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

**PRESENT:** HON. MARY V. ROSADO **PART** 33M

*Justice*

----------X

DEAN C FOCARILE,

Plaintiff,

- v -

G.A. WINDOWS INC. D/B/A ADLER WINDOWS, WA WA WINDOWS INC., BLUE WOODS MANAGEMENT GROUP INC.,720 WEST 173RD STREET OWNERS CORP.

Defendant.

----------X

**INDEX NO.** 151894/2018

**MOTION DATE** 06/03/2024

**MOTION SEQ. NO.** 006

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270

were read on this motion to/for SET ASIDE VERDICT.

Upon the foregoing documents, and after oral argument, which took place on September 23, 2024, where Jonathan R. Ratchik, Esq. appeared for Plaintiff Dean C. Focarile ("Plaintiff"), Keith J. Norton, Esq. and Richard W. Ashnault, Esq. appeared for Defendants Bluewoods Management Group, Inc. and 720 West 173rd Street Owners Corp., ("Building Defendants") and Edward Guardaro, Jr. Esq. and Susan Scaria, Esq. appeared for Defendant G.A. Windows Inc., d/b/a Adler Windows ("Adler") (collectively "Defendants"), Plaintiff's motion to set aside the verdict is denied.

## I. Factual and Procedural Background

This is an action for personal injuries which Plaintiff alleges he sustained after window capping fell from a building located at 736 West 163rd Street, New York, New York (the "Premises"). After the close of discovery, all parties moved for summary judgment (*see* Mot. Seq. 003). On March 22, 2022, the Hon. James D'Auguste issued an Amended Decision and Order denying all

parties' motions. Justice D'Auguste specifically found "the existence of a sharp issue of fact" regarding "whether or not the falling piece of window capping hit the plaintiff." (NYSCEF Doc.168). The basis for this issue of fact lay in conflicting testimony from numerous witnesses as to whether the window capping actually hit Plaintiff. Although a notice of appeal was filed (NYSCEF Doc. 171), the appeal was ultimately withdrawn.

This matter then proceeded to trial by jury before the undersigned. After nearly a month of trial, with testimony from numerous fact and expert witnesses, the jury returned a verdict in favor of the Defendants. Specifically, the jury found that Plaintiff was not hit on the head by the window capping (NYSCEF Doc. 238). Plaintiff now moves to set aside the verdict.

Plaintiff argues that because a disinterested witness testified that he saw Plaintiff get hit on the head by window capping, and Defendant Adlers' incident report stated that Plaintiff was hit on the head by a piece of loose capping, there was no basis for the jury to find that Plaintiff was not hit on the head. Plaintiff also relies on medical evidence, which indicates Plaintiff's medical condition could only be explained by a traumatic brain injury. Although Plaintiff concedes that a jury's conclusions are to be afforded great deference, here the only fair interpretation of the evidence is that Plaintiff was hit on the head by the window capping.

The Defendants oppose. Defendants highlight the testimony of Mr. Mundo, the building superintendent, who testified he witnessed the capping fall from the window and it did not hit Plaintiff. Defendants also point to the fact that Plaintiff never called the police or sought emergency medical assistance after he suffered an allegedly traumatic brain injury, but instead drove to work. While driving to work, Plaintiff was able to text the building manager and Mr. Adler, the principal of Defendant Adler Windows. Defendants point to the testimony of Mr. Cotto, an Adler employee, who swore that Plaintiff told him that something "almost" hit him. Defendants dispute the validity

of the incident report since it was filled out by an employee who was not on site; did not witness the accident, and allegedly misstated information provided by Mr. Cotto. Defendants allege the only witness who claimed the cap hit Plaintiff, Mr. Palma, admitted he was blind in one eye. Defendants further rely on a "live" photo taken by Plaintiff, where Plaintiff can be heard saying "That's right, it didn't hurt me."

Defendants cite to medical notes from Plaintiff's doctor, Albert Z. Szabo, MD, who examined Plaintiff the day after his accident, and found "no obvious evidence of any head trauma. Careful examination of his scalp does not reveal any trauma." (NYSCEF Doc. 257 at 74). Defendants cite to Plaintiff's own expert, Dr. Greenwald, who admitted that an MRI taken the day after the accident showed normal results (Tr. at 831-32). Defendants also attribute Plaintiff's complaints about migraines to Plaintiff's family history of migraines – specifically evidence that Plaintiff's mother and sister both experience migraines. The jury heard evidence that Plaintiff was "self-treating" with LSD, psilocybin, and marijuana. Plaintiff further had a medical history for photophobia, vertigo, and headaches, all dating back to the 1990s, and a bipolar diagnosis. He also admitted to a history of cocaine and ecstasy use. Defendants argue the Court may not set aside the jury's verdict as the evidence presented a valid line of reasoning to reach the conclusion that Plaintiff was not hit on the head by the window capping and his ailments were explained by other causes.

In reply, Plaintiff argues that the objective medical evidence, namely Plaintiff's concussion symptoms, can only be explained by a head injury. Plaintiff argues that the only fair interpretation of the evidence is finding that he was hit on the head by the window capping. Plaintiff also argues that the Defense witness testimony that the capping did not hit Plaintiff is a fabrication.

## II. Discussion

In order for this Court to disregard the jury's verdict, the weight of the evidence must be "'so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence'" (*Killon v Parrotta*, 28 NY3d 101, 107 [2016] quoting *Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]). The jury is to be afforded great deference, and the jurors may reject the testimony of experts and assess the credibility of witnesses (*Rozon v Schottenstein*, 204 AD3d 94 [1st Dept 2022]).

In determining whether a verdict is against the weight of the evidence, the non-moving party is afforded "every inference which may properly be drawn from the facts presented, and the facts must be considered in the light most favorable to the nonmovant" (*KBL, LLP v Community Counseling & Mediation Services*, 123 AD3d 488 [1st Dept 2014] quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Where there is conflicting testimony as to the existence of a dangerous condition or occurrence, the jury is entitled to determine which fact witnesses it finds most credible (*Gonzalez v NYC Department of Citywide Administrative Services*, 190 AD3d 416 [1st Dept 2021]; *Santana v 3410 Kingsbridge LLC*, 148 AD3d 557 [1st Dept 2017]). Simply because there is some evidence which may support "each party's position with regard to liability does not mean that the jury exceed[s] its province in determining which evidence to accept and which to reject" (*Demetro v Dormitory Authority*, 199 AD3d 605 [1st Dept 2021]).

As Justice D'Auguste wisely held in denying Plaintiff's motion for summary judgment, the pre-trial testimony presented sharp issues of fact as to whether the window capping hit Plaintiff's head. At the trial, the same factual issues were presented to the jury. It is axiomatic that where such sharp conflicts exist on critical liability issues, these factual matters are "peculiarly within the province of the jury to determine" (*Niewieroski v Natoinal Cleaning Contractors*, 126

AD2d 424 [1st Dept 1987]). Based on the month-long presentation of conflicting evidence, the jury found that the window cap did not hit Plaintiff's head.

There were ample grounds for the jury to reach this conclusion, not least of which was Plaintiff's own "live" photo where he can be heard saying "[t]hat's right, it didn't hurt me." (Tr. at 1561). The jury also heard conflicting testimony from Defense witnesses who claimed to have witnessed the accident and who swore the capping did not hit Plaintiff. The jury was presented with the medical records from the date of the accident, where multiple medical providers did not cite any evidence of trauma to Plaintiff's head, and Plaintiff's own medical expert admitted that Plaintiff's MRI taken contemporaneously with the accident showed no abnormalities (Tr. at 802). The jury was also presented with evidence calling into question the credibility of Plaintiff's experts. Dr. Greenwald, Plaintiff's expert, also admitted that he was unaware of Plaintiff having had a prior history of vertigo, trauma to his eye, and photophobia (Tr. at 819). When asked about the long-term impact the use of marijuana and LSD has on the brain, Dr. Greenwald could not answer (Tr. at 829).

Although Plaintiff's expert Dr. Lipton testified about Plaintiff's low fractional anisotropy ("FA") levels which may be indicative of a brain injury, he also admitted that a history of migraines, of which Plaintiff, along with his mother and sister experience, could theoretically cause low FA levels (Tr. at 1101). Dr. Lipton also testified that people with bipolar disorder, such as Plaintiff, may have lower FA levels in their brain (Tr. at 1103). He also testified chronic drug use could cause low FA levels (Tr. at 1113). Dr. Lipton further testified that although low FA levels may be indicative of a traumatic brain injury, they do not inform when the injury occurred, if at all (Tr. at 1143). Further, Plaintiff's treating doctors relied on Plaintiff's representation that he was hit on the head to inform their diagnoses – a representation that was rejected by the jury.

Moreover, Mr. Palma, who was the only fact witness Plaintiff presented to support his version of events, was far from the pinnacle of credibility. Mr. Palma admitted he is blind in one eye and that Plaintiff took him out for a steak lunch in midtown Manhattan prior to the lawsuit to ensure his cooperation (Tr. at 111). Although Mr. Palma testified the window capping hit Plaintiff, he also testified that he never saw the window capping fall out of the window (Tr. at 115). Mr. Palma testified that nobody else was present at the time of the incident, which directly contradicted Plaintiff's testimony that there were four or five workers on the sidewalk (Tr. at 118). Mr. Palma could not explain other inconsistencies in his testimony, such as when he testified at his deposition that he picked up the window cap and handed it to Plaintiff at the time of the incident, but then at the time of trial testified that he never picked up the window cap and could not remember why he testified he did at his deposition (Tr. at 120). Viewing the facts in the light most favorable to the non-movants and given the sharp factual issues which the jury was asked to determine, the jury's finding that Plaintiff was not struck on the head by the window capping did not go against the weight of the evidence. Therefore, the motion is denied.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion to set aside the verdict is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

11/7/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | [x] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [x] DENIED | [ ] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |