

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 20-00400

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PATTI FITZGERALD, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN KULA, DEFENDANT-RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT.

TREVETT CRISTO P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered February 18, 2020. The order and judgment, among other things, awarded money damages to both parties.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the verdict is set aside and the matter is remitted to Supreme Court, Ontario County, for a new trial.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, assault and battery, and in his amended answer defendant asserted counterclaims for, inter alia, defamation. The matter proceeded to trial, and now plaintiff appeals and defendant cross-appeals from an order and judgment of Supreme Court that denied the parties' respective motions to set aside portions of the jury verdict and, upon the jury verdict, awarded damages both to plaintiff and to defendant. We reverse.

We agree with defendant on his cross appeal that the court erred in denying his request to poll the jury. "A party has an absolute right to poll the jury, and a court's denial of that right mandates reversal and a new trial" (*Holstein v Community Gen. Hosp. of Greater Syracuse*, 20 NY3d 892, 893 [2012]; see *Duffy v Vogel*, 12 NY3d 169, 175 [2009]; *Muth v J & T Metal Prods. Co.*, 74 AD2d 898, 898 [2d Dept 1980], lv dismissed 51 NY2d 703 [1980], lv dismissed 51 NY2d 745 [1980]; see generally *Matter of National Equip. Corp. v Ruiz*, 19 AD3d 5, 12-13 [1st Dept 2005]). We therefore reverse the order and judgment and remit the matter to Supreme Court for a new trial (see *Dore v Wyer*, 1 AD2d 973, 974 [2d Dept 1956]; see generally *Holstein*, 20 NY3d at 893). In light of our determination, we do not address the

remaining contentions of the parties.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court