

<b>Schecher v R. Park Cent., LLC</b>
2014 NY Slip Op 31365(U)
May 27, 2014
Supreme Court, New York County
Docket Number: 103055/2008
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

SUZANNE SCHECHER,  
Plaintiff,

Index No.: 103055/2008

Motion Date: 06/28/2013

- v -

Motion Seq. No.: 005

R. PARK CENTRAL, LLC, H. PARK CENTRAL, LLC,  
O. PARK CENTRAL MANAGEMENT, LLC, PARK  
CENTRAL HOTEL (de) LLC, PARK CENTRAL OWNER  
LLC, and THE MANHATTAN CLUB TIMESHARE INC.,

Defendants.

The following papers, numbered 1 to 4 were read on this motion to set aside a jury verdict.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

**UNFILED JUDGMENT** 1

Answering Affidavits - Exhibits

~~This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).~~

Replying Affidavits - Exhibits

Cross-Motion:  Yes

No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ordered that the motion of plaintiff to set aside the verdict shall be granted solely on the issue of damages, and is otherwise denied.

The jury rendered its verdict in this action on May 21, 2012. The jury found that defendants were negligent and that their negligence was a substantial factor in causing plaintiff's accident, and that plaintiff was also negligent and that her negligence was a substantial factor in causing her accident. The jury apportioned liability 75% to defendants and 25% to plaintiff. It awarded lost earnings in the amount of \$35,000, medical expenses in the amount of \$17,146.00, past pain and

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

suffering in the amount of \$42,500 and made no award for future pain and suffering. Thus the jury award totaled \$95,146.00 before reduction for plaintiff's comparative fault.

Plaintiff moves pursuant to CPLR § 4404<sup>1</sup> to set aside the jury award as contrary to the weight of the evidence and for an additur or a new trial, arguing that the damages award deviates materially from reasonable compensation for the injuries that plaintiff suffered as a result of the accident. Plaintiff also moves to set aside the verdict and for a directed verdict of no negligence on the part of plaintiff contending that there was no evidence of comparative fault on the part of plaintiff. Finally, plaintiff contends that a new trial is warranted on the issue of damages as the court erroneously admitted portions of a surveillance tape that were more prejudicial than probative on the question of the extent of the loss of enjoyment of life suffered by plaintiff as a result of the accident.

Defendants oppose the motion.

The court must consider a variety of factors in assessing the adequacy of the jury's verdict, including the nature of the accident and injuries to determine whether the jury's award of past and future damages for pain and suffering "deviates materially from what would be reasonable compensation" for

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<sup>1</sup>In addition, plaintiff erroneously cites CPLR § 5501, which pertains to the scope of review on appeal from a final judgment.

plaintiff's injury. Lopiano v Baldwin Transportation, Inc., 248 AD2d 161 (1<sup>st</sup> Dept 1998). The First Department has observed that "the issue of whether an appealed award deviates materially from comparable awards is a mixed question of law and fact that is resolved by analogizing an appealed case with relevant precedent." Donlon v. City of New York, 284 AD2d 13 (1<sup>st</sup> Dept 2001).

The record at trial establishes that after the accident on August 5, 2007, plaintiff was transported to the emergency room of St. Vincent's Hospital where she was examined and released. Radiology films taken eleven days later revealed that she sustained a tear of the lateral meniscus of her left knee and a non-displaced fracture of her fibula representing a component of a Maisonneuve injury to her left ankle. On October 29, 2007, she underwent arthroscopic surgery (including chondroplasty and synovectomy) on her left knee, under general anesthesia, and was discharged the same day with crutches. The ankle fracture healed with an air cast and crutches but without surgery. Defendants vigorously contested plaintiff's claims that she also injured her back and left shoulder in the August 5, 2007 accident pointing to the absence of any references to an examination or treatment of those parts of plaintiff's body in any medical records until two years after the accident.

The most analogous binding precedent to the injuries suffered by plaintiff in this case appears to be the First Department's decision in Gaston v City of New York, 59 AD3d 281 (1<sup>st</sup> Dept 2009). In that five-year old case, the Court modified the trial court's denial of the plaintiff's motion to set aside the verdict awarding plaintiff \$5,000 and \$0 for past and future pain and suffering, respectively, and ordered a new trial solely on the issue of damages unless defendants stipulated to an award, prior to apportionment of past and future pain and suffering in the amount of \$200,000 and \$50,000, respectively. In Gaston, the plaintiff slipped on a defective condition on the sidewalk and "suffered a torn meniscus that necessitated surgical repair and would be attended by arthritic consequences." The First Department found that the awards of \$5,000 for past pain and suffering and \$0 for future pain and suffering were inadequate. Modifying such award, the Court held \$200,000 for past pain and suffering, and \$50,000 for future pain and suffering, to be reasonable compensation. In another instructive case, Schultz v Turner Constr Co (278 AD2d 76, 77 [1<sup>st</sup> Dept 2000]), the Court held that damages in the principal amounts of \$200,000 and \$400,000 for past and future pain and suffering, respectively, were not excessive "for a knee injury that required arthroscopic surgery followed by eight weeks of physical therapy three times a week, continues to require follow-up care, will likely require

additional surgery in the future, and has had a significant and severe impact on the quality of the injured plaintiff's life and on his ability to perform many household duties, and will continue to do so over a period of 25 years." However, the injuries suffered by the plaintiff in Schultz, including evidence of a prognosis of additional surgery, which is absent here, appear to have been more severe than those suffered by the plaintiff here. In this case, it was admitted that the plaintiff suffered a torn meniscus requiring arthroscopic surgery and physical therapy. Though the testimony from the plaintiff and plaintiff's doctor that there was a permanent loss of a range of motion in the joint was contradicted by the testimony of defendant's doctor, such doctor admitted that trauma may cause degenerative processes. The court does concur with defendants that the weight of the evidence support their defense that plaintiff injured neither her back nor her shoulder in the August 2007 accident.

The court disagrees with plaintiff that the court erroneously admitted certain portions of the surveillance videotapes that show plaintiff attending a motorcycle rally, as the only segments admitted show plaintiff's range of motion and non use of pain medication patches. "[T]he videotape was not unduly prejudicial to [plaintiff] but rather was probative of plaintiff's damages claims" (Hairston v Metro-North Commuter RR,

\* 6]  
6 Misc3d 399, 401 [Sup Ct, New York County 2004]), specifically as to pain and the loss of enjoyment of life.

Finally, plaintiff's prior awareness of the defect bears on comparative negligence (Elliott v East 220<sup>th</sup> St Realty Co, 1 AD3d 262, 263 [1<sup>st</sup> Dept 2003]), and her testimony that she was aware of the condition of the stairs for many weeks before she fell provides sufficient support for the jury's determination assessing 25% of the fault to her.

Based upon the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that the awards for past and future pain and suffering are vacated and a new trial is directed for the plaintiff Suzanne Schecher solely on the issue of damages, unless within 30 days after service of a copy of this Order with notice of entry, the defendants shall serve and file in the Office of the Clerk of the Supreme Court, New York County, a written stipulation consenting to increase the verdict prior to apportionment as to damages for pain and suffering from the sum of \$42,500 (\$42,500 for past pain and suffering and \$0 for future pain and suffering) to the sum of \$340,000 (\$250,000 for past pain and suffering and \$90,000 for future pain and suffering); and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED and ADJUDGED that the Clerk shall enter judgment upon the verdict accordingly.

This is the decision and order of the court.

Dated: May 27, 2014

ENTER:

~~*Debra A. James*~~

**DEBRA A. JAMES**

J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).