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Varano v FORBA Holdings, LLC
2014 NY Slip Op 50312(U)
Decided on March 5, 2014
Supreme Court, Onondaga County
Karalunas, J.
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Decided on March 5, 2014

Supreme Court, Onondaga County

Kelly Varano, as parent and natural guardian of infant JEREMY BOHN, Plaintiffs,

against

FORBA Holdings, LLC n/k/a/ Church Street Health Management, LLC; FORBA, N.Y., LLC; FORBA, LLC n/k/a LICSAC, LLC; FORBA NY, LLC n/k/a LICSAC NY, LLC; DD Marketing, Inc.; Small Smiles Dentistry of Syracuse, LLC; Daniel E. DeRose; Michael A. DeRose, D.D.S.; Edward J. DeRose, D.D.S.; Adolph R. Padula, D.D.S.; William A. Mueller, D.D.S.; Michael W. Roumph; Naveed Aman, D.D.S.; Koury Bonds, D.D.S. and Yaqoob Khan, D.D.S., Defendants.

2011-2128

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Deborah H. Karalunas, J.

This constitutes the court's decision concerning three defense motions to renew and, upon

renewal, reverse a December 2, 2013 order. The motions were argued during the court's March 5, 2014 motion calendar.

I. Background

In a decision dated November 18, 2013 and order dated December 2, 2013, this court exercised its discretion to grant a new trial. *Varano v. Forba Holdings, LLC, et al.*, 42 Misc 3d 303 (Onondaga Co. 2013). The decision was not made lightly. In fact, it disturbed a unanimous jury verdict for the defense after a 15-day trial and the use of tremendous judicial resources. The decision was required because the conduct of a third party, an attorney named Scott Greenspan, violated the sanctity of the jury, imperiled the administration of justice, and was prejudicial and likely influenced the jury's verdict.

Greenspan was observing the trial on behalf of a company that insured some of the trial defendants. The court found that he also observed the jurors outside the courtroom at every opportunity — by following them to lunch, following them outside during smoking breaks, riding with them in the courthouse elevators, and lingering near them during other breaks. There is no dispute that Greenspan had one conversation with several jurors in a courthouse elevator during the trial. One of the jurors asked him if he was a reporter, and he responded that he could not talk to the jurors. The impetus of this conversation was central to the court's finding of misconduct. As the court stated in its prior decision:

What defendants ignore, however, is what prompted the juror to finally ask Mr. Greenspan who he was. In the juror's own words: "I was very curious because I was sick and tired of him following us. And I said I'm going to ask him, if he's got the nerve to follow us around, I'm going to have the nerve to ask him why. . . . I just did not like it. He was everywhere we went. You know, to me that's stalking. You don't do that." Tr. of 10/16/13 at 10-11. The court credits the sworn testimony of the juror, a completely disinterested witness, and the consistent statements of the jurors given immediately after the verdict. The court finds that Mr. Greenspan's conduct went well beyond the conversation in the elevator. Over the course of a 15-day trial, Mr. Greenspan continuously followed and monitored the jurors when they went to lunch, when they took smoking breaks, and when they rode the elevator. The court discredits Mr. Greenspan's attempts to minimize his contacts with the jurors. Even without characterizing the [*2]behavior as stalking, Mr. Greenspan's contact with the jurors constituted improper misconduct.

Varano, 42 Misc 3d at 919-20. Reference is made to the prior decision for a complete recitation of

the facts and the court's analysis.

By notice of motion dated January 30, 2014, the "New FORBA" defendants (i.e., FORBA Holdings, LLC n/k/a Church Street Health Management, LLC, FORBA NY, LLC and Small Smiles Dentistry of Syracuse, LLC) moved to renew the prior mistrial motion, and upon renewal, reverse the prior decision and order and reinstate the jury's verdict. The "Old FORBA" defendants (i.e., FORBA, LLC n/k/a LICSAC, LLC, FORBA NY, LLC n/k/a LICSAC NY, LLC, DD Marketing, Inc., DeRose Management, LLC and several individual defendants) and defendant dentists Dr. Naveed Aman, Dr. Koury Bonds and Dr. Yaqoob Khan joined in the motion. Plaintiff opposed the motion.

II. Discussion

A. Leave to renew

CPLR Section 2221(e) governs a motion for leave to renew and states in relevant part that the motion must be "based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2) & (3). The decision on the motion is committed to the court's discretion. *See Chiappone v. William Penn Life Ins. Co. of New York*, 96 AD3d 1627 (4th Dep't 2012).

Defendants offer new facts in the form of six affidavits from jurors in the Bohn trial. The evidence was not previously available because this court instructed counsel to have no direct or indirect contact with the jurors. Lerner Aff. Ex. C. The court issued this instruction on October 10, 2013, shortly after Greenspan testified and the issue of potential misconduct came to light. Implicit in that instruction was the court's desire to protect the jurors from further intrusion after completing their service. The court made that rationale explicit in its October 18, 2013 order releasing to counsel a redacted transcript of one juror's testimony. That order stated: "The issue of jury tampering or intimidation is a serious matter. The Court believes it is its obligation to protect the sanctity, identity and views of the jurors on this issue." Lerner Aff. Ex. G. The court vacated its October 10, 2013 order in the December 2, 2013 order following the mistrial decision. Lerner Aff. Ex. K.

In an abundance of deference to the defendants, the court grants the motion to renew to allow consideration of the new affidavits. This relief does not extend to a "supplemental affidavit" of

Juror Number Four dated February 24, 2014. This new evidence improperly was submitted with defendants' reply papers on the motion to renew. Defendants were required in their initial moving papers to identify all of the new facts upon which their request for relief relied. There is no reason why defendants could not have included the statements in the supplemental affidavit in the original affidavit of Juror Number Four.

B. Analysis of the new affidavits

As this court noted in its prior decision, jurors' own statements are incompetent to impeach their verdict. *See Payne v. Burke*, 236 A.D. 527, 529 (4th Dep't 1932); *see also Alford v. Sventek*, 73 AD2d 825 (4th Dep't 1979). The implicit corollary of this rule is that jurors' own statements are incompetent to justify or otherwise bolster their verdict. Defendants improperly cite *Butterfield v. Caputo*, 108 AD3d 1162, 1164 (4th Dep't 2013), for the proposition that juror [*3]affidavits are admissible evidence to support a verdict. Lerner Reply Aff. ¶ 17. That case concerned correction of a ministerial error in reporting the verdict, not an examination of the manner in which the jurors reached their verdict. *See also Pache v. Boehm*, 60 AD2d 867, 868 (2d Dep't 1978) (noting that "[w]here errors are made in reporting a verdict, the Trial Judge may, in his discretion and upon the unanimous affidavits or statements of the jurors, correct the judgment in accordance with the actual verdicts. However, this exception to the rule prohibiting impeachment of jury verdicts was not intended to encompass jury error in *reaching* a proper verdict.") (emphasis in original). A court simply may not invade the deliberative process, and it presumes that jurors will follow the court's instructions. *See Peters v. Port Auth. Trans-Hudson Corp.*, 234 AD2d 205, 207 (1st Dep't 1996).

New York law is completely consistent with Rule 606(b) of the Federal Rules of Evidence, which make the above distinctions even more explicit. The rule provides that a court may not receive a juror's affidavit or other statement about anything that occurred during deliberations, the juror's mental processes concerning the verdict, or "the effect of anything on that juror's or another juror's vote." F. R. Evid. 606(b)(1). Like *Butterfield*, an exception to the rule concerns a mistake in entering the verdict on the verdict form. F. R. Evid. 606(b)(2)(C). Another exception concerns testimony about "extraneous prejudicial information . . . improperly brought to the jury's attention," which is consistent with New York cases where, for example, courts heard evidence about jurors' unauthorized visits to accident scenes. *See Varano*, 42 Misc 3d at 918. The final exception concerns evidence about whether "an outside influence was improperly brought to bear on any juror." F. R. Evid. 606(b)(2)(B). When this court limited its inquiry of the jurors into the facts of Greenspan's misconduct without improperly asking about the effect of that conduct, this court adhered to

established legal boundaries.

The juror affidavits submitted on this motion improperly invade the deliberative process. Each affidavit of a juror who deliberated states that they never discussed Greenspan during deliberations. Affidavits from the two alternate jurors speculate that Greenspan did not influence the verdict. However, this court noted previously that "it is the most natural thing" for a juror to disclaim that misconduct had any influence on the verdict. *Varano*, 42 Misc 3d at 918. *See also Adams Laundry Mach. Co. v. Prunier*, 74 Misc. 529, 532-33 (Schenectady Co. 1911). The disclaimers in the affidavits carry no weight.

In addition to obvious hearsay and reliability concerns, the anonymous on-line comments to which defendants cite also invade the deliberative process. To give credence to these comments would cast any verdict in doubt and undermine the judicial system. For example, a blogger claiming to be one of the jurors wrote that "the true culprit in the case was bad parenting." Lerner Aff. ¶ 34. Of course, the law does not permit allegations of contributory negligence against an injured infant such as Jeremy Bohn and does not permit any parental negligence to be ascribed to the child. *See Galvin v. Cosico*, 90 AD2d 656 (3d Dep't 1982). Just as the court would not rely on this blogger's comment to impeach the verdict, it will not rely on the other comments to bolster the verdict.

The attorney-drafted affidavits are remarkably uniform. Indeed, they are virtually identical. The affidavits are consistent in stating that Greenspan's only verbal contact with any juror involved the conversation in the elevator. That fact was never disputed. The affidavits do not contradict the juror's testimony before this court that he/she and the other jurors discussed Greenspan's conduct during the course of the trial. *Varano*, 42 Misc 3d at 915-16. The affidavits do not contradict the juror's testimony that he/she told the other jurors he/she believed [*4]Greenspan worked for the defendants. *Id*. at 916. The affidavits are completely silent on the issue of Greenspan's conduct in following the jurors to lunch, on smoking breaks, in the elevators, and in other areas. The affidavit of the juror who testified before the court in no way conflicts with his/her prior testimony that Greenspan's conduct "bothered" him/her, was "creepy," was "stalking," and made him/her feel "scared." *Id*. at 915-16.

Most importantly, defendants submit the juror affidavits in support of a subjective standard as to whether Greenspan's misconduct influenced the verdict. As this court held previously, and as discussed more fully below, that is not the correct legal standard.

C. Relevant legal standard

Although defendants on this motion complain about the manner in which this court investigated Greenspan's misconduct, they do not dispute that trial courts have wide discretion in addressing the effects of third party contacts on jurors. *See United States v. Edwards*, 342 F.3d 168, 182 (2d Cir. 2003). Instead, defendants argue that the juror affidavits and on-line comments actually establish that Greenspan's misconduct had no impact on the verdict. Def. Mem. at 2-3. Defendants contend that this court merely speculated regarding the effect of Greenspan's misconduct. Def. Mem. at 4.

Defendants repeatedly state that the dispositive issue here is whether Greenspan's misconduct actually influenced the jurors. However, case law states that the dispositive issue is whether the misconduct or improper outside influence was *likely* to influence the verdict. *Varano*, 42 Misc 3d at 918. The Fourth Department has held:

It was not necessary for the plaintiff to show that the acts complained of influenced the verdict in favor of the defendants; it is sufficient to warrant relief, if they were likely so to do. It is important that the conduct of those to whom the administration of the law is intrusted should be such as to furnish no just ground for suspicion that the decision was founded on anything other than the evidence.

Payne, 236 A.D. at 528. *See also People v. Miller*, 217 AD2d 970, 971 (4th Dep't 1995) (holding that "[i]n determining whether defendant has been prejudiced by extraneous matters heard by the jury, the court must look to the nature of the matter and its probable effect on a hypothetical average jury.") This objective standard is necessary in light of case law prohibiting invasion of the deliberative process. Contrary to defendants' contention, the case law makes no distinction in applying this standard to instances of misconduct by jurors themselves as opposed to misconduct in the form of third-party contact with jurors.

As this court stated in its prior decision, "[t]he decision to grant or deny a mistrial is within the sound discretion of the trial court and is to be made on a case-by-case basis." *Varano*, 42 Misc 3d at 919 (*quoting Chung v. Shakur*, 273 AD2d 340 (2d Dep't 2000)). "No ironclad rule concerning juror misconduct had been formulated, and we have observed that in each case the facts must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered.'" *Id*. (*quoting Alford v. Sventek*, 53 NY2d 743, 745 (1981)).

Upon application of the correct legal standard to the facts of this case, this court adheres to its prior ruling that a new trial is required because "Mr. Greenspan's conduct violated the sanctity of the jury, raises ground for suspicion that the decision was founded on something other than the evidence, and was prejudicial and likely to influence the verdict." *Varano*, 42 [*5]Misc 3d at 920. On this motion defendants continue to attempt to minimize Greenspan's conduct by referring only to the elevator conversation, but the undisputed facts establish a far greater intrusion into the jury process and the administration of justice. The juror affidavits upon which defendants rely in no way changes this court's prior determination. As noted above, the jurors' purported disclaimers of the influence of Greenspan's misconduct is inherently unreliable. The disclaimers are even more unreliable in a case like this, where the misconduct concerned stalking and the potential intimidation such conduct entails.

III. Conclusion

For the forgoing reasons, defendants' motions to renew are GRANTED, and, upon renewal, their motion to reverse this court's December 2, 2013 order is DENIED. Counsel for plaintiff is directed to prepare an order consistent with this decision to be submitted to the court on notice within 10 days. The order shall attach a copy of this decision and incorporate it therein.

Dated: _____

Syracuse, New YorkHON. DEBORAH H. KARALUNAS

SUPREME COURT JUSTICE

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