

<b>Hernandez v Kaisman</b>
2015 NY Slip Op 31743(U)
April 30, 2015
Supreme Court, New York County
Docket Number: 104989/2007
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

YAHAIRA HERNANDEZ, ESTHER HERARTE and  
JENNIFER V. STERN,

Plaintiffs,

- v -

DR. ARDEN KAISMAN,

Defendant.

Index No.: 104989/2007

Motion Date: 11/21/2014

Motion Seq. No.: 017

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The following papers, numbered 1 to 5 were read on this motion to set aside the jury verdict and for a new trial and for attorneys fees.

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

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

FILED

MAY 04 2015

PAPERS NUMBERED

1, 2, 3
4
5

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERKS OFFICE

Upon the foregoing papers, the motion of defendant for an order pursuant to CPLR 4404(a) shall be granted, and the motion of plaintiffs Yahaira Hernandez and Esther Herarte for attorneys fees and disbursements are granted.

Motion Sequence Number 016 and 017 are consolidated for disposition.

At the conclusion of the trial on March 7, 2014, the jury returned a verdict, in pertinent part:

- with one juror dissenting, the jury answered "\$50,000" to interrogatory number 12, "State the amount of

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

compensatory damages for an offensive bodily contact award to plaintiff Jennifer V. Stern. Damages for Mental Anguish and/or Pain and Suffering"; and

- with no jury dissenting (unanimous), the jury answered "\$50,000" to interrogatory number 12, "State the amount of compensatory damages for the placing of plaintiff Jennifer V. Stern in apprehension of immediate harmful or offensive conduct award to plaintiff Jennifer V. Stern. Damages for Mental Anguish and or Pain and Suffering", for a total compensatory award of \$100,000 to plaintiff Jennifer V. Stern.

Defendant now moves pursuant to CPLR 4404(a) for an order to set aside the damages part of the jury verdict in favor of plaintiff Jennifer V. Stern on the grounds that it is excessive (Motion Sequence Number 017). The court shall grant such motion.

To set aside the verdict as against the weight of the evidence and order a new trial, the court must determine that the evidence so greatly preponderates in the moving party's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. See Pavlou v City of New York, 21 AD3d 74, 76 (1<sup>st</sup> Dept 2005). It is axiomatic that in its evaluation, the judge "cannot interfere with a jury's fact-finding process simply because [she] disagrees with its finding or would have reached a contrary conclusion based on different

credibility determinations." See Cholewinski v Wisnicki, 21 AD3d 791 (1<sup>st</sup> Dept 2005).

Pursuant to CPLR 5501( c), the standard for a trial court to alter the damages part of the verdict is whether the "jury's money verdict" "'materially deviates' from what would be reasonable compensation'" (see Griffin v Starbucks Corp., 52 AD3d 250 (1<sup>st</sup> Dept 2008); see also Wendell v Supermarkets General Corp., 189 AD2d 1063, 1064 [3d Dept 1993]); Prunty v YMCA of Lockport, 206 AD2d 911 [4<sup>th</sup> Dept 1994]; Shurgan v Tedesco, 179 AD2d 805 [2d Dept 1992]).

In Killon v Parrotta, 125 AD3d 1220 (3d Dept 2015), defendant struck plaintiff in the face with a metallic baseball bat, as a result of which plaintiff suffered a shattered mandible and open fracture in his mouth, which required him to undergo a tracheotomy and surgical reconstruction of the bone fragments with a mesh device to promote regrowth of the bone that was unsuccessful, recurring infections, seven more surgical procedures, chronic pain and permanent disability as to his speech, with the prospect of further reconstructive surgery. The Killon appeals court conducted a detailed review of awards in four assault and battery cases in the Second and Third Departments and one in the Supreme Court, Bronx County to determine whether the jury award to plaintiff of \$25,000 for past pain and suffering and no damages for past pain and suffering was

reasonable. Determining that the award was inadequate, the Killon court held that "a new trial is required on the issues of past and future pain and suffering unless defendant stipulates to an award of \$200,000 for past pain and suffering and \$150,00 for future pain and suffering" (125 AD3d at 1223).

Based on the Killon court's analysis, this court finds that in light of the fact that plaintiff Stern suffered absolutely no physical injury, including bruising or swelling, as the result of defendant's having briefly grabbed her arm for five to ten seconds to follow him, the jury verdict of \$100,000 for assault and battery is excessive to the extent indicated in the below decretal paragraph.

"The New York City Human Rights Act [Administrative Code of City of NY § 8-502(f)] provides that the court, in its discretion, may award the prevailing party costs and reasonable attorneys fees." Fortnuto v Nisi, 84 AD3d 617 (1<sup>st</sup> Dept 2011).

Having prevailed on their claims under the statute with jury awards of \$20,000, and \$50,000 in compensatory damages, respectively, plaintiffs Yahaira Hernandez and Esther Herarte now move for attorneys' fees. This court finds that such plaintiffs are entitled to recover reasonable attorneys fees.

The court has reviewed the billing records and court file to determine what constitutes a reasonable number of hours for

the successful prosecution of the sexual harassment claims of the prevailing plaintiffs.

The court finds that based upon their experience, the following hourly rates for each attorney who provided legal services on behalf of plaintiffs Hernandez and Herarte are reasonable:

Fred Lichtmacher: \$500 per hour;

Jessica Acosta: \$175 per hour;

Matthew Flamm: \$350 per hour.

Total hourly time charges of \$6,500 based upon 20 hours of legal services performed by Flamm, including perfection of the appeal, are reasonable.

The \$75 hourly rate of Serbie Kwan, the paralegal who provided services for plaintiffs Hernandez and Hearte, is reasonable, as are her total fees in furtherance of the claim of such plaintiffs in the amount of \$1,200. Likewise, the court finds the 80 hours incurred for Tatiana Perez's services as a paralegal at an hourly rate of \$85 for a total of \$6,800 to be reasonable.

The court finds the travel rates of \$250 and \$87.50 per hour for Fred Lichtmacher and Jessica Acosta, respectively to be reasonable.

The court concurs with defendant that the trial hours attributed to attorney Acosta should be discounted because she

conducted a short examination of only one witness, and was a newly admitted attorney at the time of trial.

Fees for 100 hours of services performed by attorney Acosta that total \$17,500 plus \$612.50 for travel are reasonable.

Fees for 450 hours of services performed by attorney Lichtmacher that total \$225,000 plus 28 hours of travel totaling \$7,000 is an adequate award.

Defendant is correct that plaintiffs submit no receipts for out-of-pocket expenses. Nonetheless, without peradventure, plaintiffs Hernandez and Herarte incurred costs in prosecuting the appeal, airfare for the deposition of a witness in Florida, and the costs of deposition transcripts and an award of \$12,000 for such disbursements is reasonable.

While the attorneys fees exceed the amount of the award, as the plaintiffs' case here serves a significant public purpose pursuant to New York City Human Rights Law §8-502(f), such a fee award is appropriate (see McGrath v Toys "R" Us, Inc., 3 NY3d 421 [2004]).

Based upon the foregoing, it is

ORDERED that the motion of plaintiff Yahaira Hernandez and Esther Herarte for an award of attorneys fees in the amount of \$ 264,612.50 and disbursements in the amount of \$ 12,000.00 against defendant Arden Kaisman is granted; and it is further

ORDERED that the motion of the defendant for an order setting aside that part of verdict that awarded plaintiff Jennifer V. Stern \$50,000 in damages for assault and \$50,000 in damages for battery and for remittitur is granted and the court directs a new trial solely on the issue of damages for mental anguish and/or pain and suffering for assault and battery, unless plaintiff Jennifer V. Stern, within 30 of service of a copy of this order, with notice of entry, stipulates to reduce the reward to \$15,000 for assault and \$5,000 for battery, for a total award in favor of plaintiff Jennifer V. Stern in the amount of \$20,000, and it is further

ORDERED that the Clerk shall enter judgment in accordance therewith.

This is the decision and order of the court.

Dated: April 30, 2015

ENTER:

Debra A. James  
 DEBRA A. JAMES J.S.C.

**FILED**  
 MAY 04 2015  
 NEW YORK  
 COUNTY CLERKS OFFICE