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Preservation, Post-Jury Trial Challenges to Weight of the Evidence

In 'Evans v. New York City Tr. Auth.', the Second Department broke from its own precedent case law and parted from its sister departments, now holding that "an appellant need not preserve the contention that a jury verdict was contrary to the weight of the evidence by making a post verdict motion for a new trial."

By **Elliott Scheinberg** | January 03, 2020

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Preservation is the foundation of appellate practice. Aside from the many exceptions to that rule, "an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial." *Rentways v. O'Neill Milk & Cream*, 308 N.Y. 342 (1955).

"Preservation is not simply a meaningless technical barrier to review." *Wilson v. Galicia Contr. & Restoration*, 10 N.Y.3d 827 (2008). An adverse party should have the opportunity to address an argument. *Robles v. Brooklyn Queens Nursing Home*, 131 A.D.3d 1032 (2d Dept. 2015). Nonetheless, "the Appellate Division may reach and decide issues which are not properly preserved." *Matter of Barbara C.*, 64 N.Y.2d 866 (1985); *Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990 (1988).

In *Evans v. New York City Tr. Auth.*, 2019 NY Slip Op 07872 (2d Dept. 2019), a well reasoned decision, the Second Department broke from its own precedent case law and parted from its sister departments, now holding that "an appellant need not preserve the contention that a jury verdict was contrary to the weight of the evidence by making a post verdict motion for a new trial." *Evans* examined extant case law from the other departments, relevant statutes and both cases from the Second Department imposing a preservation requirement for weight of the evidence review.

Background

"It is for the jury to make determinations as to the credibility of the witnesses, and deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" ... Accordingly, if the jury's resolution of the controversy in favor of [a party] is grounded upon a fair interpretation of the evidence, that finding should be sustained ... in the absence of some other reason for disturbing it in the interest of justice." *Thompson v. E. Coast 6*, 153 A.D.3d 1296 (2d Dept. 2017). "Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view." *Pierre v. Andre*, 151 A.D.3d 1089 (2d Dept. 2017).

"The fact that determination of a motion to set aside a verdict involves judicial discretion does not imply [] that the trial court can freely interfere with any verdict that is unsatisfactory or with which it disagrees. A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict

and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Factfinding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and unnecessarily interfere with the factfinding function of the jury to a degree that amounts to an usurpation of the jury's duty." *Nicastro v. Park*, 113 A.D.2d 129 (2d Dept. 1985).

The Appellate Division may not disregard a jury verdict as against the weight of the evidence unless "the evidence 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 N.Y.3d 101 (2016).

"Whether a particular factual determination is against the weight of the evidence is itself a factual question" (*Cohen v. Hallmark Cards*, 45 N.Y.2d 493 (1978)); it "does not involve a question of law, but rather requires a discretionary balancing of many factors" (*Watson v. New York City Tr. Auth.*, 172 A.D.3d 957 (2d Dept. 2019)). "Appellate courts do not have the power to make factual findings in weight of the evidence analysis in a jury case." *Candela v. N.Y.C. Sch. Constr. Auth.*, 111 A.D.3d 522 (1st Dept. 2013).

"Where the Appellate Division determines that a [jury] verdict is against the weight of the evidence, the remedy is to remit for a new trial" (*Killon*, 28 N.Y.3d at 107), "not a directed verdict." *Brongo v. Town of Greece*, 98 A.D.3d 1260 (4th Dept. 2012); *McDonald v. 450 W. Side Partners, LLC*, 70 A.D.3d 490, 492 (1st Dept. 2010).

Significantly, a "weight of the evidence determination is a factual one that [the Court of Appeals] ha[s] no power to review." *Heary Bros. Lightning Protection Co. v. Intertek Testing Servs.*, 4 N.Y.3d 615 (2005), citing *Cohen v. Hallmark Cards,* 498-500.

'Evans'

In *Evans v. New York City Tr. Auth.*, the Second Department examined its own decisional history, and that of its sister departments, behind the issue of whether the contention that a jury verdict is contrary to the weight of the evidence requires a post-verdict motion for a new trial in order to be preserved for appeal.

Evans began with *Schwinger v. Raymond*, 105 N.Y. 648 (1887), wherein the Court of Appeals held that the Appellate Division has the power to review and set aside a verdict as against the weight of the evidence, without any requirement that the issue be preserved. *Schwinger* was followed by *Middleton v. Whitridge*, 213 NY 499 (1915), wherein "the Court of Appeals ["similarly"] held that it is 'incumbent on the Appellate Divisions to review the findings of fact in all cases.'"

Evans pointed to further "prior appellate jurisprudence that a weight of the evidence argument need not be preserved by a motion for a new trial":

> *Bintz v Hornell*, 268 App Div 742, 747 [4th Dept 1945] ["We may reverse or modify a judgment although no motion for a new trial was made"], affd 295 NY 628; *Miller v Brooklyn Hgts. R.R. Co.*, 173 App Div 910, 910-911 [2d Dept 1916] ["Although the defendant has appealed merely from the judgment, without any motion for a new trial, this court since the 1914 amendment of Code of Civil Procedure, section 1346, has power to review the facts"]; also *Mosler Safe Co. v Brenner*, 100 Misc 107, 111 [App Term, 1st Dept 1917] ["That the General Term and the Appellate Division have always had the power to reverse a judgment of the Supreme Court as being contrary to the evidence regardless of whether or not a motion was made to nonsuit the plaintiff, we think there can be no doubt"].

More current case law, however, until *Evans*, has held that weight-of-the-evidence contentions must be preserved for review by way of a timely motion to set aside the verdict on that ground, by way of example: *Almuganahi v. Gonzalez*, 174 A.D.3d 1492 (4th Dept. 2019); *Cyrus v. Wal-Mart Stores E., LP*, 160 A.D.3d 1487 (4th Dept. 2018) (on appeal from a judgment entered upon a jury verdict in favor of defendant, in a slip and fall case, plaintiffs "concede[d] that they failed to preserve for [appellate] review their contention that the verdict was against the weight of the evidence inasmuch as 'there [wa]s no indication in the record that [they] made a posttrial motion to set aside the verdict pursuant to CPLR 4404(a).'"); *Likos v. Niagara Frontier Tr. Metro Sys.*, 149 A.D.3d 1474 (4th Dept. 2017); *Durrans v. Harrison & Burrowes Bridge Constructors*, 128 A.D.3d 1136 (3d Dept. 2015); *Creamer v. Amsterdam High School*, 277 A.D.2d 647 (3d Dept. 2000) (whether the jury determination was against the weight of the evidence had not been preserved for appellate review due to the absence of an appropriate objection to Supreme Court's charge to the jury.)

While case law in the First Department similarly imposes preservation as a predicate to an appeal from a "weight-of-the-evidence" argument, *Evans* does not cite the cases. See *Askin v. City of New York*, 56 A.D.3d 394 (1st Dept. 2008) ("It does not avail HHC to characterize its failure to preserve the inconsistency argument as an argument addressed to the weight of the evidence."); *Sims v. Comprehensive Community Dev.*, 40 A.D.3d 256 (1st Dept. 2007), abrogated by *Ornstein v. New York City Health and Hosps.*, 10 N.Y.3d 1 (2008) ("Burnside may not avoid the consequence of its failure to preserve the inconsistency argument by characterizing it as an argument addressed to the weight of the evidence.").

CPLR 5501(c). The Second Department turned to the evolution of the statutory scheme, noting that, in 1916, it had relied upon §1346 of the Code of Civil Procedure for the proposition that the Appellate Division has the power to exercise its factual review power on an appeal from a judgment where no motion for a new trial was made":

> That statute [] provided that on an appeal to the Appellate Division from a final judgment, "[w]hen the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both". Likewise, CPLR 5501, the current statute governing this Court's scope of review on an appeal from a final judgment, imbues this Court with the same broad authority to review the facts: "The appellate division shall review questions of law and questions of fact on an appeal from a judgment" (CPLR 5501[c]).

CPLR 4404(a). The Second Department next looked to CPLR 4404(a): "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 ... order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence. Insofar as the trial court is permitted to order a new trial 'on its own initiative', and 'the power of the Appellate Division ... is as broad as that of the trial court', (*Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 NY2d 492, 499), this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court."

'Condor' and 'Bendersky' Are Aberrations. The Second Department next reviewed

two of its prior decisions, *Condor v. City of New York*, 292 A.D.2d 332 (2d Dept. 2002) and *Bendersky v. M & O Enters.*, 299 A.D.2d 434 (2d Dept. 2002). *Condor* is noteworthy because therein the Second Department simultaneously declined to hear the contention that the verdict was contrary to the weight of the evidence because it was "unpreserved ... [being] raised for the first time on appeal," but, with no reason given beyond "in any event", it "considered [and upheld] the contention." *Condor*, 292 A.D.2d at 332.

Evans parenthetically observed that *Condor*'s reference to *Singh v. Eisen*, 260 A.D.2d 363 (2d Dept. 1999) is unclear because, while *Singh* "involved an issue of preservation, [] it did not involve a contention that a verdict was contrary to the weight of the evidence."

Evans next examined *Bendersky v. M & O Enters.*, 299 A.D.2d 434 (2d Dept. 2002), wherein "this Court *signaled* the existence of a preservation requirement for weight of the evidence contentions" (emphasis added), "signaled" suggests the absence of clear authority. There were only two issues in *Bendersky,* inconsistency of the verdict and that the verdict was against the weight of the evidence: "Although the plaintiffs failed to preserve their argument that the verdict was inconsistent by not objecting to the verdict before the jury was discharged ... their claim that the verdict was against the weight of the evidence was preserved and meritorious." The language is firm as to the preservation requirement.

Evans concluded: "*Condor* and *Bendersky* cannot be reconciled with the extensive authority, discussed above, that recognizes the Appellate Division's power to consider a weight of the evidence argument without any need for preservation." Moreover, *Evans* emphasized, neither *Condor* nor *Bendersky* has ever been cited by the Second Department for the proposition that a weight of the evidence argument must be preserved: both cases "are aberrations in this Court's jurisprudence and [] should no longer be followed for the proposition that a weight of the evidence argument must be preserved."

Conclusion

This issue will ultimately be determined by the Court of Appeals.

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