

To be Argued by:
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New York County Clerk's Index No. 601365/97

New York Supreme Court
Appellate Division – First Department

BLUEBIRD PARTNERS, L.P.,

Plaintiff-Respondent,

– against –

FIRST FIDELITY BANK, N.A., NEW JERSEY,

Defendant-Appellant,

MIDLANTIC NATIONAL BANK; UNITED JERSEY BANK;
NATIONSBANK OF TENNESSEE, N.A.; CONSTELLATION BANK;
CORESTATES NEW JERSEY NATIONAL BANK; WILENTZ,
GOLDMAN & SPITZER, P.C. and KELLEY DRYE & WARREN,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This appeal concerns a new-trial motion that got lost in the jurisdictional shuffle of a complicated case – one that has hop-scotched through the New York State courts for nearly ten years, producing five opinions from this Court and two from the Court of the Appeals. Along the way, as a result of an unusual series of procedural steps, Defendant First Fidelity Bank, N.A., New Jersey (“First Fidelity”) was denied its right to have the trial court consider whether to exercise its discretionary power to grant a new trial.

As a result of this erroneous denial, a number of meritorious claims of error have never been properly considered by any court, the trial court never exercised its discretion whether to grant a new trial in response to First Fidelity’s motion seeking that relief, and judgment has been entered prematurely. Before First Fidelity can be forced to pay the sizeable – more than \$70 million – judgment entered in this case, it is entitled to have the trial court rule on its motion for a new trial.

QUESTION INVOLVED

1. Whether the trial court erred by refusing to consider the defendant’s still-pending, undecided motion for a new trial, after this Court reversed the trial court’s grant of judgment as a matter of law and reinstated the jury’s original verdict against the defendant.

STATEMENT OF FACTS¹

In 1994, Plaintiff Bluebird Partners, L.P. (“Bluebird”) purchased debt certificates that had been issued by Continental Airlines (“Continental”) in 1987. Continental had sought bankruptcy protection in 1990, four years before Bluebird bought the certificates at a deeply discounted price. The certificates were secured under a trust indenture for which Continental’s aircraft and engines served as collateral. Defendant First Fidelity had been the “collateral trustee” until December 1991.²

Although Bluebird had purchased the certificates at a depressed price and eventually made a handsome profit on them, Bluebird filed suit shortly after it acquired the certificates, alleging that First Fidelity had acted negligently and had breached various contractual and fiduciary duties when, in June 1991 (three years before Bluebird’s purchase), First Fidelity had failed to take certain steps that allegedly would have protected the collateral from depreciating (and, incidentally,

¹ Due to procedural happenstance, this challenge to the IAS Court’s order denying consideration of First Fidelity’s new-trial motion has been perfected as its own appeal, rather than as part of the full appeal from the final judgment in the same case. This appeal has been calendared for hearing together with the appeal and the cross appeal from the final judgment.

Because this appeal concerns a single procedural issue (and because it is being heard together with the more comprehensive appeal), we shall not burden the Court in this brief with a full recitation of the facts, most of which are not relevant to the issue presented. Instead, we shall discuss here only those facts and items of procedural history directly relevant to the order being challenged. The full facts and procedural history of the case will be described in the briefs on the cross appeals from the judgment.

² There was disagreement at trial whether First Fidelity remained collateral trustee until February 1992; for purposes of this appeal, the precise date is irrelevant.

would have raised the price Bluebird paid for the debt certificates) in the wake of Continental's 1990 bankruptcy filing.

After a variety of preliminary appeals by both parties, the case came to trial in December 2002. Justice Gammerman presided over the nine-day trial. The jury returned a verdict of \$54 million in favor of Bluebird, allocating 61% of the "fault" to First Fidelity. In January 2003, First Fidelity filed a post-trial motion under CPLR 4404(a) seeking judgment as a matter of law, or in the alternative, a new trial. First Fidelity's primary argument was that it was entitled to judgment (JNOV) because the evidence was insufficient as a matter of law to support the verdict.

The latter portion of the brief in support of the motion, as well as a five-page affirmation submitted by defense counsel, identified a long list of "other errors" that, in the alternative, justified a new trial. These were mostly trial errors – principally evidentiary issues and flaws in the jury instructions and verdict form. First Fidelity also argued that the verdict was against the weight of the evidence. The remedy for either category of these errors would be a new trial, which the trial court has the discretion to order pursuant to Section 4404(a). Finally, First Fidelity argued that, if it was not granted a new trial and the verdict was sustained, the court should reduce the damages award because (1) the amount of damages awarded by the jury could not be squared with the evidence presented at trial, and

(2) First Fidelity was entitled to set-off credit for certain settlement payments and other amounts that the plaintiff had already received.

In July 2003, Justice Gammerman granted First Fidelity's motion to set aside the verdict and grant judgment as a matter of law (JNOV), holding that the plaintiff had failed to adduce sufficient evidence of proximate cause to support the jury's verdict. Because the court agreed with First Fidelity's primary argument, there was no reason to address any of the alternative arguments for setting aside the verdict or reducing the damages award, and Justice Gammerman did not rule on the alternative motion for a new trial. Indeed, the court's opinion and order noted that the court was dealing only with First Fidelity's motion "to set aside a \$54 million jury verdict as a matter of law." R-23.³ The decretal paragraph ordered the JNOV motion granted, the complaint dismissed, and judgment entered for First Fidelity. There was no discussion of the court's power to grant First Fidelity a new trial as an exercise of the court's discretion or to reduce the amount of damages. The court evidently concluded that it did not need to reach any of the trial errors or damage issues that First Fidelity had asserted in requesting alternative relief, and the court did not do so.

Bluebird appealed the order granting JNOV to First Fidelity. The primary focus of First Fidelity's response brief in that appeal was, of course, a defense of

³ Citations to "R-__" refer to the Record on Appeal.

the trial court's order setting aside the verdict and granting judgment NOV on insufficiency grounds. In the alternative, First Fidelity identified several additional grounds for affirmance. It also included a request for remand based on some of the trial errors that had been discussed in the original alternative request for a new trial. The relevant discussion was introduced as follows:

“Respondent [First Fidelity] moved below, in the alternative, for ‘a new trial upon [various grounds].’ However, the Trial Court did not consider any of these arguments in the Set Aside Decision. ***Respondent respectfully requests that if this Court reverses the Judgment, it remand this matter to the Trial Court for re-trial or so that it can first consider these arguments, which provide grounds for granting a new trial.***” R-69. (Emphasis added) (footnotes omitted).

Following this introduction, First Fidelity's brief included a short summary of some, but not all, of the new trial arguments that it had briefed in the trial court and that the trial court had not addressed. First Fidelity's brief mentioned the argument that the verdict was “against the weight of the evidence,” offering a one-paragraph summary of the issue. The brief then listed nine other types of error that could warrant a new trial, also providing just a single paragraph summary of each, to outline the issues that remained to be addressed by the trial court, if this Court reversed the JNOV in First Fidelity's favor. Acknowledging the cursory nature of the discussion necessitated by the alternative status of the argument, First Fidelity made the following request:

“In the event that this Court is inclined to consider these issues in the first instance, Respondent respectfully requests that the Court permit both Appellant and Respondent to fully brief these issues.” R-69, n.14.

In its reply brief, Bluebird presented extensive arguments (covering a dozen pages) detailing its views on the issues that First Fidelity had flagged either for consideration by the trial court in the first instance or at least for fuller briefing by *both* parties. On October 7, 2004, without providing First Fidelity with the opportunity for full briefing on the alternative, new-trial issues, this Court issued a decision (the “October 7 Decision”) reversing the JNOV and holding that the evidence was sufficient to support the jury’s verdict. The opinion explained that this Court was rejecting “defendant’s alternate grounds for setting aside the verdict and dismissing the complaint” and concluded with a sentence stating: “We have considered and rejected First Fidelity’s remaining arguments claiming various trial errors.”

Because Justice Gammerman had not ruled on the motion for a new trial, the only decision before this Court for review was the JNOV in First Fidelity’s favor. Accordingly, that is all the Court decided. The decretal language in the October 7 Decision was as follows:

“Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered July 21, 2003, which granted the motion of defendant First Fidelity Bank, N.A., New Jersey, to set aside the \$54 million jury verdict and dismiss the complaint, unanimously reversed, on the law,

without costs, the motion denied and the verdict reinstated.” R-81.

The October 7 Decision, therefore, addressed only the motion “to set aside the jury verdict * * * and dismiss the complaint,” and it was only that “motion [that was] denied.” The Court did not order entry of judgment in favor of Bluebird. The ordering paragraph did not contain any decretal language concerning First Fidelity’s alternative motion for a new trial. That motion remained pending and unresolved before the trial court while Bluebird pursued its appeal from the granting of judgment as a matter of law in First Fidelity’s favor. Once the JNOV was “reversed” and “the verdict reinstated,” as this Court ordered, the alternate motion for a new trial became ripe for resolution on remand.

In response to the October 7 Decision, Bluebird moved in the trial court for entry of judgment. First Fidelity opposed that motion. First Fidelity asked the trial court to decide its original motion for a new trial, which had never been considered. The trial court’s denial of that motion (the “Motion for Decision”) on February 16, 2005, is the subject of this appeal.

First Fidelity’s argument to the trial court in its Motion for Decision was a simple one: Because of the procedural history of the case, “no Court has squarely addressed all the full, substantive merits of First Fidelity’s arguments in support of a new trial.” R-21. Justice Gammerman’s initial order had held that First Fidelity was entitled to judgment as a matter of law and never reached those new-trial

arguments. This Court's October 7 Decision reversing the JNOV and reinstating the verdict, despite its cursory reference to "various trial errors," had not purported to deny the portion of the post-trial motion requesting a new trial. Nevertheless, Justice Moskowitz, who had succeeded Justice Gammernan as the IAS judge for this case, denied the Motion for Decision from the bench after a short hearing, stating that this Court's order reinstating the verdict barred the trial court from considering the new-trial motion and its supporting arguments.

ARGUMENT

Rule 4404(a) of the CPLR provides that, upon motion following a verdict or entry of judgment, the trial court may direct the entry of judgment in favor of "a party entitled to judgment" or it "may order a new trial * * * where the verdict is contrary to the weight of the evidence, [or] in the interest of justice * * * ." Rule 4406 in turn requires that "every ground for post-trial relief" must be joined in "only one motion under this article * * * ."

As the CPLR required, First Fidelity challenged the jury's verdict in a single post-trial motion that contained multiple distinct grounds for (1) entering JNOV *or* (2) granting a new trial. The request, in the alternative, for a new trial invoked the discretionary powers of the trial court. The original trial judge, Justice Gammernan, never exercised that discretion, because he granted the first branch of First Fidelity's motion.

Once this Court reversed that decision, however, it was incumbent on the successor judge, Justice Moskowitz, to step into the shoes of the trial judge and rule on the as-yet-unresolved motion for a new trial. This Court’s comment that it had “considered and rejected” First Fidelity’s arguments about “various trial errors” did not – and could not – foreclose Justice Moskowitz from giving deliberate and careful attention to the new trial motion before entering judgment against First Fidelity for over \$74 million.

I. THE DEFENDANT HAS A RIGHT TO HAVE THE TRIAL COURT DECIDE A MOTION FOR A NEW TRIAL IN THE FIRST INSTANCE.

A request for a new trial under CPLR 4404(a) is supposed to be decided in the first instance by the trial judge, who is presumed to be “in the best position” to make determinations on such motions. *Trapp v. Am. Trading & Production Corp.*, 66 A.D.2d 515, 519, 414 N.Y.S.2d 11, 13 (1st Dep’t 1979); see also CPLR 4405 (a motion under CPLR 4404 “shall be made before the judge who presided at the trial”). This is not a mere technicality in allocating responsibilities between trial judges and appellate courts. As the Court of Appeals has emphasized, the requirement that trial judges rule on post-trial motions for a new trial in the first instance

“is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein. The Trial Judge must decide whether substantial

justice has been done, whether it is likely that the verdict has been affected.” *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 382 (N.Y. 1976) (citations omitted).

The grant of a new trial, either because the verdict is against “the weight of the evidence,” or because a new trial is in the “interest of justice,” is a discretionary function involving evaluation of facts, and it is, therefore, reviewed with great deference by the appellate division. See *Merl v. Adler*, 207 A.D.2d 323, 616 N.Y.S.2d 185 (1st Dep’t 1994); *Nicastro v. Park*, 113 A.D.2d 129, 137, 495 N.Y.S.2d 184, 190 (2d Dep’t 1985); *Am. Linen Supply Co. v. M.W.S. Enters., Inc.*, 6 A.D.3d 1079, 1080, 776 N.Y.S.2d 387, 389 (4th Dep’t 2004). By holding that this Court’s October 7 Decision prevented her from considering First Fidelity’s arguments supporting the motion for a new trial, Justice Moskowitz deprived First Fidelity of the opportunity to benefit from this discretion.

A. The Trial Court Has Broad Discretion To Grant A New Trial In The Interest Of Justice, Or If The Verdict Is Against The Weight Of The Evidence.

CPLR 4404(a) authorizes the trial court to set aside a verdict and grant a new trial where, among other grounds, the trial judge concludes that the verdict is “contrary to the weight of the evidence” or that a new trial is otherwise “in the interest of justice.” First Fidelity invoked both grounds. Each of these grounds reflects the trial court’s discretionary power and primary responsibility to ensure a fair trial.

1. “Against The Weight Of The Evidence”

A trial court may set aside a jury’s verdict as against the weight of the evidence if “the jury could not have reached its verdict on any fair interpretation of the evidence.” *McDermott v. Coffee Beanery, Ltd.*, 9 A.D.3d 195, 206, 777 N.Y.S.2d 103, 111 (1st Dep’t 2004); see also, e.g., *Johnson v. N.Y. City Health and Hosps. Corp.*, 246 A.D.2d 88, 94, 676 N.Y.S.2d 38, 42 (1st Dep’t 1998); *Nicastro*, 113 A.D.2d at 134, 495 N.Y.S.2d at 189 (citing *Delgado v. Board of Educ.*, 65 A.D.2d 547, 408 N.Y.S.2d 949 (2d Dep’t 1978), aff’d 48 N.Y.2d 643; *Tripoli v. Tripoli*, 83 A.D.2d 764, 443 N.Y.S.2d 488 (4th Dep’t 1981), aff’d 56 N.Y.2d 684 (1982)). The standard of fair interpretation is applied whether the verdict is in favor of the plaintiff or the defendant. See *Nicastro*, 113 A.D.2d at 134.

The question whether a jury verdict is against the *weight* of the evidence is a discretionary and factual determination quite distinct from the question of whether a jury verdict, as a matter of law, is supported by *legally sufficient* evidence. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498-99 (N.Y. 1978). “Although these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results.” *Id.* at 498. To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be “no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis

of the evidence presented at trial.” *Id.* at 499. The test is a harsh one, because a finding that a jury verdict is not supported by sufficient evidence leads to a directed verdict terminating the action without resubmission of the case to a jury. *Nicastro*, 113 A.D.2d at 132, 495 N.Y.S.2d at 188.

By contrast, the standard for setting aside a jury verdict as against the weight of the evidence is necessarily less stringent. Such a determination results only in a new trial and does not deprive either party of its right to have all disputed issues of fact resolved by a jury. *Cohen*, 45 N.Y.2d at 498. The difference between the two inquiries is crucial:

“Although at first glance the fair interpretation phraseology might seem to reduce the weight of the evidence question to one of law, this merely serves to illustrate the danger of relying upon set phrases rather than underlying principles. * * * It is well settled that a motion to set aside a verdict as contrary to the weight of the evidence invokes the court’s discretion, and resolution of such a motion involves an application of that professional judgment gleaned from the Judge’s background and experience as a student, practitioner and Judge.” *Nicastro*, 113 A.D.2d at 134-35, 495 N.Y.S.2d at 189.

Therefore, when this Court reviewed the original decision granting First Fidelity JNOV as a matter of law, it was applying a far more rigorous standard than the trial judge would apply in deciding whether the verdict was contrary to the “weight” of the evidence. A finding that the verdict is against the “weight” of the evidence is based on an evaluation of the entire record, including First Fidelity’s

evidence, and can be proper even if considering everything in the light most favorable to Bluebird would provide minimally “sufficient” support for the verdict. Indeed, in its opening brief challenging the trial judge’s grant of JNOV, Bluebird correctly emphasized that the standard for granting JNOV “is much more restrictive than that required to determine whether the verdict is against the weight of the evidence.”

Both this Court’s October 7 Decision and the decretal paragraph in that decision demonstrate that the Court was addressing only this “more restrictive standard,” which Bluebird successfully urged the Court to apply. The Court considered only the question of legal sufficiency and did not attempt to preempt the trial court from applying the distinct standard that may justify awarding a new trial based on the “weight” of the evidence. As the Court stated: “The primary issue before us now is therefore whether the evidence was *sufficient* to support the verdict that First Fidelity’s inaction caused Bluebird’s financial loss.” R-83 (emphasis added). The Court never mentioned the distinct question whether the verdict was contrary to the *weight* of the evidence, a question that Bluebird itself acknowledged was not the relevant inquiry. That silence is hardly surprising, because the decision whether to grant a new trial on that ground (or any other) was not before the Court.

For this reason, the Court’s order disposing of the appeal simply reversed the grant of JNOV dismissing the complaint and directed reinstatement of the verdict. This limited decision restored the *status quo ante* and set the stage for the successor trial judge to review the trial record and decide whether First Fidelity’s separate challenge to the verdict should be sustained: Was the verdict against the *weight* of the evidence?

2. New Trial “In The Interest Of Justice”

First Fidelity also had invoked the power to grant a new trial “in the interest of justice.” This argument, too, lay undecided by the trial judge when this Court reversed the grant of JNOV. As the Court of Appeals has explained, the power to grant a new trial in the interest of justice

“is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein. The Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected, and must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision. This power conferred upon a court to order a new trial is discretionary in nature.” *Micallef v. Miehle Co.*, 39 N.Y.2d at 381 (internal quotation marks and citations omitted).

See also *Pyptiuk v. Kramer*, 295 A.D.2d 768, 770, 744 N.Y.S.2d 519, 522 (3d Dep’t 2002) (“in evaluating claimed errors on [a motion brought pursuant to CPLR 4404], the trial court must decide, in its discretion, ‘whether substantial justice has

been done [and] whether it is likely that the verdict has been affected”) (quoting *Micallef*, 39 N.Y.2d at 381); *Id.* (citing *Andrew v. Big Flats*, 155 A.D.2d 737, 739, 547 N.Y.S.2d 450, 451 (3d Dep’t 1989) (“The statute contemplates an evaluation of the claimed error, in this case a jury instruction, by the trial court, who must in its discretion ‘decide whether substantial justice has been done, [and] whether it is likely that the verdict has been affected.’”) (quoting *Micallef*) (emphasis omitted)).

The power to grant a new trial in the interest of justice calls for the exercise of informed discretion, much like the question whether a verdict is against the fair weight of the evidence. The power reflects the trial judge’s unique ability to determine whether error or misconduct occurred during trial and may have tainted the verdict. While the commission of legal error is a matter that an appellate court may consider *de novo*, the trial judge is generally more familiar with the course of the trial proceedings and may be in a better position to identify and evaluate certain types of error.

Moreover, the special perspective of the trial court may furnish better insight into whether a series of questionable rulings may raise doubts about the overall fairness of the outcome, even if none of the questionable rulings individually may amount to reversible error. That is why the CPLR gives the trial court the power to set aside the verdict and grant a new trial “in the interest of justice.” That standard is broader than one that would constrain the trial court to act only in the presence

of error so prejudicial that an appellate court would have to reverse. Once First Fidelity made a timely motion invoking its statutory right to have the trial court exercise this discretion, the reversal of the order granting even more sweeping relief (JNOV) did not – and could not – cut off its right to a decision on that alternative request.

Although Justice Moskowitz was not the trial judge, she has replaced Justice Gammerman as the IAS judge for this case. As the successor judge, she steps into the shoes of the original trial judge and has both the power and the responsibility to familiarize herself with the trial record, so that she can render any rulings that otherwise would have been within the power of the original trial judge. As the Second Department recently recognized, even when the original trial judge is no longer available to rule on a post-trial motion and to provide his unique “perspective” on the issues, the movant is at least entitled to the “consideration and determination of that motion by another justice of the Supreme Court * * * .” *Bonasera v. Town of Islip*, 2004-05698, 2004-09779, 2005 N.Y. App. Div. LEXIS 6907, *4 (2d Dep’t June 20, 2005); see also, e.g., *Gayle v. Port Auth. of N.Y. & N.J.*, 6 A.D.3d 183, 183-84, 775 N.Y.S.2d 2, 3 (1st Dep’t 2004); *Plunkett v.*

Emergency Med. Serv. of N.Y. City, 234 A.D.2d 162, 163, 651 N.Y.S.2d 462, 464 (1st Dep't 1996).⁴

B. The Great Deference Appellate Courts Show Toward The Trial Courts' Rulings On New Trial Motions Demonstrates The Importance Of Obtaining A Ruling From The Trial Court In The First Instance.

Because the grant of a new trial on either “weight of the evidence” or “interest of justice” grounds is a discretionary ruling involving the evaluation of the whole trial record, such orders are ordinarily reviewed only for abuse of discretion. See, e.g., *Merl*, 207 A.D.2d at 324, 616 N.Y.S.2d at 185; *Trapp*, 66 A.D.2d at 519, 414 N.Y.S.2d at 13; *Nicastro*, 113 A.D.2d at 137, 495 N.Y.S.2d at 190; *Am. Linen Supply Co.*, 6 A.D.3d at 1080, 776 N.Y.S.2d at 389. In *Trapp*, this Court cited the following passage from the Third Department’s 1953 decision in *Mann v. Hunt* to describe the proper role of appellate review in the new-trial context:

“The duty of the [trial] judge to supervise the reasonableness of the verdicts returned to him ought to be viewed liberally on appeal because the independence of mind with which that duty is exercised is ingredient to the sound health of the judicial process.” 66 A.D.2d at 520, 414 N.Y.S.2d at 13 (citing *Mann v. Hunt*, 283 A.D. 140, 141, 126 N.Y.S.2d 823, 825 (3d Dep't 1953)).

⁴ Under Section 21 of the Judiciary Law, a new trial may be necessary automatically, if the trial judge is no longer available and a successor judge is barred from making necessary rulings on purely fact-based issues. See, e.g., *Connelly-Logal v. West*, 272 A.D.2d 920, 708 N.Y.S.2d 225 (4th Dep't 2000).

Following this reasoning, the *Trapp* court deferred to the trial judge's determination to grant a new trial. Such deferential review is the norm, not the exception. See, e.g., *Merl*, 207 A.D.2d at 324, 616 N.Y.S.2d at 185 (the trial judge's determination is to be accorded "great respect" and is reviewable only for abuse of discretion). The Second Department has described the process as follows:

"[A]s a principle of appellate review * * * the trial court's decision to exercise its discretion and order a new trial must be accorded great respect* * * . That respect compels the appellate tribunal to view with liberality the trial court's disposition of a motion to set aside on evidentiary considerations—not only because the trial court is in the best position to properly assess the evidence presented at trial, but also because judicial independence of mind in making that determination is an essential 'ingredient to the sound health of the judicial process.'" *Nicastro*, 113 A.D.2d at 137, 495 N.Y.S.2d at 190-91.

This standard of review is applied uniformly throughout the state. See, e.g., *Am. Linen Supply Co.*, 6 A.D.3d at 1080, 776 N.Y.S.2d at 389 ("The determination of the trial court to set aside a jury verdict as against the weight of the evidence must be accorded great respect, and, where the court's determination is not unreasonable, we will not intervene to reverse that finding.") (internal quotation marks and citations omitted); *Osborne v. Schoenborn* 216 A.D.2d 810, 811, 628 N.Y.S.2d 886, 887 (3d Dep't 1995) ("Whether to set aside a verdict is within the

sound discretion of the trial court and the court's decision should not be disturbed absent a showing of an abuse of that discretion.”).

C. Failure To Have The Trial Court Rule On A Motion For A New Trial Deprives The Movant Of The Opportunity To Obtain This Kind Of Broad, Discretionary Relief.

The consistent line of authorities recognizing that appellate courts should defer to trial court decisions on motions for a new trial underscores the point that Justice Moskowitz missed here. First Fidelity had a statutory right to have a judge at the trial level carefully review the trial record to exercise informed discretion in response to First Fidelity’s argument that the verdict, reinstated after reversal of the JNOV, is nevertheless against the weight of the evidence or should be set aside in the interest of justice. Only after a Justice at the trial level addresses those issues will the matter be ripe for this Court’s deferential review

As this Court and its sister Departments have recognized for more than fifty years, the trial court is in the best position to determine these discretionary questions, at least in the first instance. This Court should remand to the trial court for consideration of First Fidelity’s new trial arguments. Only after that consideration is complete will it be appropriate for the parties to seek review from whatever final judgment results.

II. NO COURT HAS EVER RULED UPON FIRST FIDELITY'S MOTION FOR A NEW TRIAL.

The trial court's refusal to hear argument on these issues and to decide the new-trial motion following this Court's remand meant that *no court ever* considered and ruled upon First Fidelity's motion.

A. The Post-Trial Motion Comprised Two Distinct, Alternative Branches, And First Fidelity Was And Is Entitled To A Ruling On Each Branch.

Since 1962, New York law has required an aggrieved party to file a single, consolidated post-trial motion challenging an adverse jury verdict. N.Y. CPLR 4406. First Fidelity's post-trial motion, brought pursuant to CPLR 4404(a), requested that the trial court set aside the verdict and order one of two alternative forms of relief: either judgment for the defendant or a new trial. Each of the documents filed in support of this motion (including the notice of motion and the supporting affirmation and memorandum of law) reflected this dual request.

The fact that multiple claims for relief are contained in a single motion does not ordinarily relieve the trial court of its obligation to rule on each distinct claim. Where an order decides only one discrete aspect of a motion that contains more than one request for relief, the remaining branch of the motion remains undecided and, therefore, requires a decision by the trial court before review by this Court. *Hill v. Andron Constr. Corp.*, 256 A.D.2d 549, 549, 682 N.Y.S.2d 872, 872-73 (2d Dep't 1998); *Lopez v. Mass. Mut. Life Ins. Co.*, 170 A.D.2d 583, 585, 566

N.Y.S.2d 359, 360 (2d Dep't 1991); *Weitzenberg v. Nassau County Dep't of Recreation & Parks*, 249 A.D.2d 538, 539, 672 N.Y.S.2d 110, 111 (2d Dep't 1998) (“Lastly, the appeal by the plaintiffs from so much of the order as failed to decide that branch of their motion which was for reinstatement is dismissed. Inasmuch as the court did not grant or deny that branch of the motion, it is pending and undecided.”); *Elbert v. Village of N. Hills*, 262 A.D. 470, 471, 30 N.Y.S.2d 236, 237 (2d Dep't 1941) (where trial court granted motion to dismiss complaint and Appellate Division reversed and remanded, the defendants “were entitled to have decided those portions of their motion [for dismissal] not passed upon in the original decision of the [trial court]”).

B. The Trial Court Did Not Decide The New Trial Branch Of The Post-Trial Motion.

In this case, First Fidelity’s alternative request for a new trial was initially mooted by the trial judge's decision to set aside the verdict as a matter of law and to enter judgment for First Fidelity. However, once that ruling was reversed, the trial court’s obligation to decide the alternative branch of the motion was revived.

Justice Gammerman makes clear that he was only deciding the first branch of the post-verdict motion, the motion for JNOV, and not the alternative motion for a new trial. At the start of his order, the trial judge described the claim he was deciding as follows: “Defendant * * * moves, pursuant to CPLR 4404(a), to set aside a \$54 million jury verdict *as a matter of law.*” R-23 (emphasis added). The

full motion, of course, contained more than a request to set aside the verdict as a matter of law. It also contained a request that the trial court exercise its discretionary authority to grant a new trial in the interest of justice, or because the verdict was against the weight of the evidence.

The decretal paragraph in Justice Gammerman's order shows that he was not deciding the motion for a new trial. The order granted "the motion," described earlier in the opinion as one to set aside the judgment "as a matter of law." It ordered that the complaint be dismissed and that the clerk "enter judgment accordingly." R-30. Nowhere in the decretal paragraph or elsewhere in the order did the trial court discuss the request for a new trial.

C. **This Court Likewise Did Not Decide First Fidelity's New Trial Motion.**

Nor did this Court's October 7 Decision decide First Fidelity's still-pending request that the trial court set aside the verdict in the interest of justice or as against the weight of the evidence. The October 7 Decision contained a single decretal paragraph:

"Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered July 21, 2003, which granted the motion of defendant First Fidelity Bank, N.A., New Jersey, to set aside the \$54 million jury verdict and dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied and the verdict reinstated. Appeal from order, same court and Justice, entered July 14, 2003, unanimously dismissed, without

costs, as subsumed in the appeal from the *judgment*.”
R-81 (emphasis added).

This Court’s decree described the focus of the appeal as the “Judgment” rendered in favor of First Fidelity in response to its motion for JNOV. The order from which Bluebird’s appeal was dismissed as “subsumed” in that “Judgment” was the Decision and Order of Justice Gammerman granting the motion for JNOV. The Court identified that motion in question as the one “to set aside the * * * verdict *and dismiss the complaint*.” This description is consistent with the trial court’s description of the motion as one to “set aside the verdict as a matter of law.” This Court did not mention in the decretal paragraph or elsewhere in the opinion that there remained a portion of the post-verdict motion that requested a new trial.

This Court did note at the end of its opinion that, in reaching its decision, it had “considered and rejected First Fidelity’s remaining arguments claiming various trial errors.” R-87. This single sentence, however, did not mean that this Court was deciding, in the first instance, First Fidelity’s request that the trial court exercise its discretion to grant a new trial. For one thing, this unadorned sentence does not change the decretal language, which does not mention the request for a new trial.

Even if the Court had power to address the request for a new trial without the benefit of a ruling on that motion at the trial court level – which we deny – one

can assume that the Court would not have left unstated such extraordinary action preempting trial court action. If the Court had wanted to assert the power to foreclose the trial court from addressing the new trial motion after the remand to deny JNOV and reinstate the verdict, the Court would have declared: “and motion for new trial ordered denied and judgment to be entered for Plaintiff-Appellant.” The Court issued no such mandate.

None of this is surprising. First Fidelity had not requested appellate review of the trial errors raised in the post-trial motion and had not asked this Court to consider ordering the trial court to grant a new trial. Instead, the brief requested a *remand* to the trial court for consideration of those issues in the first instance, if the Court overturned the JNOV. Thus, Point III (at R-69) in First Fidelity’s only brief stated:

“IF, BUT ONLY IF, THE JUDGMENT IS REVERSED, THE CASE SHOULD BE REMANDED FOR RETRIAL OR FOR CONSIDERATION OF ISSUES RAISED IN THE NEW TRIAL MOTION WHICH WERE NOT DECIDED BELOW”

In an abundance of caution, First Fidelity added a footnote asking that the Court give both sides a chance “to fully brief” the issues that had not been addressed below, “if this Court is inclined to consider these issues in the first instance.” The Court never stated that it was going to assert the extraordinary power to decide a new trial motion in the first instance. The Court never gave First Fidelity the chance to “fully brief” those issues. Therefore, the Court’s focus on

reversing the judgment granting JNOV must be understood as leaving the new trial motion for decision after the case returned to the trial court and the verdict was reinstated. The reinstatement of the verdict automatically would set the stage for the trial court to rule on the alternative motion for a new trial.

In the end, this Court's October 7 Decision should not be read to have decided or ordered more than its decretal paragraph indicates. The order directed the trial court to deny First Fidelity's motion for judgment to "dismiss the complaint" and to reinstate the verdict. The motion to grant a new trial was still pending upon issuance of this limited order.

D. The Trial Court Erred, On Remand, In Concluding That This Court Had Prevented The Trial Court From Deciding The New Trial Motion.

In denying First Fidelity's Motion for Decision on its pending new-trial motion, Justice Moskowitz explicitly declared that, in her view, this Court's October 7 Decision had required her to enter judgment for the plaintiff, without considering the grounds for a new trial. She explained: "I don't believe the Appellate Division remanded to this court to consider the alternate argument of a new trial. Therefore, I'm denying the motion." R-13. As discussed above, however, nothing in this Court's decree purported to require *entry of judgment* for Bluebird without addressing the open issue whether a new trial was warranted. The Court only went so far as to require reinstatement of the original *verdict*. That

action effectively revived the timely but undecided motion to set aside the verdict *in favor of a new trial*. See CPLR 4404(a).

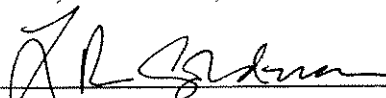
Justice Moskowitz's refusal to consider First Fidelity's motion for a new trial deprived the defendant of its statutory right to have the trial court rule on this motion before the entry of the massive judgment that it is now facing.

CONCLUSION

This Court should remedy that error by reversing the order declining to decide the new-trial motion and remanding the matter to the trial court with instructions to consider First Fidelity's new-trial arguments in the first instance and to hold the judgment in favor of Bluebird in abeyance until the trial court resolves that motion.

Dated: New York, New York
July 11, 2005

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Printing Specifications Statement

I, Lauren R. Goldman, attorney for the defendant-appellant First Fidelity Bank, N.A., New Jersey, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2002. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 6488 words counted by the word-processing program.

Dated: July 11, 2005
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

BLUEBIRD PARTNERS, L.P.,

Plaintiff,

- against -

FIRST FIDELITY BANK, N.A., NEW JERSEY;
MIDLANTIC NATIONAL BANK; UNITED
JERSEY BANK; NATIONSBANK OF
TENNESSEE, N.A.; CONSTELLATION BANK;
CORESTATES NEW JERSEY NATIONAL
BANK; WILENTZ, GOLDMAN & SPITZER,
P.C. and KELLEY DRYE & WARREN;

Defendants.

New York County
Index No. 97-601365

IAS Part 3
Hon. Karla Moskowitz

**CIVIL APPEAL
PRE-ARGUMENT
STATEMENT**

1. Title of the Action and Full Name of the Parties: The title of the action and the full names of the parties are set forth in the caption above. There has been no change in the parties.

Prior to trial, the claims against defendants Midlantic National Bank, United Jersey Bank, and NationsBank of Tennessee, N.A., were dismissed pursuant to settlement. The claims against defendants Constellation Bank and Corestates New Jersey National Bank were dismissed during the trial by the Honorable Ira Gammerman. The claims asserted against defendants Wilentz, Goldman & Spitzer, P.C. and Kelley, Drye & Warren were dismissed earlier in the litigation.

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3. Court Below: Supreme Court, New York County (Moskowitz, J.).

4. Commencement of Action: This action was commenced on March 14, 1997 by the filing of Plaintiff's complaint.

5. Nature of the Action: The Complaint asserts claims for breach of contract, breach of fiduciary duty, and negligence against a group of indenture trustees and law firms.

6. Result Below: An Order was entered on February 16, 2005, denying First Fidelity's Motion Requesting Decision on the Pending, Undecided Motion for New Trial Pursuant to CPLR 4404. Prior to this decision, a Judgment was entered on January 21, 2005, based on a jury verdict rendered on December 12, 2002.

7. Grounds for Reversal or Modification: This is an appeal from the Decision and Order by the Supreme Court, New York County (Moskowitz, J.) entered on February 16, 2005, denying First Fidelity's Motion Requesting Decision on the Pending, Undecided Motion for New Trial Pursuant to CPLR 4404, and from each and every part of that order, a copy of which is attached hereto, as well as from the whole thereof.

The grounds for reversal are based on the Trial Court's failure to consider and decide the merits of the motion, which was initially filed on January 21, 2003. On July, 10, 2003, the Trial Court (Gammerman, J., who is no longer assigned to the case) granted First Fidelity's Motion to Set Aside the Jury Verdict and, therefore, did not reach the aspect of First Fidelity's January 21, 2003 motion seeking a New Trial. The Appellate Division reversed the Trial Court's July 10, 2003 decision and reinstated the verdict. Thus, the January 21, 2003 New Trial motion was never decided by the Trial Court.

The Supreme Court erred in denying First Fidelity's Motion Requesting Decision on the pending, undecided motion for a new trial, dated January 21, 2003. There are numerous errors in the Trial Court's decision. Among other things, the Appellate Division was not presented with, and did not address, all new trial issues raised in the January 21, 2003 motion for a new trial.

8. Method of Appeal: The method of appeal being used is the appendix method.

9. Related Actions and Appeals:

(a) Plaintiff has filed a Notice of Appeal from a portion of the January 21, 2005 Judgment entered in this matter, and First Fidelity has filed a Notice of Cross-Appeal from the entire Judgment. Copies of Plaintiff's Notice of Appeal and

Preargument Statement, and First Fidelity's Cross-Appeal and Preargument Statement, are attached hereto.

(b) Bluebird Partners, L.P. v. The Bank of New York, et. al., Index No. 96-601016, is currently pending in Supreme Court, New York County.

(c) Dresner Co. Profit Sharing Plan v. First Fidelity Bank, N.A., Docket No. 95-cv-1924 (S.D.N.Y.) (DLC), is currently pending in the United States District Court for the Southern District of New York. The action asserts claims based on the same instruments which are the subject of this action.

Dated: Newark, New Jersey
March 1, 2005

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