SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

LESZEK ZUKOWSKI and BOZENNA ZUKOWSKA,

INDEX NO. 28062/2001

HON. BERNADETTE F. BAYNE

Plaintiff(s)

v.

Decision/Order

YURY GOKHBERG, MARAT GOKHBERG, LEONID RUBANOV, and V & V CONSTRUCTION CORPORATION

DATE: SEPTEMBER 28, 2004

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this

MOTION TO SET ASIDE A JURY VERDICT SUBMITTED ON JULY 6, 2004

Papers	Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	
Replying Affidavits	
Exhibits	
Other	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This is a motion to set aside the jury verdict rendered on February 25, 2004 on the issue of damages. This case arises from the plaintiff's fall from a collapsed scaffold situated on the premises owned by the defendants, Yury Gohkberg, and Leonid Rubanov. The plaintiff was employed as a mason for one of the subcontractors. The general contractor, V & V Construction Corp. hired the plaintiff's employer to complete certain masonry work. At the onset of the trial on February 20, 2004, defendants conceded liability. The damages trial followed with testimony provided by the plaintiff and various medical providers. Among other injuries, plaintiff claimed that he had permanent limitations as a result of an intraarticular wrist fracture and herniated discs in his cervical and lumbar spine.

Defendant V & V Construction Corp. now moves the Court for an Order pursuant to CPLR Section 4404 to set aside the verdict rendered for the plaintiff. Specifically, defendants'

counsel is now seeking to set aside the Jury's damages verdict. Defendant argues that the verdicts as to future pain and suffering and future medical expenses were excessive, unsupported by the evidence and should be eliminated or reduced. Plaintiff was awarded $600,000 for future pain and suffering, $120,000 for future medical and $25,000 for future loss of services. Plaintiff, in opposition argues that the jury's evaluation of the evidence and fact finding should not be usurped given the credible nature of the testimony relied upon by it and the lack of any evidence that would contradict the jury's findings. Plaintiff's counsel also maintains that the damages award was reasonable given the injuries suffered by the plaintiff and the impact the injuries will have on him in the future.

I. The Verdict is Contrary to the Weight of the Evidence

The Defendant's argument that the verdicts are contrary to the weight of the evidence is persuasive. The Defendant asserts that the jury could not have reached its verdict based upon the testimony of the plaintiff and the plaintiff's doctors. Specifically, defendant argues that the plaintiff and his experts' testimony revealed gaps in the plaintiff's treatment, the plaintiff's failure and refusal to seek surgical treatment for his injuries, speculative testimony regarding his future medical problems and a failure to prove all of the alleged injuries. Defendant, in support of its contention that the verdict is not credible cites the testimony of both the plaintiff's witnesses and the defendant's witnesses. Plaintiff, in opposition to the motion argues that the defendant has merely restated the arguments made during the trial summations. Plaintiff also attempts to show the appropriateness of the verdict by citing a number of recent cases in which the verdicts ranged higher than the plaintiff's total verdict. The courts, as is noted in both the Defendant's Motion Papers and in the Plaintiff's Affirmation in Opposition, are unwilling to set aside a jury verdict without a showing that the evidence so preponderates in favor of the moving party that the verdict could not have been reached upon any fair interpretation of the evidence. ***Nicastro v. Park, 113 A.D.2d 129, 495 N.Y.S. 2d 184*** (2nd Dept. 1985). More recently, the Appellate Division of the Second Department refused to overturn a jury verdict and reiterated the views set forth in Nicastro by holding that, "the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict." ***Schray, et al., v. Amerada Hess Corporation, et al., 746 N.Y.S.2d 405 (2nd Dept. 2002)***.

In the case at hand, the Court is however persuaded that the evidence presented by both the plaintiff and the defendant does not support the damages awarded to the plaintiff for future pain and suffering and future medical expenses.

III. The Damages Verdict is Excessive given the Nature of the Injury

The Defendant contends that the jury award of $120,000 is excessive for future medical expenses and that $600,000 is excessive for future pain and suffering. The Defendant cites a

number of cases in which jury damages verdicts have been reduced based upon the facts and circumstances of the cases. The defendant, argues that this award should be reduced to conform to the credible evidence adduced at trial. (Attorney's Affirmation in Support of Defendant's Motion to Set Aside the Verdict, p. 16). The defendant argues further that the awards "deviate materially from what would be reasonable compensation." *Blas v. R.M.H. Realty Corp.*, 772 N.Y.S.2d 606, (2004), *Stylianou v. Calabrese*, 297 A.D.2d 798, 748 N.Y.S.2d 36. Defendant also contends that the verdict is not in conformity with the testimony offered by the medical professionals during trial. Moreover, defendant argues that plaintiff has not actively sought medical treatment for carpal tunnel syndrome or for pain in his back since November 2002 and he has on two different occasions declined to have the surgery on his wrist. (Attorney's Affirmation in Support, p. 13). Finally, Defendant argues that the estimates offered by Dr. Kaplan during the trial for future physical therapy and future epidural injections are overstated and not based upon factual experience because the plaintiff has not to this date sought these medical treatments.

The Plaintiff, in opposition to the defendant's motion argues that the award for future medical expenses is not excessive given the nature of the injuries. Plaintiff contends that even though the plaintiff has not had the surgery in the past, and he did in fact demonstrate some reluctance to having the procedures performed, the jury was given the opportunity to consider the progressive nature of the plaintiff's injuries and that deliberation resulted in their verdict. Plaintiff further argues that defendant's own doctor, Dr. DeMarco found limitations to the plaintiff's ranges of motion and progressive permanency.

Future Medical Expenses:

At trial, plaintiff's counsel presented medical witnesses who testified that the plaintiff may need future medical treatment in the form of surgery, physical therapy and epidural injections. The defendants were able to illicit from the plaintiff's witnesses that the plaintiff has not sought these treatments prior to the trial nor has he indicated a willingness to seek them in the future. Defendants now seek to reduce the award for future medical expenses not only on the grounds that the plaintiff has not sought these treatments previously; but also, on the basis that the plaintiff has not indicated either by actions or testimony that he intends to do so in the future.

After attending Coney Island Hospital for his injuries, plaintiff testified that he started to visited a Dr. Scott Gray around the beginning of November 2000. He continued to see Dr. Gray for physical therapy related to his wrist until November 2002. When asked if during that period of time if Dr. Gray ever recommended surgery for his hand, plaintiff testified, "he was not saying anything. I was seeing him for therapy." (Plaintiff's trial transcript, p.35). When further questioned about what he did when his therapy sessions with Dr. Gray were coming to an end, the plaintiff testified that he also had gone to an orthopedic hand specialist, Dr. Rogers. He visited Dr. Rogers six times from 2001 until the end of 2002. Plaintiff admits that during the course of his treatment with Dr. Rogers his hand continued to improve, stating, "Yes, it was improving since he sent me for therapy to Sports Medicine Center on Manhattan Avenue."

When asked if on November 20, 2002 he told Dr. Rogers that he had less pain and increased grasp, plaintiff replied, "it could be so." The plaintiff attributed most of his statements that may have led Dr. Rogers to believe that he was improving to a lack of understanding between himself and Dr. Rogers. Plaintiff indicated that the Doctor did not speak Polish and that oftentimes their conversations were not held with an interpreter. Plaintiff's testimony about the sequence of doctors he saw and when he finished seeing them is somewhat confused. He claims that he did not see Dr. Rogers after he started seeing Dr. Gray however there does appear to be some overlap. In any event, plaintiff does not indicate that either doctor ever recommended surgery for his wrist. When asked about his last two visits with Dr. Rogers in 2001 and the fact that he told Dr. Rogers that he had full range of motion and was able "to turn your wrist in and turn your wrist out", plaintiff's answer is vague, "certainly, not if at all. If we are talking about that particular — may be some specific examinations, well if he wrote it, probably it was so. It definitely isn't." Similarly, the plaintiff's treatment with Dr. Kaplan and Dr. Gray also overlapped from April 2002 to November 2002. Nevertheless, plaintiff also claims that he considered Dr. Gray to be his primary physician and that he received physical therapy from Dr. Gray for his neck, back and wrist through November 2002. Plaintiff's counsel never called Dr. Gray to testify.

In April of 2002, the plaintiff was referred to a Dr. Jeffrey Kaplan, a board certified orthopedist for further treatment. In his initial visit with Dr. Kaplan, plaintiff testified that Dr. Kaplan examined his wrist and then prescribed a "wrist immobilizer for his forearm", which he, "was supposed to put it on whenever I felt pain in my wrist." (Plaintiff's Trial Transcript, p. 43). Plaintiff further testified that after the April 2002 visit he did not see Dr. Kaplan again until April 2003.(Plaintiff's Trial Transcript, p. 43). According to the testimony, plaintiff was not seeing any doctor from November 2002 until April 2003 when he went back to Dr. Kaplan for further consultation. Dr. Kaplan testified that he saw the plaintiff on eight occasions from April 2002 until January 2004. When questioned further about his first visit with the plaintiff, Dr. Kaplan could not remember if the plaintiff wore a "lumbar brace" for his back; however, he does remember, recommending that the plaintiff continue to see Dr. Gray stating, "Dr. Gray is a doctor I know. He specializes in rehabilitation, physical therapy and I felt the proper course, at this point, when I first saw him was to continue with the physical therapy." (Trial Transcript for Dr. Kaplan, p. 31). Dr. Kaplan when asked if the physical therapy was successful responded, ".... physical therapy in certain injuries, specifically where there is posttraumatic arthritis involves damage to the nerve, can be successful in that the treatment of pain, it can treat the pain, it can't always correct the problem. So it was not successful in correcting the problem and giving him long-term permanent relief, but I think it did help reduce some of the pain while he was doing physical therapy." (Dr. Kaplan's Trial Transcript, p. 32)

On cross-examination of Dr. Kaplan, the doctor testified that in his initial visit with the plaintiff, the plaintiff only complained of ".... low back pain and pain in the right wrist. He was, as I said, not having the neck pain, at that time." (Dr. Kaplan's Trial Transcript, p. 59) When questioned further about his initial examination of the plaintiff, Dr. Kaplan states that he was recommending surgery for the plaintiff's wrist to release the carpal tunnel nerve (Dr. Kaplan's

Trial Transcript, p. 70) A year and a half later, on October 2, 2003, Dr. Kaplan noted in his records that the plaintiff's carpal tunnel surgery had been authorized. When asked if the plaintiff had declined the surgery again, Dr. Kaplan did not provide a direct answer to the question:

Q: At that point, he didn't want the surgery, October 2, 2003, correct?
A: Again, he has more than the one thing going on here.
Q: Doctor, I'm asking a simple question, perhaps if you answer it. Did he indicate, at that point that he did not want to undergo the surgery October 2, 2003?
A: You're not asking a simple question, you're oversimplifying it.
(Dr. Kaplan Trial Transcript, p. 78)

The Court notes that even on December 11, 2003, the plaintiff saw another physician in Dr. Kaplan's office and based upon the notes prepared by the doctor, the plaintiff was once again told that the authorization for the surgery had been obtained but he once again declined the surgery. (Dr. Kaplan's Trial Transcript, p.80)

With respect to the plaintiff's neck and lower back, Dr. Kaplan testified that even in the plaintiff's second, third, fourth, fifth and sixth visits to his office there are no complaints regarding neck pain. By this time, the plaintiff had also stopped treating with Dr. Gray. Dr. Kaplan testified that as a result of the MRI performed on October 22, 2003, he mentioned in his notes problems with the plaintiff's neck for the first time. His notes about neck pain were not in response to complaints from the plaintiff. (Dr. Kaplan Trial Transcript, p. 76). When asked:
Q: If he mentioned (in his notes) that the cervical symptom is "quiescent?",
A: "Correct."
Q: What does that mean?
A: They come and go. When we are seeing him here, cervical symptoms were not something I felt were that serious.
(Dr. Kaplan's Trial Transcript, p. 76)

Moreover, upon examination by another doctor in Dr. Kaplan's office on November 12, 2003, it was found that the plaintiff had full range of motion in his neck.. (Dr. Kaplan's Trial Transcript, p. 79)

In light of the fact that Dr. Gray did not testify, the Court is left with only the testimony of Dr. Kaplan and with the plaintiff's testimony to determine whether the awards for the plaintiff's future medical expenses and future pain and suffering "deviate materially from reasonable compensation." It is clear from Dr. Kaplan's testimony that the plaintiff had not expressed any interest in pursuing surgery to relieve the pain in his wrist. Dr. Kaplan testified that the surgery's cost would be around $7,000.(Dr. Kaplan's Trial Transcript, p. 38). The surgery would require post-operative physical therapy for approximately twelve weeks, twice a week at a rate of $100 to $150 a week. The doctor also indicated that the plaintiff may need antiinflammatory medication at a rate of about $90 per month for three months. (Dr. Kaplan's Trial Transcript, p. 39). The trial testimony bears out the fact that the plaintiff's wrist was fractured and the healing process

has led to a diagnosis of carpal tunnel syndrome. When asked if the plaintiff may still need some type of medical restraint after the surgery, Dr. Kaplan indicated there would be a need for ongoing medical visits and he may have a need for a brace for his arm at a cost of anywhere from $50 to $200. Despite the fact that the plaintiff has been reluctant to have the surgery to relieve the pain, the plaintiff is only 46 years old and he may choose the operation in the future. The Court finds that the award of $20,000 for the costs associated with a surgery in the future is appropriate.

Dr. Kaplan also indicated in his testimony that he could foresee the plaintiff having physical therapy indefinitely for his neck and his back; however, the plaintiff stopped his physical therapy in November 2002 and despite the fact that the doctor continued to recommend that he see Dr. Gray, he did not do so. Dr. Kaplan indicated that he foresaw a conservative treatment for the plaintiff's radiculopathy of the lumbar spine, including epidural steroid injections at a cost of $3,000 to $7,200 annually. When questioned as to whether in the four years since the accident if the plaintiff has had any epidural injections, Dr. Kaplan, responded, "absolutely not. That is for progressive problems. I'm not saying he needs it today, I'm saying he needs epidural injections in future treatments." (Dr. Kaplan's Trial Transcript, p. 82). Dr. Kaplan again testified that the plaintiff's physical therapy may cost anywhere from $100 - 150 per session. The Court finds that an award for future medical expenses related to the plaintiff's back for epidural injections and physical therapy is excessive and speculative. The plaintiff in four years since the accident has not had any epidural injections nor has he continued his physical therapy. Moreover, with respect to his neck the plaintiff had not complained of neck pain and Dr. Kaplan by his own testimony indicates that he did not consider neck pain to be significant as of November 2003. Most importantly, Dr. Kaplan's own colleague found the plaintiff to have full range of motion in his neck in November 2003. Thus, the Court finds the plaintiff did not show an ongoing need for physical therapy or for epidural injections. The Court hereby reduces the award for future medical expenses related to neck and back pain to zero.

Future Pain and Suffering

Defendant argues that the award for future pain and suffering is excessive and is not in line with similar cases of injuries. Plaintiff in opposition, argues that the award is minimal in comparison to a number of other cases of all or some of the injuries claimed.

Defendant correctly asserts in his affirmation in reply that all of the cases cited by the plaintiff in his affirmation in opposition either can be distinguished from the present circumstances or the verdict with respect only to future pain and suffering was not in fact as great as the plaintiff would have the Court believe. Although, the jury evaluated the totality of the plaintiff's situation, noting his age at the time of the accident, the change in his lifestyle both professionally and personally and the fact that he is no longer employed, the evidence presented does not support the damages awarded to the plaintiff. In the recently decided case of ***Harris v. City of New York, 770 N.Y.S. 2d 380, (2003)***, a 29 year old police officer was awarded damages in excess of two million dollars by a Queens County jury. The Appellate Division reduced the

plaintiff's damages for both past and future pain and suffering. In addressing the plaintiff's future pain and suffering award, the Court found that although the plaintiff underwent surgery to stabilize a tendon in his wrist and although he continued to experience pain, weakness, numbness, and loss of motion in his wrist, the award of $550,000 was excessive. The Court appeared to be influenced in part by the fact that the surgery was successful and that over time the plaintiff may see continued improvement in his hand.

In another case cited first by the plaintiff and then distinguished by the defendant, ***Julien v. Leo Green, Queens County Supreme, (1994)***, an 84 year old woman sustained a fracture to her nondominant wrist which led to a diagnosis of carpal tunnel syndrome. plaintiff cites the case for the proposition that the award of $400,000 was in the range of the plaintiff Zukowski's verdict and thus the plaintiff's verdict should be consider reasonable. Plaintiff does however overstate the similarity of the award for similar injuries. The plaintiff in the Julien case was only awarded $100,000 for her future pain and suffering. Her award for past pain and suffering of $300,000 reflected the fact that this older plaintiff had endured two wrist surgeries up to the time of trial, including the carpal tunnel release procedure. Similarly, plaintiff cites the case of ***Oakes v. Brookes Shopping Center***, a 1996 Bronx Supreme Court case in which a 70 year old plaintiff was awarded $260,000 from a trip and fall accident in which her wrist was fractured and she ultimately developed carpal tunnel syndrome. Defendant correctly points out that plaintiff's argument is misleading in that the award for future pain and suffering was in fact only $110,000.

Although the plaintiff argued throughout the trial that Mr. Zukowski suffered from both wrist pain and back pain, the evidence clearly showed that the injury to the plaintiff's wrist was the most significant. Neither plaintiff nor defendant has been able to provide the Court with case law exhibiting a factual situation even more closely analogus than the two cases previously discussed and those two cases involve elderly plaintiffs who had surgical procedures done prior to trial to improve their wrists. The Court finds in this case that the Plaintiff cannot overcome the fact that each case has a different set of facts and circumstances and the jury's fact finding and determination of damages in the instant case does appear to be excessive.

The plaintiff's own testimony at trial is that although he cannot lift heavy bags anymore, "before I was carrying heavy bags when shopping with her, I was cleaning. I was just helping her with everyday chores," (p. 23 Trial Transcript for Zukowski) he also testified that he drives everyday because his wife does not have a driver's license (p. 50 Trial Transcript for Zukowski). Plaintiff indicated that he cannot rollerblade and play tennis with his children and his ability to help his wife in their home has changed; however, plaintiff did not express a willingness to pursue either through his past behavior or through his testimony that he was eager to try medical treatments that may improve his condition. At the very least the plaintiff has not even pursued continued physical therapy which by his own admission was helping to make him feel better. The plaintiff has not shown that he has pursued all reasonable remedies to no avail and that as a result his family relationships have been damaged. The Court finds that the award for pain and suffering is not consistent with other recent cases in the second department where the injuries have been similar and more often where the treatment has been more significant.

As a result, the Court finds that the jury verdict for the plaintiff on future damages was excessive and contrary to the weight of the evidence. The Court hereby reduces the plaintiff's award for future medical expenses to $20,000.00 and future pain and suffering to $200,000.00.

This constitutes the Decision and Order of this court.

Law Secretary to notify both sides of this Decision/Order

DATED: September 30, 2004

Bernadette Bayne

BERNADETTE F. BAYNE
Justice, Supreme Court