SHORT FORM ORDER

INDEX No. 99-1097

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY



***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/10/08
ADJ. DATES 12/5/08
Mot. Seq. # 009 - MD

| | |
|---|---|
| LINDA BRINKMAN & VALENTINUS BRINKMAN, Plaintiffs, | FLOMENHAFT & CANNATA, LLP<br>Attys. For Plaintiffs<br>90 Broad St.<br>New York, NY 10004 |
| -against- | McHENRY, HORAN & LAPPING, PC<br>Attys. For Def. Mebrathu<br>6800 Jericho Tnpk.<br>Syosset, NY 11791 |
| ANTHONY V. SPEZZANO, D.C., SAMPSON MEBRATHU, M.D. and RAPHAEL DAVIS, M.D. Defendants. | SCHIAVETTI, CORGAN, SOSCIA, ETAL<br>Attys. For Def. Davis<br>575 Eighth Ave.<br>New York, NY 10018 |

Upon the following papers numbered 1 to 7 read on this motion to vacate judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5; 6-7 ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#009) by the plaintiffs for an order vacating the judgment entered by the Clerk on August 21, 2008 in favor of the defendant, Sampson Mebrahtu, M.D. (s/h/a Mebrathu) in accordance with a June 21, 2008 jury verdict and for vacatur of a separate judgment entered by the Clerk on August 29, 2008 in favor of the defendant, Raphael Davis, M.D., in accordance with the June 21, 2008 verdict, is considered under CPLR Articles 50 and 44 and is denied.

In this medical malpractice action, the plaintiffs' claims against defendant, Sampson Mebrahtu, M.D. (hereinafter "Mebrahtu") and defendant, Raphael Davis, M.D. (hereinafter "Davis") were determined by a jury on June 21, 2008 after a lengthy trial. By such verdict, the jury found in favor of each of said defendants. The clerk entered a judgment in favor of Mebrahtu on August 21, 2008 and a separate judgment in favor of Davis on August 29, 2008.

The plaintiffs now move to vacate said judgments pursuant to CPLR 5011 and 5015 on the grounds that the above described judgments "are premature and improperly entered before determination of the post trial motion." Plaintiffs also demand "reimbursement for the costs of the making of this motion and for

filing of two notices of appeal in response to the premature judgments." Alternatively, the plaintiffs demand an order staying execution of the August 21, 2008 judgment which awarded costs in favor of Mebrahtu in the amount of $950.00.

Underlying these demands for relief are allegations that the plaintiffs had obtained leave of the court to file a motion pursuant to CPLR 4404 and that during the pendency of such leave, the defendants entered their separate judgments. The plaintiffs argue that these circumstances render said judgments improper due to prematurity and warrant their vacatur and the incidental monetary and other relief demanded by the plaintiffs.

The court, however, rejects the foregoing contentions of the plaintiffs. It is well established that this court has jurisdiction to entertain a timely motion pursuant to CPLR 4404 to set aside a verdict notwithstanding that a final jury verdict has been entered thereon (*see* ***Manning v Brookhaven Mem. Hosp. Med. Ctr.***, 11 AD3d 518, 782 NYS2d 833 [2d Dept 2004]; *see also* ***Patrella v Atlantic Chiropractic Group***, 41 AD3d 806, 839 NYS2d 177 [2d Dept 2007]). Here, it is not disputed that the plaintiffs' motion was timely, under the extensive leave granted by the court to the plaintiffs with respect to the time within which their motion had to have been interposed. The plaintiffs' claims that entry of the judgments at issue were improper due to prematurity are thus, rejected as unmeritorious. The plaintiffs' demands for vacatur of said judgments and the incidental relief demanded in connection therewith, are thus denied.

The court also denies the plaintiffs' alternative demands for a stay of the execution of Mebrahtu's judgment. Mebrahtu, by his counsel, has indicated that he will not seek to enforce or execute on his judgment, which contained an award of costs in the amount of $950.00, until the plaintiffs' pending motion and appeals have been determined.

In view of the foregoing, this motion (#009) by the plaintiffs for, among other things, vacatur of the judgments entered on the jury verdict rendered herein, is denied.

DATED: 2/10/09

THOMAS F. WHELAN, J.S.C.

SHORT FORM ORDER

INDEX No. 99-1097

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY



***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/7/08
ADJ. DATES 12/5/08
Mot. Seq. # 008 - MD

| | |
|---|---|
| LINDA BRINKMAN & VALENTINUS BRINKMAN,<br><br>Plaintiffs,<br><br>-against-<br><br>ANTHONY V. SPEZZANO, D.C., SAMPSON MEBRATHU, M.D. and RAPHAEL DAVIS, M.D.<br><br>Defendants. | FLOMENHAFT & CANNATA, LLP<br>Attys. For Plaintiffs<br>90 Broad St.<br>New York, NY 10004<br><br>McHENRY, HORAN & LAPPING, PC<br>Attys. For Def. Mebrathu<br>6800 Jericho Tnpk.<br>Syosset, NY 11791<br><br>SCHIAVETTI, CORGAN, SOSCIA, ETAL<br>Attys. For Def. Davis<br>575 Eighth Ave.<br>New York, NY 10018 |

Upon the following papers numbered 1 to 11 read on this motion to set aside verdict ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5; 6-7 ; Replying Affidavits and supporting papers 8-11 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#008) by the plaintiffs for an order setting aside the jury verdict rendered in favor of the defendants and awarding the plaintiff judgment as a matter of law or directing a new trial, is considered under CPLR 4404 and is denied.

The plaintiff commenced this action to recover damages purportedly attributable to acts of malpractice and negligence committed by the defendants, Sampson Mebrahtu, M.D. (hereinafter "Mebrahtu") and Raphael Davis, M.D. (hereinafter "Davis") during their treatment of the plaintiff, Linda Brinkman for injuries to her back and neck which she sustained in a 1994 automobile accident. Specifically, the plaintiffs charge Davis with malpractice in performing contraindicated spinal fusion surgery on plaintiff, Linda Brinkman, in January of 1998. They charge Mebrahtu with malpractice by reason of his failure to prescribe continued physical therapy in 1995 and in failing to report the absence of reflex abnormalities to Davis in March of 1997.

The plaintiffs' claims against Davis and Mebrahtu were tried before a jury in May and June of 2008. The jury returned a verdict in favor of the defendant doctors on June 20, 2008. The plaintiffs' oral motion

to set aside the verdict as against the weight of the evidence was denied without prejudice to the interposition of a noticed motion for the said relief. The plaintiffs' time to interpose said motion was extended on several occasions by the court.

By the instant motion, the plaintiffs seek to set aside the verdict on the issue of liability and for a judgment in their favor as a matter of law. Alternatively, the plaintiffs demand an order setting aside the verdict as against the weight of the evidence and directing that a new trial be held. For the reasons set forth below, the motion is denied.

To establish a prima facie case of liability in a medical malpractice action, it is incumbent upon the plaintiff to prove that the defendant deviated from accepted medical practice and that such deviation proximately caused the plaintiff's injuries (*see* ***Monroy v Glavas***, 57 AD3d 631, 870 NYS2d 371 [2d Dept 2008]). To meet this burden, the plaintiff ordinarily relies upon expert testimony, as such testimony is necessary to establish a deviation from the requisite standard of medical care and in most cases, to establish proximate cause (*see* ***Deadwyler v North Shore Univ. Hosp. at Plainview***, 55 AD3d 780, 866 NYS2d 306 [2d Dept 2008]; ***Zak v Brookhaven Mem. Hosp. Med. Ctr.***, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]). To establish proximate cause, the plaintiff must present sufficient evidence from which a reasonable person might conclude that it was more probable than not that the defendant's deviation was a substantial factor in causing the injury (*see* ***Alicea v Ligouri***, 54 AD3d 784, 864 NYS2d 462 [2d Dept 2008]).

The proponent of a CPLR 4404 motion to set aside a jury verdict on the grounds that, as a matter of law, said verdict is not supported by sufficient evidence must demonstrate that there is no valid line of reasoning and permissible inferences which would lead rational persons to the conclusions reached by the jury (*see* ***Cohen v Hallmark Cards, Inc.***, 45 NY2d 493, 410 NYS2d 282 [1978]; ***Patrella v Atlantic Chiropractic Group***, 41 AD3d 806, 839 NYS2d 177 [2d Dept 2007]; ***White v Kyung Kim***, 29 AD3d 685, 814 NYS2d 876 [2d Dept 2006]). Here, the evidence adduced at the trial was sufficient as a matter of law as it is evident therefrom that a valid line of reasoning could have led the jury to conclude that neither Davis nor Mebrahtu departed from good and acceptable medical practice during their treatment of the plaintiff. Accordingly, those portions of this motion by plaintiffs for an order setting aside the verdict and granting judgment to the plaintiffs as a matter of law, are denied.

The plaintiffs' alternative demands for relief pursuant to CPLR 4404(a) are also denied. It is well established that a jury verdict should not be set aside as against the weight of the evidence unless the verdict could not have been reached in any form of interpretation of the evidence (*see* ***Lolik v Big V Supermarkets***, 86 NY2d 744, 631 NYS2d 122 [1995]; ***Goldberg v Sottile & Megna, MD, PC***, 54 AD3d 359, 863 NYS2d 70 [2d Dept 2008]). If the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to a presumption that the jury adopted that view (*see* ***Ashby v Mullin***, 56 AD3d 588, 868 NYS2d 687 [2d Dept 2008]; ***Pearson v Walker***, 44 AD3d 1019, 846 NYS2d 194 [2d Dept 2007]). The test in determining an application to set aside a verdict as against the weight of the evidence is not whether the jury erred in weighing the evidence but whether any viable evidence existed to support the verdict (*see* ***Lolik v Big V Supermarket***, 86 NY2d 744, *supra*). Where the parties present expert testimony, or any other evidence in support of their respective contentions, it is within the province of the jury to resolve any conflicts between the testimony of the witnesses, experts or otherwise (*see* ***Cohen v Kasofsky***, 55 AD3d 859, 868 NYS2d 70 [2d Dept 2008]; ***Goldberg v Sottile & Megna, MD, PC***, 54 AD3d 359, *supra*; ***Bobek v Crystal***, 291 AD2d 521, 739 NYS2d 396 [2d Dept 2002]).

Upon review of the trial evidence, it appears that the jury's determination that neither of the defendants departed from good and accepted medical practice with respect to their respective decisions to stop physical therapy in 1995 and to perform fusion surgery in 1998 on the plaintiff's back was based upon a fair interpretation of the evidence presented a trial. The plaintiffs' attempt to characterize the testimony

of defendants' witnesses as misleading, to reargue evidentiary rulings made during the course of the trial and to introduce new and additional evidence is rejected as unmeritorious (*see* ***Siegle v County of Fulton***, 174 AD2d 930, 571 NYS2d 626 [3d Dept 1991]; ***Beechy v DeSorbo***, 53 AD2d 727, 383 NYS2d 925 [2d Dept 1976]; ***Kirby v Mafox Realty Corp.***, 272 AD2d 889, 71 NYS2d 124 [1st Dept 1947]).

In view of the foregoing, the instant motion by the plaintiffs for relief pursuant to CPLR 4404 is in all respects denied.

DATED: 2/10/09

THOMAS F. WHELAN, J.S.C.