ANALYSIS

Weight of Evidence, Preservation, Third Department Joins Second, Fourth (and First)

The Third Department, in 'Fitzpatrick v. Tvetenstrand', has now adopted 'Evans' and 'Defisher'. It also logically reads the First Department's decision, 'Sims v. Comprehensive Community Development', abrogated by 'Ornstein v. New York City Health and Hospitals', as also so holding.

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By Elliott Scheinberg | May 01, 2024 at 10:00 AM

On Oct. 28, 2020, this column titled "Fourth Department, Preserving Weight of Evidence Contentions; Judicial Notice" addressed the Fourth Department's momentous two decisions, *Defisher v. PPZ Supermarkets*, 186 A.D.3d 1062 [4th Dept. 2020] and *Alexandra R. v. Krone*, 186 A.D.3d 981 [4th Dept. 2020], which repudiated its prior authority and adopted the then recent shift in law by the Second Department, in *Evans v. New York City Transit Authority*,179 A.D.3d 105 [2d Dept. 2019], 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."

The evolution continues as the Third Department, in *Fitzpatrick v. Tvetenstrand*, 2024 NY Slip Op 01956 [3d Dept 2024], has now adopted *Evans* and *Defisher.* It also logically reads the First Department's decision, *Sims v. Comprehensive Community Development,* 40 AD3d 256, 258 [1st Dept 2007], abrogated by *Ornstein v. New York City Health and Hospitals,* 10 NY3d 1 [2008], as also so holding.

CPLR 4404

CPLR 4404, post-trial motion for judgment and new trial, provides:

> (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 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.
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> (b) 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 4406: A Trap for the Unwary

CPLR 4406, styled the "single post-trial motion," cautions the 4404(a) movant:

> 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*.

"Successive motions are not permitted under CPLR 4406." Hon. Mark C. Dillon, Practice Commentaries. "'The post-trial motion' is usually made on papers *that reiterate every significant error that occurred during the trial* that affected or caused the jury verdict or decision by the court." New York Appellate Practice, A. Vincent Buzard; Thomas R. Newman, original author. Also, Professors David D. Siegel and Patrick Connors state in their Practice Commentaries, CPLR 4406: "[A] party bent on any motion under CPLR 4404 should see to it that *all possible grounds are joined*." A party opposing a 4404-motion must file a cross-motion to assure that the court consider only one motion, and that *all possible grounds* urged by all parties will be simultaneously reviewed.

'Evans v. New York City Transit Authority': CPLR 4404(a)

In *Evans v. New York City Transit Authority*, 113 N.Y.S.3d 127 [2d Dept 2019], a strong decision penned by Justice Francesca E. Connolly, the Second Department, following a scrutinized examination of statue and precedent authority in its court, as well as in its sister courts, abandoned its prior rulings to now hold 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 focused, inter alia, on the language in CPLR 4404(a), which allows a court, "on its own initiative," to "order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence." The Second Department read the term "own initiative" in 4404(a) in conjunction with *Northern Westchester Professional Park Association v. Town of Bedford*, 60 NY2d 492, 499 [1983], wherein the Court of Appeals, stated "the power of the Appellate Division…is as broad as that of the trial court…this court [the Appellate Division] also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court."

'Fitzpatrick v. Tvetenstrand': Third Department Joins Second, Fourth Departments, Implies First Department Also So Holds

In *Fitzpatrick v. Tvetenstrand*, 2024 NY Slip Op 01956, 1 [3d Dept 2024], the Third Department stated:

> “[W]e now join our colleagues in our sister Departments in concluding that plaintiffs were not required to preserve their weight of the evidence contention by moving to set aside the verdict upon that basis (*Defisher v. PPZ Supermarkets*, 186 AD3d 1062, 1063 [4th Dept 2020]; *Evans v. New York City Transit Authority*, 179 AD3d 105, 109-111 [2d Dept 2019]; Sims v Comprehensive Community Dev. Corp., 40 AD3d 256, 258 [1st Dept 2007]; Mark C. Dillon, Prac. Commentaries, McKinney’s Cons Laws of NY, CPLR C4404:3).
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> A trial court has the authority to order a new trial “on its own initiative” when the verdict is contrary to the weight of the evidence (CPLR 4404 [a]), and this court’s power “is as broad as that of the trial court” (*Northern Westchester Professional Park Association v. Town of Bedford*, 60 NY2d 492, 499 [1983]). Although we believe it remains best practice for a party to challenge a verdict upon this basis before the trial court, in light of its superior opportunity to evaluate the proof and credibility of witnesses (*Richmor Aviation v. Sportsflight Air*, 82 AD3d 1423, 1426 [3d Dept 2011]; *Mazzariello v. Davin*, 252 AD2d 884, 885 [3d Dept 1998]), we nonetheless agree that this court is fully empowered to “order a new trial where the appellant made no motion for that relief in the trial court” (*Evans v. New York City Transit Authority*, 179 AD3d at 110; accord *DeFisher v. PPZ Supermarkets*, 186 AD3d at 1063). To the extent that our prior decisions have suggested otherwise, they should no longer be followed (see e.g. *Durrans v. Harrison & Burrowes Bridge Constructors*, 128 AD3d 1136, 1139 [3d Dept 2015]; Papa v Kilroy, 24 AD3d 1088, 1089 [3d Dept 2005]; *Lockhart v. Adirondack Transit Lines*, 305 AD2d 766, 767 [3d Dept 2003]; Creamer v Amsterdam High School, 277 AD2d 647, 651 [3d Dept 2000]).

However, although the First Department has yet to clearly articulate its adoption of the rule that weight of evidence contentions do not require preservation for appeal, the Third Department applies a well-reasoned interpretation of *Sims v. Comprehensive Community Development,* 40 AD3d 256, 258 [1st Dept 2007], abrogated on other grounds by *Ornstein v. New York City Health and Hospitals,* 10 NY3d 1 [2008], as being indicative of the First Department’s having abandoned the preservation requirement over a decade before *Evans*.

Sims states: “Burnside [defendants-appellants (collectively, 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.” The implication is inescapable that had the defendants successfully been able to convert their argument from inconsistency to weight of the evidence they could have salvaged their preservation omission.

In his Practice Commentaries CPLR 4404:3, Justice Mark C. Dillon, notes: “[A]fter the Second Department published its decision in *Evans*, the Fourth Department followed suit on August 20, 2020 by likewise holding, contrary to its own prior precedent, that weight of the evidence review need not be preserved (*DeFisher v. Supermarkets*, 186 A.D.3d 1062, 129 N.Y.S.3d 599 [4th Dep't. 2020]). The First Department does not appear to have any authority directly on point on this issue, but inferentially does not appear to require that weight be preserved (*Sims v. Comprehensive Community Development*, 40 A.D.3d 256, 258, 835 N.Y.S.2d 163 [1st Dep't. 2007], abrog. on other grounds, *Ornstein v. New York City Health and Hospitals*, 10 N.Y.3d 1 [2008]).”

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