

Altagracia Simo v New York City Transit Authority

2002 NY Slip Op 30023(U)

April 23, 2002

Supreme Court, Queens County

Docket Number: 0004946/4946

Judge: Phyllis Orlikoff Flug

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

ALTAGRACIA SIMO, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">-against-</div> THE NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, NAB CONSTRUCTION CORP./GROW TUNNELING CORP., J.V. and JOSEPH RADUSA CRAFTS, INC., <div style="text-align: right;">Defendant.</div>	Index Number..4946/95 Motion Date...1/29/02 Motion Cal. Number.....34 & 35 Trial Cal. Number.....
--	--

The following papers numbered 1 to 7 read on motion #34

Notice of Motion	1 - 2
Memorandum of Law	3
(2) Affirmations in Opposition	4 - 5
Reply Affirmation	6
Letter dated 2/28/02 with Copy of decision	7

The following papers numbered 1 to 5 read on motion #35

Notice of Motion	1 - 2
Memorandum of Law	3
Affirmation in Opposition	4
Reply Affirmation	5

The defendant, New York City Transit Authority ("T.A."), has moved for an order setting aside the verdict and granting judgment to it dismissing the complaint and all cross-claims against it; or in the alternative, directing the defendant NAB Construction Corp./Grow Tunneling Corp ("NAB") to indemnify the movant pursuant to the contractual indemnification provisions of the contract.

The defendant, NAB seeks, by separate motion, the same relief with the exception of indemnification.

After trial, the jury found the defendant NAB created the defect and was 60% negligent, while the T.A. was 40% negligent.

"It is well settled that, reviewing a jury verdict for sufficiency, a court must examine the evidence in the light most favorable to the prevailing party ... and that before the court may find the verdict is not supported by sufficient evidence, it must first conclude there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by a jury on the basis of the evidence presented at trial" (Grassi v. Ulrich, 87 NY2d 954 [1996]; Cohen v. Hallmark Cards, 45 NY2d 493, 499 [1978]; Kravis v. Horn, 254 AD2d 462 [2d Dept. 1998]).

Based upon this record, this court cannot so conclude. There is ample evidence to sustain the jury's findings of liability and apportionment.

In evaluating whether an assessment of damages is excessive, the court must determine whether it deviates materially from what would be reasonable compensation (see, CPLR §5501 [c]; Jump v. Facelle, _____ AD2d _____ [2d Dept. decided March 18, 2002, Slip. Op. 03358]; Olsen v. Burns, 267 AD2d 366 [2d Dept. 1999]).

Here, the court finds that the awards of \$850,000 for past and \$1,000,000 for future pain and suffering are excessive. However, considering the nature of the pain and suffering endured by the patient, her operation, the time spent in the hospital for post-operative care, the permanence of the injury, and the trauma developed degenerative arthritis requiring possible future surgery ("Replacement/fusion") on her ankle, the court finds that awards of \$200,000 and \$400,000 respectively are appropriate.

Therefore, a new trial will be granted on the issue of damages, unless within 30 days after service upon the plaintiff of a copy of this order, she shall serve and file in the office of the Clerk of the Court, a written stipulation consenting to reduce the verdict as to damages for past pain and suffering from the sum of \$850,000 to \$200,000 and as to damages for future pain and suffering from the sum of \$1,000,000 to \$400,000, and to the entry of an appropriate judgment, accordingly; in the event that the plaintiff so stipulates, then the verdict, as so reduced and amended, is sustained and the motion will be denied.

Finally, the court denies on the ground of Res Judicata, that portion of the T.A.'s motion regarding the issue of indemnification. The Appellate Division, First Department, in a decision dated February 5, 2002, rejected this same argument in affirming a summary judgment motion, involving the same parties, granted in New York County on January 10, 2001 (J. Brown).

April 23, 2002

J.S.C.