

Altman-Fider v Gershon

2002 NY Slip Op 30122(U)

February 19, 2002

Supreme Court, New York County

Docket Number: 122937/97

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten
Justice

PART 6

Marilyn Altman-Fider

INDEX NO. 122937/97

MOTION DATE 10-16-01

- v -

MOTION SEQ. NO. 02

Roger M. Geshon, DDS

MOTION CAL. NO. Comm

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ the decision and order under sequence number 02 dated January 24, 2002 is hereby recalled and replaced with the accompanying memorandum decision.

SCANNED
FEB 26 2002

This constitutes the decision and order of the court.

Dated: 2-19-02

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
EILEEN BRANSTEN
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X

MARILYN ALTMAN-FIDER,

Plaintiff,

-against-

ROGER M. GERSHON, D.D.S.

Defendant.

-----X

Index No.: 122937/97
Motion Date: 10/16/01
Motion Sequence No.: 02

SCANNED
FEB 26 2002

PRESENT: EILEEN BRANSTEN, J.

In this dental malpractice action the jury returned a verdict in favor of plaintiff Marilyn Altman-Fider and against Dr. Roger M. Gershon, concluding that Dr. Gershon departed from accepted practice in his installation of an implant crown on tooth number 2 and that the departure was a substantial factor in causing plaintiff injury. The jury awarded plaintiff \$3,400 for her dental expenses and \$50,000 for past pain and suffering. The jury rejected imposition of liability, however, in connection with treatment of teeth numbered 5, 7, 8, 9, 10, 11, 20 and 31.

Defendant now moves, pursuant to CPLR 4404(a), for a new trial, or, in the alternative, to reduce the verdict on the grounds that the award is excessive and unsupported by the evidence. Arguing that the verdict sheet and jury interrogatories were confusing, plaintiff cross-moves for a new trial or for an order setting aside portions of the verdict, directing that a judgment be entered in her favor and increasing the verdict.

Trial Evidence

The testimony and documents submitted at trial establish that Altman-Fider, who had a history of dental problems, was under Dr. Gershon's care between December 1993 and February 1997. In 1996, she complained of, among other things, pain stemming from the crowns on her dental implants on teeth numbered two and three. Plaintiff testified generally that the condition of her mouth caused her nervousness and that she was devastated when she learned the implant crown on teeth two and three, among other dental work, had to be redone, requiring her to undergo tedious and painful replacement procedures. Plaintiff's discomfort persisted until October 1998 when another dentist replaced the dental work on teeth numbered two and three. The replacement work was bloody and painful and necessitated painkillers.

Analysis

Pursuant to CPLR 5501(c), in reviewing a money judgment that the defendant contends is excessive, the appellate division is directed to determine whether the award "deviates materially from what would be reasonable compensation." This standard of review "calls for closer surveillance than 'shock the conscience' oversight" and is designed to tighten the range of tolerable awards. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 424 (1996) (interpreting New York law); *see also, Donlon v. City of New York*, 284 A.D.2d 13, 16 (1st Dep't 2001).

The “material deviation” standard is also to be applied by a trial court in determining a post-trial motion to set aside a jury verdict as excessive. *See Gasperini*, 518 U.S. at 425; *Motichka v. Cody*, 279 A.D.2d 310, 311 (1st Dep’t 2001); *Cochetti v. Gralow*, 192 A.D.2d 974, 975 (3d Dep’t 1993); *In re New York City Asbestos Litigation*, 173 Misc.2d 121, 124 (Sup. Ct. N.Y.Co. 1997); *see also, Ashton v. Bobruitsky*, 214 A.D.2d 630, 631 (2d Dep’t 1995); *Birkbeck v. Central Brooklyn Medical Group, P.C.*, 2001 WL 1154985 (Sup. Ct. Kings Co. 2001). To determine whether a verdict “deviates materially from what would be reasonable compensation,” the Court must examine jury awards in other similar cases, considering--among other things--the type of injury, the level of pain, and the age of the plaintiff. *Garcia v. Queens Surface Corp.*, 271 A.D.2d 277 (1st Dep’t 2000); *see also, Donlon*, 284 A.D.2d at 18. The Court must always keep in mind, however, that each case is unique, and there is no one set formula to apply. *See, Murphy v. Lewry*, 235 A.D.2d 968, 970 (3d Dep’t 1997).

Plaintiff urges that the \$53,400 award is justified because she experienced more than two years of pain, nervousness, emotional distress, and discomfort and had to undergo several dental procedures as a result of defendant’s malpractice. Because, however, the jury award for deviates from what is reasonable compensation under the circumstances, defendant is entitled to a new trial unless plaintiff stipulates to accept a reduced award in the amount

of \$40,000 . See, *Michaels v. United States Tennis Assn, Inc.*, 284 A.D.2d 186, 187 (1st Dep't 2001); *Motichka v. Cody*, 279 A.D.2d 310, 311 (1st Dep't 2001).

Plaintiff never specified the extent of her pain that related to teeth 2 and 3. Indeed, the evidence was general and unremarkable with respect to the pain experienced because of the improperly installed implant crown. Plaintiff's allegations concerning her pain and suffering throughout the course of her reparative dental work, moreover, related to a multitude of procedures spanning three years. Though the work included repair of the crowns on teeth two and three, it also encompassed several other procedures completely unrelated to defendant's malpractice. Thus, \$53,400 is excessive under the circumstances.

There is no doubt, however, that plaintiff suffered and should be compensated. This Court has examined past pain and suffering damages awards in several cases involving tooth injuries and the verdicts approximated \$40,000. See, e.g., *Teller v. Anzano*, 263 A.D.2d 647, 649-650 (3d Dep't 1999) (\$35,000 past pain and suffering award in personal injury action involving damage to two front teeth); *Classen v. Ashkinazy*, 258 A.D.2d 863, 864 (3d Dep't 1999) (\$40,000 award not excessive in failed-implant dental malpractice case); *Kushner v. Mollin*, 181 A.D.2d 866, 867 (2d Dep't 1992) (\$40,000 for past pain and suffering). Accordingly, the verdict will be set aside unless plaintiff agrees to a \$40,000 verdict.

Plaintiff's Cross-Motion

Plaintiff's cross-motion to set aside the verdict in part and order a new trial must be denied. CPLR 4110-b explicitly provides that no "party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection." *See also, Myers v. S. Schaffer Grocery Corp.*, 281 A.D.2d 156, 157 (1st Dep't 2001); *Calabrese v. Chan*, 244 A.D.2d 376 (1st Dep't 1997); *Figueroa v. Waldbaum's Inc.*, 222 A.D.2d 483 (2d Dep't 1995). Having failed to object at the outset, plaintiff's argument that the jury interrogatories are confusing and that portions of the jury's verdict must be set aside is wholly unpreserved.

Conclusion

In accordance with the foregoing, this Court finds that the jury's award is excessive and materially deviates from what would be reasonable compensation. Accordingly, the Court will grant defendant a new trial on the issue of damages unless, within thirty days of this order, plaintiff executes a stipulation agreeing to reduce the jury's award to \$40,000.

Plaintiff's cross-motion is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 19, 2002

ENTER



Hon. Eileen Bransten