

Keating v SS&R Mgt. Co.

2007 NY Slip Op 30633(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0122264/2003

Judge: Lottie E. Wilkins

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

PRESENT: Lottie E. Wilkins
Justice

PART 18

Index Number : 122264/2003

KEATING, LAURIE

INDEX NO. _____

vs

SS&R MANAGEMENT

MOTION DATE _____

Sequence Number : 006

MOTION SEQ. NO. _____

TRIAL DE NOVO

MOTION CAL. NO. _____

is 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

FILED

APR 10 2007

Motions by defendants, Robert Borgella and High Thor Taxi Corp., granted in accordance with the attached decision and order.

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 4, 2007

Lottie E. Wilkins

APR 04 2007

Lottie E. Wilkins *J.S.C.*

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):

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

-----X
LORI KEATING and KEVIN KEATING,

Plaintiffs,

- against -

SS&R MANAGEMENT CO., HIGH THOR TAXI
CORP. and ROBERT BORGELLA,

Defendants.
-----X

PART 18

Index No. 122264/03

DECISION

Lottie E. Wilkins, J.:

Defendant Robert Borgella moves for an order pursuant to CPLR 5501 and CPLR 4404 setting aside the verdict in favor of plaintiff and ordering a new trial or, in the alternative, an order granting remittitur and reducing the jury's award. Defendant High Thor Taxi Corp. cross-moves for an order pursuant to CPLR 4404 dismissing the claims against it as a matter of law or, in the alternative, reducing the jury's award. Plaintiffs oppose both motions.

This action arises out of a motor vehicle accident of the kind frequently referred to as a "pedestrian knock-down" which occurred on July 2, 2003. Plaintiff, who worked as a legal secretary, was struck by a taxicab driven by defendant Borgella while she stood on the sidewalk near the intersection of East 49th Street and Second Avenue in Manhattan. As a result of the impact, plaintiff sustained severe fractures of her right tibia and fibula. She was admitted to hospital for seventeen days during which she

underwent surgeries for both internal and external fixation of the shattered bones in her right leg. All told, plaintiff has undergone six surgeries since the accident, including the fixation procedures mentioned above, as well as skin, muscle and nerve grafts. Her leg is badly deformed.

With respect to liability, since no other car was directly involved in this accident, there was no issue of comparative negligence among defendants. The only issue with respect to the corporate defendants pertains to their vicarious liability as "owners" under the Vehicle and Traffic Law, which is discussed at greater length within. Additionally, defendants presented no evidence at trial tending to show that plaintiff's own culpable conduct caused her accident or injuries, thus there was no need for the jury to apportion liability at all.

It should be noted that, at trial, the defendant driver Robert Borgella did not appear, nor did any other person testify on behalf of defendants. Since plaintiffs made a prima facie case for liability, and there were no factual issues which required resolution by the jury, thus the Court directed a liability verdict in favor of plaintiffs leaving only the question of damages for the jury.

The jury awarded plaintiff Lori Keating \$70,000.00 for past medical expenses, \$150,000.00 for past lost earnings, \$5,000,000.00 for past pain and suffering, \$800,000.00 for future medical expenses over 10 years, \$1,000,000.00 for future lost

earnings over 14 years and \$7,000,000 for future pain and suffering over 31 years. In addition, the jury awarded plaintiff Kevin Keating \$100,000.00 for the past loss of his wife's services. The total award, in excess of \$14 million, likely places the jury's verdict among the highest made for this class of injuries.

Analysis

Because the cross-motion to dismiss by High Thor raises questions of law unique to that particular defendant, it will be addressed first. High Thor argues that it is not an owner for purposes of Vehicle and Traffic Law § 388 and thus cannot be vicariously liable to plaintiffs. In response, plaintiffs argue that High Thor has not rebutted the presumption of ownership created by its registration of the taxicab with the Department of Motor Vehicles. Plaintiffs also argue, separate from the question of ownership, that High Thor should be held vicariously liable as Robert Borgella's employer. This latter argument, however, is based on a statement attributed to Mr. Borgella that he was employed by High Thor at the time of the accident. Such an admission is not binding on High Thor and is otherwise unsupported by the record. Indeed, the parties did not dispute at trial that Mr. Borgella rented the taxicab from High Thor and operated it as an independent contractor. Thus plaintiffs' respondeat superior argument lacks merit. However, the argument concerning vicarious liability

under VTL § 388 and the presumption of ownership created by registration of a vehicle requires closer analysis.

It was stipulated by the parties at the beginning of trial that defendant SS&R Management was the "title owner" of the taxicab, meaning that title to the vehicle belonged to SS&R. Somewhat confusingly, it was further stipulated that defendant High Thor was the "registered owner," meaning that the vehicle had been registered with the State Department of Motor Vehicles by High Thor. The distinction between title and registration forms the basis for High Thor's motion to dismiss pursuant to Vehicle and Traffic Law §§ 128 and 388.

The pertinent parts of Vehicle and Traffic Law § 388 in effect at the time of this accident stated:

"1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from the negligence in the use or operation of such vehicle...by any person using or operating the same with the permission, express or implied, of such owner...

3. As used in this section, "owner" shall be as defined in section one hundred twenty-eight of this chapter and their liability under this section shall be joint and several."

Section 128 of the Vehicle and Traffic Law, referred to in VTL § 388 above, provides in relevant part that an "owner" is:

"[a] person, other than a lien holder, having the property in or

title to a vehicle or vessel.”

Pointing to the language in VTL § 128, High Thor argues that it cannot be vicariously liable for plaintiffs’ damages because it neither had a property interest in nor held title to the vehicle involved in this accident. Registration of the vehicle, according to High Thor, is an insufficient basis upon which to predicate vicarious liability, especially in light of SS&R’s admission that it was the title owner.

Both plaintiffs and High Thor agree that registration of a vehicle is prima facie evidence of ownership (see, Switzer v Aldrich, 307 NY 56 [1954]). Both sides also agree that the presumption of ownership created by registering a vehicle can be rebutted with evidence that another party actually owned the vehicle in question (see, Aronov v Bruins Trans., Inc., 294 AD2d 523, 524 [2nd Dept. 2001] [dealing with the rebuttable presumption of ownership created by a certificate of title]). The only point of disagreement among these parties is whether the presumption of ownership created by High Thor’s registration of the vehicle was successfully rebutted on this record. Given that SS&R’s admitted that it owned title to the vehicle, any presumption of ownership created by High Thor’s registration of the vehicle was completely dispelled when SS&R Management admitted that it owned the vehicle. It hardly need be stated that, in a court of law, an admission by a party on a material issue of fact such as ownership is highly conclusive.

The analysis does not end there, however. It has also been held that the agent of an owner who administers leasing of the vehicle on the owner's behalf is also considered an owner for purposes of vicarious liability under the Vehicle and Traffic Law (see, Taughrin v Rodriguez, 254 AD2d 735 [4th Dept. 1998]). Thus, in order for High Thor to escape vicarious liability, the principles articulated in Taughrin cannot be applicable to these facts. Unfortunately, they are.

It was quite evident at trial that High-Thor registered vehicles owned by SS&R Management and then leased them to taxi drivers with the full knowledge and consent of SS&R Management. There was never any question on this account. If anything, it seems that High Thor and SS&R deliberately created an arrangement whereby one company registered the vehicles even though another was the true owner. In this Court's opinion, holdings like that in Taughrin are specifically intended to help claimants break through often complex and confusing corporate arrangements that are made in the vehicle leasing industry generally, and in taxicab leasing specifically. Thus, as in Taughrin, it is appropriate for the Court to break through the tangled web of corporate arrangements in order to achieve the results that Vehicle and Traffic Law §§ 128 and 388 were intended to serve at the time. For that reason, High Thor's motion to dismiss is denied.

Having determined that High Thor should not be dismissed from the

action, the next issue is the motion by defendants concerning the verdict. The essence of those motions is that the jury's verdict was excessive and deviated from what could be considered reasonable compensation. These arguments appear to have merit.

The legal standard applied by the Appellate Division – and necessarily by this Court – to claims that a jury verdict is improper is whether the award “deviates from what would be reasonable compensation” (CPLR 5501[c]). Because the appropriate amount of compensation for injuries is a question of fact, the determination of the jury is entitled to deference and should only be disturbed where the verdict could not have been reached on any fair interpretation of the evidence (see Simeon v Urrey, 278 AD2d 624 [3rd Dept. 2000]). Once the determination to alter the verdict is made, the Court must carefully review verdicts in other cases while at the same time remaining “mindful of the fact that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification (see Morsette v “The Final Call”, 309 AD2d 249, 256 [1st Dept. 2003] [citations omitted]).

This Court acknowledges and fully agrees with the many well-settled rules of law noted by plaintiffs in opposition to these motions: e.g., that the jury's verdict is to be accorded great weight (see, Mertsaris v 73rd Corp., 105 AD2d 67 [2nd Dept. 1984]; that it is the unique province of the jury to decide which evidence it will

accept and which it will reject; that a large verdict is not necessarily an excessive one (see, Murphy v Rochester Telephone Co., 208 AD 392 [4th Dept. 1924]); that the question of damages is especially subjective and difficult to second-guess; that the use of prior damage awards is only a guide and an imperfect one at that (see, Monroe v Leonard, 62 Misc2d 463 [Civ. Court, NY County, 1969]).

As venerable as these principles are, there are nonetheless some verdicts where it is abundantly clear that the jury's award is excessive and deviates from what would be reasonable compensation. This is such a case. Specifically, the jury's pain and suffering awards, both past and future, deviate so greatly from what is typically awarded in such cases that some modification is called for. The pain and suffering awards must be adjusted to better comport with notions of reasonable compensation. As noted by the Court in Morsette, the way to do that is to compare the award here with verdicts in similar cases.

In the search for factually similar precedents on which to base a comparison, the cases cited by plaintiffs are not particularly helpful. A number of plaintiffs' cases do contain substantial pain and suffering awards but they quite obviously involved a psychological component of terror brought about by extraordinary circumstances that are not present in this case (see, Lubecki v City of New York, 304 AD2d 224 [1st Dept. 2003] [plaintiff held a gunpoint during bank robbery then

shot by police]; Estate of Zarif v Korean Airlines Co., Ltd., 836 F.Supp 1340 [E.D. Mich. 1993] [plaintiff endured nine minutes of terror between the time jetliner was struck by missile and when it crashed into the sea, killing all aboard]; Steel v State, 6 Misc3d 1030(A) [Ct. of Claims 2005] [plaintiff strangled by ex-convict negligently released from prison]). While the Court does not wish to belittle plaintiffs' suffering, the occasion for the injury in this case – a car accident – could not be expected to engender the same level of terror and emotional suffering that plaintiffs in the cited cases endured. Moreover, the physical injuries described in those cases are not at all similar to the injuries at issue here. Finally, notwithstanding the difference in injuries, the pain and suffering awards ultimately made to plaintiffs in those cases appear to be significantly lower than the jury's award in this case.

The remaining cases claimed by plaintiffs to be appropriate comparisons are even more confounding. Those cases, which all seems to involve lower pain and suffering awards, have no discernible factual similarities to this case beyond the fact that one apparently involved a pedestrian knock-down car accident (see, Glassman v City of New York, 225 AD2d 658 [2d Dept. 1996]; Barrett v U.S., 660 F.Supp. 1291 [S.D.N.Y. 1987]). In general, plaintiffs' cases are of no real benefit in determining whether the jury's award deviates from reasonable compensation. Plaintiffs efforts to make these cases seem comparable are not persuasive.

In contrast, defendants' precedents seem to be more factually analogous to the present situation. They are generally more recent, and, unlike many of plaintiffs' cases, emanate from the two Departments of the Appellate Division that encompass New York City. For example, in Orellano v 29 East 37th St. Realty Corp., the First Department modified the award to a 47-year-old plaintiff who had sustained a fractured tibia and fibula, underwent several surgeries and a two-month hospital stay by reducing the jury's \$2.5 million past pain and suffering award and its \$3 million future pain and suffering award to \$375,000.00 each (4 AD3d 247 [1st Dept. 2004]).

Similarly, in Brownell v City of New York, the same Court affirmed a combined pain and suffering award of \$709,222.00 to a plaintiff in her forties who sustained a fractured tibia and fibula, underwent four surgeries (and probably would have more), was permanently scarred and swollen, and suffered diminished ability to perform her activities (277 AD2d 31 [1st Dept. 2000]).

In Holland v Gaden, plaintiff sustained a fractured tibia, fibula and glenoid, had open reduction to reset the bone including insertion of metal bars and pins and underwent two subsequent surgeries including a skin graft. The Second Department reduced the total pain and suffering award of \$1 million to \$750,000.00, allocating \$500,000.00 to past pain and suffering and \$250,000.00 to future (260 AD2d 604 [2nd Dept. 1999]).

Finally, in Kovit v Estate of Hallums, the decedent's right leg was amputated in a car accident. The Second Department reduced the pain and suffering awards for this arguably more serious injury from \$5 million for past pain and suffering plus \$10 million for future pain and suffering to \$2 million and \$1.75 million, respectively (307 AD2d 336 [2nd Dept. 2003]).

The injuries in each of the cases cited by defendants are clearly related to injuries involved in this case. It could be argued that some are less severe, and it certainly appears that some are more severe than the injuries at issue, but each case provides a clear point of reference from which to determine what would constitute reasonable compensation under the present circumstances.

Based on the foregoing, this Court determines that in order to achieve just compensation, the past pain and suffering award should be reduced from \$5 million to \$600,000.00 and the future pain and suffering award should likewise be reduced from \$7 million to \$500,000.00. These figures strike the proper balance between due respect for the jury's unanimous impulses and the CPLR's requirement that awards fall within a range that provides reasonable compensation. Should plaintiff not agree to these figures, then a new trial on damages is directed.

To the extent that defendants seek to reduce other pecuniary aspects of the jury's award – notably the awards for lost earnings and medical expenses – these

motions are denied. The figures that were awarded by the jury in these categories were supported by evidence such that they were based upon a fair interpretation of the evidence. Thus, there is no justification for altering these awards. Nor does the Court see a justification for altering the award on Kevin Keating's derivative claim.

Accordingly, it is

ORDERED that the motion by defendant High Thor Taxi Corp. to dismiss the claims against it as a matter of law is denied, it is further

ORDERED that the motions by defendants Robert Borgella and High Thor Tax for remittitur are granted to the extent that there shall be a new trial on the issue of plaintiffs' pain and suffering unless plaintiffs stipulate to decreasing the award for past pain and suffering to \$600,000.00 and decreasing the award for future pain and suffering to \$500,000.00 within 30 days of service of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated:

April 4, 2007

APR 04 2007


Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins

FILED

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