Trial Motions

and

Motions in Limine

from the

Civil Perspective

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Presented by: Michael P. O'Brien
O'Brien Law Firm, PLLC
30 Wall Street, 8th Floor
New York, NY 10005
Phone: 212-269-2290

TRIAL MOTIONS

Civil Practice Law and Rules – Article 44 Trial Motions

CPLR 4401. Motion for judgment during trial.

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. ("Judgment as a matter of law")

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 decision, verdict or discharge of the jury. The court shall have no power to grant relief after argument or submission of an 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.

A direction of a verdict is supportable only when "by no rational process could the trier of the facts base a finding in favor of [the party opposing the motion] upon the evidence…presented," Blum v. Fresh Grown Preserve Corp., 292 N.Y.241, 255 (1944).

"A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party." Adler v. Bayer, 2010 NY Slip Op 07300 (App. Div., 2nd 2010); see, Hamilton v. Rouse, 46 AD3d 514, 516; Tapia v. Dattco, Inc., 32 AD3d 842, 844. In considering such a motion, "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" (Szczerbiak v. Pilat, 90 NY2d 553, 556). Or, was there evidence on which rational people could conclude that the winning party was entitled to the verdict? Cohen v. Hallmark Cards, 45 N.Y.2d 493, 410 N.Y.S.2d 282 (1978).

The Court of Appeals has held that 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. *See* 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 Appellate Division, Second Department has held that "[b]y failing to move for a directed verdict pursuant to CPLR 4401 on the issue of negligence at the close of evidence, the plaintiff implicitly conceded that the issue was for the trier of fact;…" Hurley v. Cavitolo, 239 AD2d 559 (2d Dept. 1997).

The Third and Fourth Departments have held that the failure to raise excessiveness or inadequacy arguments on a post-trial motion permits the appellate division to avoid considering such arguments. Homan v. Herzig, 55 AD3d 1413 (4th Dept. 2008); Smetanick v. Erie Ins. Group, 16 AD3d 957 (3d Dept. 2005).

Defendants should move to dismiss each of plaintiff's causes of action as insufficient as a matter of law. Plaintiffs should likewise move for a directed verdict in support of each of their causes of action. Then, both sides should move for judgment as a matter of law at the close of all evidence. Always remember to include all the grounds that you plan to raise on appeal in the event that the motion is denied.

Immediately after the verdict, attorneys will make (and many judges will inquire whether there are any) motions to set aside the verdict (also called "J.N.O.V." motions, or judgment notwithstanding the verdict). These motions can be, and are often, the same or similar arguments used in motions at the close of plaintiff's case and/or the close of all the evidence.

Regarding CPLR 4402, a court may grant a motion for a mistrial, or as it is also called, a motion for the withdrawal of a juror, upon the request of either party. This motion may be granted, with or without conditions in the discretion of the court, "when it appears that owing to some accident or surprise, defect of proof, unexpected and difficult questions of law, or like reason a trial cannot proceed without injustice to a party." Matter of Taylor, 271 App. Div. 947, 67 N.Y.S.2d 823, 825 (4th Dep't 1947).

Keep in mind the practical considerations from the court's perspective - a continuance or delay in the trial is often preferable to an entirely new trial because it avoids the necessity of conducting a new voir dire, repeating testimony, preparing new opening statements, and the costs associated with each.

Where a jury award deviates materially from what would be "reasonable compensation" for an injured plaintiff's injuries, the award should be modified so that the award constitutes reasonable compensation. Kane v. Coundorous, 11 AD3d 304 (1st Dept. 2004); Carlos v. W.H.P. 19 LLC, 301 AD2d 423 (1st Dept. 2003); Donlon v. City of New York, 284 AD2d 13 (1st Dept. 2001).

A failure to award any future pain and suffering damages cannot be reconciled with a finding of a permanent injury. Lamanna v. Jankowski, 52 AD3d 340 (1st Dept. 2008). A jury's failure to award damages on a particular issue, where the proof submitted on the issue is undisputed and/or uncontroverted, is inadequate and against the weight of the evidence. Ramos v. NYCHA, 280 AD2d 325 (1st Dept. 2001).

Timely Objections:

Make *timely* objections and/or demands for a mistrial whenever there are:

1. Errors in evidentiary submissions; or

2. Prejudicial comments.

“[W]e cannot permit counsel to press a challenged error after proceeding in a manner constituting a waiver of an objection” (Schein v Chest Service Co., Inc., 38 AD2d 929 [1972]; *see* Virgo v Bonavilla, 49 NY2d 982 [1980]; Kraemer v Zimmerman, 249 AD2d 159 [1998]; Bonilla v. New York City Health & Hosps. Corp., 229 AD2d 371 [1996]). However, the First Department directed a new trial, despite the absence of preservation, because of other egregious errors including “numerous improper and prejudicial remarks by plaintiff’s counsel, inter alia, appealing to the jurors’ class bias, prejudice or passion.” Tehozol v. Anand Realty Corp., 41 AD3d 151, 152 (1st Dept. 2007).

POST-VERDICT CHECKLIST

Before the jury is excused:

- ☐ Poll the jury.

  Most judges do this without a request from counsel. It is reversible error if the jury is not polled upon request of a litigant. See the Court of Appeals decision in Duffy v. Vogel (2009 Slip Op 02448), where the court notes New York's long history with a right to poll the jury: "…[A] verdict may not be deemed 'finished or perfected' until it is recorded, and that it may not be validly recorded without a jury poll where one has been sought, (see Warner v. New York Cent. R.R. Co., 52 NY 437, 442 [1873]), have been uncontroversial propositions."

- ☐ Demand to see the verdict sheet.

  Look for an inconsistent verdict or any other mistakes. Fix any errors before the jury is discharged.

- ☐ Make CPLR 4404 motion, plus…

- ☐ Request additional time to make a written motion. Ask the judge to consider the time it takes to obtain the full trial transcript, the time you will need to analyze the entire transcript and evidence, and the time required to research and draft the motion. By statute, the written motion is due a mere 15 days after the verdict is rendered (CPLR 4405). Typically judges will grant anywhere from 30 to 60 days additional time to file a written motion;

- ☐ Request leave to amend the relief requested in the oral motion; and

- ☐ Entry of Judgment

  The winning party will seek to enter judgment right away in order to accumulate interest. The losing party wants to delay entry of judgment.

MOTION IN LIMINE

In Latin, "*in limine*" means "at the outset". In modern legal practice, a motion in limine is presented just prior to, or during, trial. In the law, "just prior to" can mean days, weeks, even months.

The purpose of a motion in limine is to permit a party to obtain a preliminary order or ruling before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting the use of such evidence. State of New York v. Metz, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79 (1st Dept. 1998).

A trial judge has broad discretion as to the admissibility of evidence offered at trial. Radosh v. Shipstad, 20 NY2d 504, 285 NYS2d 60 (1967), and a ruling on a motion in limine, even when made in advance of trial and on paper, constitutes only an advisory opinion, which is not appealable as of right or by permission. Winograd v. Price, 21 AD3d 956 (2nd Dept. 2005).

Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. A court's ruling regarding a motion in limine is subject to change as the case unfolds, particularly if the actual testimony differs from what was contained in the party's motion. A party may prepare, serve and file motions in limine (prior to trial) to prevent the admission or mention of potentially improper evidence until the court has had an opportunity to rule on its admissibility. Coopersmith v. Gold, 636 N.Y.S.2d 399 (2nd Dept. 1996), aff'd 89 N.Y.2d 957, 655 N.Y.S.2d 857 (1997). Ordinarily, a party makes a pre-trial motion in limine when it believes that mere mention of certain evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard.

A motion in limine is an inappropriate substitute for a motion for summary judgment, and is also inappropriate to obtain relief in the nature of partial summary judgment. Rivera v City of New York, 306 AD2d 456, 457; Downtown Art Co. v Zimmerman, 232 A.D.2d 270, 648 N.Y.S.2d 101; Brewi-Bijoux v City of New York, 2010 NY Slip Op 04535 (2nd Dept. 2010).