurred vision". She further testified that she considers herself to be in good health because the thyroid issue is well controlled and is not serious in nature. In addition, she expressly denied having a dizzy spell prior to her fall. Moreover, there was no evidence that plaintiff had a dizzy spell prior to her fall. The Court notes that despite the fact the plaintiff suffers from a health condition that causes dizziness, such does not rule-out that she tripped and fell over a hazardous defect on the date of the accident unattributable to that condition. The defendant's position that the plaintiff did not trip but instead had a dizzy spell and fainted is wholly speculative (see *Stewart v. New York City*

Transit Auth., 82 AD3d 438 [1st Dept 2011][Court held it would have been overly prejudicial to permit the jury to speculate that plaintiff fell because of his prior condition]). The jury learned of the plaintiff's thyroid condition on cross examination and choose to credit the plaintiff's testimony that she tripped and fell. That was well within their prerogative.

Defendant also argues that Bellizzi's expert opinion testimony was improper because it was provided without any foundation. In support, it annexed a list of unrelated cases that precluded Bellizzi's opinion as speculative, or incredible as a matter of law. However, those cases are unrelated to the case at bar. In addition, the defendant gave a lengthy description of many of Bellizzi's expert opinions that were "devoid of any factual foundation" or deemed incredible as a matter of law. With respect to the case at bar, defendant contends that Bellizzi was retained years after the accident and just adopted the plaintiff's version of what happened without offering any independent analysis, or sufficient details to reach any conclusion. Defendant contends that all Bellizzi did was look at some pictures and conclude that the accident could have happened as the plaintiff stated.

As the plaintiff correctly noted, photographs may suffice to establish the existence of a defect and construction notice (*Taylor v New York City Transit Auth.*, 48 NY2d 903, 904 [1979]). Bellizzi was a qualified expert and he properly formed an opinion based on the facts in evidence, namely the photographs (*see Bonds v. New York City Housing Auth.*, 299 AD2d 183, 184 [1st Dept 2002][Expert testimony was admissible at trial where it was based on deposition testimony and photographs that had been entered into evidence]).

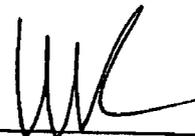
Lastly, the defendant argues that the jury's award for past and future pain and suffering is excessive. However, the defendant failed to provide the Court with any of the medical evidence or the trial transcripts of the doctors who testified at trial. Instead, it summarized the injuries as follows: "Plaintiff underwent two surgeries, one for her back and one for her wrist. She underwent a laminectomy with lumbar fusion." The Court has no idea from this summary what the plaintiff's injuries were, the extent of the injuries,

what the surgeries entailed, or the current medical prognosis. As of this writing, the Court has presided over numerous trials and can not rely on recollection to determine the adequacy of the jury's award for damages in this trial. Movant should have annexed the relevant trial transcripts of the medical experts. Since the motion does not contain the full trial transcript necessary to make a determination, the Court must deny the application (*Tesciuba v. Cataldo*, 189 AD2d 655, 655 [1st Dept 1993][“There can be no review of plaintiff's claimed entitlement to a new trial without a full trial record”]; *McCarthy v. 390 Tower Assoc., LLC*, 9 Misc.3d 219 [Sup. Ct. New York 2005][“To the extent that the court is expected to rely upon recollection and the parties characterization of evidence and testimony as to what the record contains, the applications are inadequate without a copy of the transcript, and/or relevant excerpts of testimony and arguments”]).

Accordingly, the defendant's motion is denied. Any stays in effect are hereby vacated.

This constitutes the decision and order of the Court.

Dated: 6/10/13
Bronx, New York



HON. NORMA RUIZ, J.S.C.