

TRIAL MOTIONS  
and  
MOTIONS IN LIMINE

Civil Perspective

# Article 44 – Trial Motions

# CPLR 4401

## Motion for Judgment During Trial (a/k/a “Judgment as a matter of law”)

Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

# Failure to Make a Timely Motion

“...failure to make a timely motion for a directed verdict under CPLR 4401 constitutes a waiver of any claim to judgment as a matter of law.” Miller v Miller, 68 N.Y.2d 871, 508 N.Y.S.2d 418 (1986) [plaintiff, who failed to move for a directed verdict on the question whether he had suffered a “serious injury” under the No-Fault law, thereby conceded that the question was for the jury]

“The plaintiff’s contention that she was entitled to judgment as a matter of law on the issue of liability is unpreserved for appellate review, since she failed to move pursuant to CPLR 4401 for a judgment as a matter of law at the close of the evidence.” Newman Scarpulla v. Williams, 2017 Slip Op 1398, Appellate Division, Second Department (February 22, 2017).

# CPLR 4402

## Motion for continuance or new trial during trial

At any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just.

# CPLR 4403

Motion for new trial or to confirm or reject  
or grant other relief after reference to  
report or verdict of advisory jury

Upon the motion of any party or on its own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action.

# CPLR 4404

## Post-trial motion for judgment and new trial

- (a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.
- (b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

# CPLR 4405

## Time and judge before whom post-trial motion made

A motion under this article shall be made before the judge who presided at the trial within fifteen days after the decision, verdict or discharge of the jury. The court shall have no power to grant relief after argument or submission of any appeal from the final judgment.

# CPLR 4406

## Single post-trial motion

In addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable of right by a jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to him.

# Standard of Review?

A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the non-moving party.

Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 255 (1944)

“light most favorable”

In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.

Cohen v Hallmark Cards, 45 N.Y.2d 493, 499 (1978)

# Recent Cases

Matter of New York City Asbestos Litigation  
2017 NY Slip Op 1523  
(Decided February 28, 2017)

Killon v Parrotta  
2016 NY Slip Op 07048  
(Decided October 27, 2016)

The burden on a movant seeking to have a jury verdict set aside and judgment entered in favor of the moving party under CPLR 4404(a) is a heavy one. A court must exercise considerable deference in exercising its discretionary power to set aside a jury verdict (see *Rose v Conte*, 107 AD3d 481, 484 [1st Dept 2013]). A jury verdict in favor of a party should not be set aside unless that jury "could not have reached the verdict upon any fair interpretation of the evidence" (*Lichtenstein v Bauer*, 203 AD2d 89, 89 [1st Dept 1994]; see also *Jackson v Mungo One*, 6 AD3d 236 [1st Dept 2004]). The court must view the evidence in a light most favorable to the nonmovant (see *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The movant must persuade the court that there was "simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Importantly, if the evidence is such "that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence" (*id.*; see also *Blum v Fresh Grown Preserve Corp.*, 292 NY 241, 245 [1944]; *Guiton v Gottlieb*, 236 AD2d 203 [1st Dept 1997]). The Court of Appeals has very recently reiterated the movant's high burden in *Killon v Parrotta* (28 NY3d 101 [2016]), again holding that a jury verdict is insufficient only when it is "utterly irrational" (*id.* at 108).

# Post-Verdict Checklist

- Poll the jury
- Demand to see the Verdict Sheet
- Oral motion to set aside verdict
- Additional time to make written motion
- Leave to amend relief requested in the oral motion
- Stay entry of judgment until determination of the written motion

# Motions in Limine

“*in limine*” = “at the outset”

before trial / during trial

oral / written

# Function

“...permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the instruction of such evidence to the trier of fact, in most instances a jury.”

State v Metz, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79, 83 (1<sup>st</sup> Dep’t 1998)

# Preventative

- Instruct adversary not to introduce evidence
- Instruct witness not to mention prohibited evidence
- Instruct adversary not to mention prohibited evidence during opening statement or summation

# Strategic

- Highlight issues for the Judge
- Settlement
- Potential weaknesses

# Court's Decision

- Several options:
  - Grant the motion
  - Conditional grant
  - Deny
  - Reserve decision

“...an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission” Hargrave v. Preshier, 221 AD2d 677 (3<sup>rd</sup> Dep’t 1995), quoting Savarese v City of New York Hous. Auth., 172 AD2d 506, 509)

“...appellate review should be deferred until after the trial, when the propriety of the challenged ruling can be assessed, not speculatively, but in the context of its application to a concrete factual controversy.” Id.

