

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25824  
C/kmg

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Argued - December 11, 2009

PETER B. SKELOS, J.P.  
THOMAS A. DICKERSON  
PLUMMER E. LOTT  
SHERI S. ROMAN, JJ.

2008-11673

DECISION & ORDER

Andrzej Zimnoch, et al., respondents,  
v Bridge View Palace, LLC, appellant.

(Index No. 47730/03)

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Schindel, Farman, Lipsius, Gardner & Rabinovich LLP, New York, N.Y. (Lorienton N.A. Palmer of counsel), for appellant.

Seligson, Rothman & Rothman, New York, N.Y. (Martin S. Rothman, William J. Ryan, and Alyne I. Diamond of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals, as limited by its brief, from so much of a judgment of the Supreme Court, Kings County (Schack, J.), dated October 8, 2008, as, upon an order of the same court dated March 23, 2007 which, inter alia, denied those branches of its motion pursuant to CPLR 4404(a), which were to set aside the jury verdict and for judgment as a matter of law in its favor or, alternatively, for a new trial on all issues, and granted that branch of the plaintiffs' motion, in effect, pursuant to CPLR 4404(a) which was to set aside the verdict as to damages only, and upon so much of a jury verdict as, after a new trial on the issue of damages only, awarded the plaintiff Andrzej Zimnoch the principal sums of \$300,000 for past pain and suffering, \$850,000 for future pain and suffering, \$44,000 for past medical expenses, and \$364,000 for future medical expenses, and upon an order of the same court dated March 25, 2008, which, inter alia, denied those branches of its motion pursuant to CPLR 4404 which were to set aside as excessive the damages awarded for past and future pain and suffering and past and future medical expenses, and for a collateral source hearing pursuant to CPLR 4545, is in favor of the plaintiffs and against it in the principal sums of \$300,000 for past pain and suffering, \$850,000 for future pain and suffering, \$44,000 for past medical expenses, and \$364,000 for future medical expenses, respectively.

January 26, 2010

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ORDERED that the judgment is modified, on the facts and as an exercise of discretion, by deleting the provisions thereof awarding the plaintiff Andrzej Zimnoch damages in the principal sums of \$300,000 for past pain and suffering and \$850,000 for future pain and suffering, as so modified, the judgment is affirmed insofar as appealed from, with costs payable to the appellant by the plaintiffs, and a new trial is granted with respect to those damages only unless within 30 days after service upon the plaintiffs of a copy of this decision and order, the plaintiffs shall serve and file in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the verdict as to past pain and suffering from the sum of \$300,000 to the sum of \$150,000, and as to future pain and suffering from the sum of \$850,000 to the sum of \$300,000, and to the entry of an amended judgment accordingly; in the event that the plaintiffs so stipulate, then the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

On November 10, 2003, the plaintiff Andrzej Zimnoch (hereinafter Zimnoch) fell from a height of about two feet onto a concrete floor of a building owned by the defendant while using a chop saw to cut away concrete and brick in order to enlarge a window opening. The plaintiffs commenced this action against the defendant to recover damages, inter alia, for personal injuries. After a trial, the jury found that the defendant's violation of Labor Law § 240(1) was a substantial factor in causing the accident, and it awarded the plaintiffs \$154,080 for past medical expenses, \$1,540,800 for future medical expenses, and nothing for past and future pain and suffering. Following the jury verdict, the defendant moved, among other things, pursuant to CPLR 4404(a) to set aside the verdict and for judgment as a matter of law in its favor or, in the alternative, for a new trial on all issues. The plaintiffs, inter alia, moved, in effect, pursuant to CPLR 4404(a) to set aside the verdict on damages only. The Supreme Court denied the defendant's motion, found that the damages award was against the weight of the evidence, and directed that a new trial be conducted as to damages only.

The trial court properly set aside the verdict as to damages after the first trial (*see Califano v Automotive Rentals*, 293 AD2d 436; *Myers v Schaffer Grocery Corp.*, 281 AD2d 156, 157), and providently exercised its discretion in directing a new trial on the issue of damages only (*see Figliomeni v Board of Educ. of City School Dist. of Syracuse*, 38 NY2d 178, 182). Where the jury necessarily concludes that a plaintiff was injured as a result of an accident, “the jury’s failure to award damages for pain and suffering is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation” (*Ramos v New York City Hous. Auth.*, 280 AD2d 325, 326, quoting *Kennett v Piotrowski*, 234 AD2d 983, 984; *see Califano v Automotive Rentals*, 293 AD2d 436). In addition, since the jury’s award for past and future medical expenses after the first trial was substantially more than warranted by the evidence or requested by the plaintiffs during their summation, there is a strong likelihood that the damages award was the result of an impermissible compromise (*see Califano v Automotive Rentals*, 293 AD2d 436; *Rivera v City of New York*, 253 AD2d 597, 600; *Torres v City of New York*, 226 AD2d 701, 702).

During the damages trial, the plaintiffs presented evidence that Zimnoch sustained herniated discs at L4-L5 and at L5-S1, and a bulging disc at L3-L4 as a result of the accident. As pertinent to this appeal, the jury awarded him the principal sums of \$300,000 for past pain and suffering, \$850,000 for future pain and suffering, \$44,000 for past medical expenses, and \$364,000 for future medical expenses. The Supreme Court denied those branches of the defendant’s motion

which were pursuant to CPLR 4404 to set aside the verdict as excessive and for a collateral source hearing.

The award after the damages trial for past and future medical expenses did not deviate materially from what would be reasonable compensation (*see* CPLR 5501[c]). However, the jury award for past and future pain and suffering deviates materially from what would be reasonable compensation to the extent indicated herein (*see* CPLR 5501[c]; *see generally Van Nostrand v Froehlich*, 18 AD3d 539; *Jansen v Raimondo & Sons Constr. Corp.*, 293 AD2d 574).

The defendant's contention that the trial court erroneously denied its request for a hearing as to collateral source payments made to Zimnoch by workers' compensation lacks merit. The payments which the plaintiffs received are specifically excluded from consideration by statute (*see* CPLR 4545[a]; Workers' Compensation Law § 29[1]), and the record does not support the conclusion that Zimnoch received any benefits from a collateral source which would be deductible from the award.

The defendant's remaining contentions either do not require reversal, are unpreserved for appellate review, or are not otherwise properly before this Court.

SKELOS, J.P., DICKERSON, LOTT and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court