Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

RUPERT NATOO, et al., x

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.
x

Index Number 19014/99

Motion Date January 17, 2007

Motion Cal. Number 20

The following papers numbered 1 to 13 read on this motion by defendants for an order setting aside the judgment notwithstanding the verdict, pursuant to CPLR 4404(a); and in the alternative for an order reducing the jury's award or granting a new trial; scheduling a collateral source hearing and; scheduling a hearing to reduce future damages to present value, pursuant to CPLR Article 50-B.

	Papers Numbered
Notice of Motion -Memorandum of Law - Exhibits -(A-H).....	1-4
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Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Rupert Natoo ("plaintiff"), then 46 years old, sustained personal injuries on February 13, 1999, when he fell off an unsecured ladder during the course of his employment as a foreman for a roofing company. Immediately after the accident plaintiff was admitted to Jamaica Hospital, and a CT scan taken that day revealed a fracture of the occipital bone in the back of his head, bilateral contusions in the frontal lobes and a contusion in the left temporal lobe. Plaintiff was discharged from Jamaica Hospital on February 16, 1999, and was treated at University Hospital of Brooklyn on February 17, 1999. Plaintiff returned to

work in September 1999 and stopped working entirely in October 2000.

Plaintiffs were granted summary judgment on the issue of liability on the Labor Law §240(1) cause of action, in an order dated October 19, 2001, which was modified solely as to the Board of Education, in an order dated October 8, 2002. A trial as to damages only was held on September 21- 22, 25- 29, October 2 - 6, 10 - 13, and 16 - 20, 2006. The jury, in its verdict of October 20, 2006, unanimously awarded plaintiff Rupert Natoo the sum of $2,000,000.00 for pain and suffering up to the date of the verdict; $449,968.00 for loss of earnings up to the date of verdict; $3,000,000.00 for future pain and suffering for 25 years; $1,578,216.00 for loss of earnings and household services for 9.8 years; and $3,700,000.00 for rehabilitation services and medical expenses for 25 years. The jury unanimously awarded plaintiff Christiana Natoo the sum of $300,000.00 for pecuniary loss.

It is upon the foregoing that defendants the City of New York and the New York City School Construction Authority now seek an order granting judgment in their favor, notwithstanding the verdict, pursuant to CPLR 4404(a), on the grounds that plaintiffs failed to prove that plaintiff Rupert Natoo suffers from cognitive defects, and that the amount awarded is excessive and unreasonable; and in the alternative seek a reduction of the jury's award; a collateral source hearing; and a hearing for the reduction of future damages to present value, pursuant to CPLR §50-B. [1]

It is well settled that a trial court is vested with the discretion to set aside verdicts it finds inadequate or excessive or against the weight of the evidence, and grant a new trial as to damages. (See O'Connor v Papertsian, 309 NY 465 [1955]; Tate v Colabello, 58 NY2d 84 [1983]; Cooke v Meltzer, 235 AD2d 517 [1997]; CPLR 4404[a].) To set aside a verdict and grant judgment as a matter of law, a court must determine "that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]; Severino v Schuyler

[1] The Court notes that although the parties have not attached a complete copy of the trial transcript to the motion papers, it has been scanned into the county clerk's records and thus is accessible to the Court. The court further notes that as plaintiffs did not seek leave to serve the sur-reply affirmation, this affirmation shall not be considered.

Meadows Club, 225 AD2d 954, 958 [1996]; Krueger v Wilde, 204 AD2d 988, 989 [1994]).

In their moving papers, defendants object to the amount of the jury's award, and assert that plaintiffs did not prove that plaintiff Rupert Natoo suffered from any cognitive deficits whatsoever. Defendants assert, as they did at trial, that plaintiff is not impaired and that he is malingering, and that he only sustained an occipital fracture. In support of this claim, defendants cite selected testimony of Dr. John Martin, Dr. Zimmerman, Dr. Kay and a nurse, Rena Rafiolova.

The jury clearly rejected defendants' claim that plaintiff was malingering, and that he had not sustained cognitive deficits as a result of the February 13, 1999 accident. The Court finds that legally sufficient evidence was presented at trial showing that plaintiff sustained a traumatic brain injury resulting in cognitive deficits and dementia. Prior to the accident, plaintiff appeared to be in good health, was hardworking and family oriented, and had an excellent relationship with his wife and two children. Plaintiff had emigrated from Grenada, became a naturalized citizen and enjoyed a normal life. As a result of his injuries, plaintiff has had to stop working, no longer engages in his prior social activities or hobbies, is largely uncommunicative and now suffers from headaches, dementia, memory loss, and cognitive dysfunction, exhibits behavioral and personality problems, and has a strained relationship with his wife and children. He takes medications to treat his depression, alertness, seizures, anxiety, and to aid in sleeping. His wife, Christiana, testified that she is unable to leave her husband alone, that he has had violent or irrational outbursts, and that they no longer have sexual relations. By any measure, plaintiff has suffered serious injuries and exhibits an inability to enjoy the normal pursuits and pleasures of life.

Contrary to defendants' assertions, the testimony offered by Dr. Zimmerman and Dr. Martin regarding the brain damage suffered by plaintiff was not inconsistent. The February 13, 1999 CT scan and MRIs taken in April 1999 and in July 2006 were displayed to the jury and explained by Dr. Zimmerman, a neuroradiologist. He testified that the CT scan revealed that there was bruising of brain tissue which contained a collection of blood, and bleeding into the interhemospheric fissure. Dr. Zimmerman also testified that the April 1999 MRI report, which stated that the findings were normal was incorrect, and that said MRI showed brain damage in the frontal and temporal lobes. He further testified regarding the July 2006 MRI which also revealed areas of damage to the frontal and temporal lobes, including missing brain tissue and areas of scarring. Dr. Martin testified that although there is no known

equation or formula for measuring damage to the frontal lobes that equates to known deficits, he also stated that "we understand the relationship between damage to particular parts of the frontal lobe and behavioral deficits. We understand when there's no damage to an area that there are no deficits. There's a parallel here". (T 1819.) Dr. Martin testified that plaintiff's MRI showed that there was missing brain tissue and scarring in the frontal lobe, and that the prefrontal regions of the brain are involved in cognitive functions pertaining to the learning and remembering of information, executive functions, and emotions. Neither Dr. Zimmerman's nor Dr. Martin's testimony were rebutted by defendants.

Dr. Matthew Smith, plaintiff's treating psychiatrist testified that as a result of the accident, plaintiff has an organic mood disorder, consisting of depression with bipolar features, such as mood swings, obsessive behavior, violent behavior, stealing, and becoming uncooperative, hostile, and oppositional, and dementia. He further testified that the damage to the frontal lobes resulted in the loss of executive function which he defined as loss of impulse control, irrational thinking, and regressed childlike behavior, and that the dementia was evidenced by poor memory, lack of concentration and inability to learn new information. Dr. Michael Aronoff, a psychiatrist, also testified that plaintiff suffers from adjustment disorder, organic mood disorder with bipolar features and mood disorder due to head trauma.

PLaintiff was referred to the Rusk Institute of Rehabilitative Medicine NYU Medical Center, by Dr. Esther Baldinger, his treating neurologist. Dr. Thomas Kay, a neuropsychologist, at the Rusk Institute, examined plaintiff on several occasions between July 2002 and November 2004, and testified that he was suffering from an adjustment disorder which caused him to be depressed and to regress into child-like behavior. Dr. Kay referred plaintiff to Rusk's psychology department for cognitive remediation and family counseling. Plaintiff received cognitive rehabilitation at the Rusk Institute from March 2001 to April 2002, three days a week and was diagnosed with dementia due to head trauma, organic disturbance of memory and depressive disorder.

The Court finds that the statements made by Dr. Kay in his reports and at trial as to whether plaintiff was malingering, are not inconsistent. Rather, Dr. Kay consistently stated that plaintiff was not malingering. Defendants present attempt to attack the credibility of this witness is rejected. Issues of credibility are within the purview of the jury and the jury is free to determine what witnesses they believed, what portion of the testimony they accepted, and the weight they wished to give to that

testimony. To find otherwise would be an impermissible interference with the jury's resolution of credibility issues (Krueger v Wilde, supra; see also Nicastro v Park, 113 AD2d 129, 133 [1985]).

Plaintiff receives cognitive therapy at the Fairview Traumatic Brain Injury Clinic in Brooklyn. He was accepted as a day patient at Fairview in March 2002, at which time he went three days a week for rehabilitative services. At the time of trial, plaintiff was attending Fairview five days a week, where he receives physical therapy, occupational therapy, cognitive studies, and daily living activities. Transportation is currently provided to him. Rena Rafiolova, a registered nurse, was a member of the team that evaluated plaintiff prior to his admission to Fairview. Ms. Rafiolova testified that she has worked with plaintiff over the past four and a half years, and that he would not have been admitted to Fairview if he had normal neurological findings. However, she also stated that she is not a neurologist and does not know the components of a neurology examination. Although defense counsel sought to elicit an opinion from Ms. Rafiolova as to plaintiff's neurological status, she was not qualified to give such an opinion, and in fact did not offer any such opinion. The Court finds that this witness' testimony does not support defendants' assertion that plaintiff's admission to Fairview was inappropriate.

To the extent that defendants' reply papers cite to Dr. Sidtis and Dr. Yamins' testimony regarding any alternative explanations for plaintiff's behavior, such new matters will not be considered as they should have been included as part of the initial moving papers. (See generally Hoyte v Epstein, 12 AD3d 487, 488 [2004]; Jackson-Cutler v Long, 2 AD3d 590,[2003]; Perre v Town of Poughkeepsie, 300 AD2d 379 [2002]; Wosyluk v L.T.L. Developers, Inc., 147 AD2d 475 [1989]).

In view of the foregoing, that branch of defendants' motion which seeks to set aside the verdict on the ground that plaintiffs failed to prove that plaintiff Rupert Natoo suffers from cognitive defects is denied.

To set aside the jury's verdict as excessive, the court must conclude that the jury's award materially deviates from reasonable compensation,(CPLR § 5501[c]), by looking to awards in analogous actions that have been approved on appellate review and determining that the current award departs substantially from those benchmarks. (Donlon v City of New York, 284 AD2d 13, 14-15, 18 [2001]). Nonetheless, in no two actions are "the quality and quantity" of damages, particularly for pain and suffering, identical. (Reed v City of New York, 304 AD2d 1, 7 [2003]). Their "evaluation does

not lend itself to neat mathematical calculation." (Id., see Donlon v City of New York, supra at 15). The court must exercise caution and not simply substitute the court's view of the evidence for the six fact finders' judgment or modify the harshness of a verdict the court disagrees with, particularly on damages, when the jury's peculiar function is to evaluate damages. (Po Yee So v Wing Tat Realty, 259 AD2d 373, 374 [1999]); Mazariegos v New York City Tr. Auth., 230 AD2d 608, 609 [1996]; Brown v Taylor, 221 AD2d 208, 209 [1995]; Evans v St. Mary's Hosp. of Brooklyn, 1 AD3d 314, 315 [2003]).

To the extent that defendants seek to set aside the verdict as excessive, defendants do not specify which of the six-part damages award they object to, and do not set forth any facts relating to plaintiff's past loss of earnings, future loss of earnings and household services, future rehabilitation services and medical expenses, and plaintiff Christiana Natoo's pecuniary loss. Defendants, in support of their request to set aside or reduce the verdict, cite to unreported jury verdicts. Since none of these verdicts have been reviewed by an appellate court, they lack any precedential value.

The Court has reviewed the jury's verdict and finds that the award of $449,968.00 for loss of earnings up to the date of verdict, and the award of $1,578,216.00 for loss of earnings and household services for 9.8 years, are supported by the evidence presented at trial. Plaintiffs presented documentary evidence of plaintiff's earnings and union benefits, and their expert, Thomas Fitzgerald, an economist, testified as to these past losses and calculated the future loss. This evidence was not contradicted by defendants.

Regarding the verdict of $2,000,000.00 for past pain and suffering, and $3,000,000.00 for future pain and suffering, including the enjoyment of life for 25 years, the Court finds that these awards are supported by a fair interpretation of the evidence, and do not deviate materially from other recoveries involving the same, similar or more severe injuries. (See, e.g. Paek v City of New York, 28 AD3d 207 [2006]; Chelli v Banle Associates LLC, 22 AD3d 781[2005]; Reed v City of New York, 304 AD2d 1[2003]; see also Salamone v Wincaf Properties, 249 AD2d 169 [1998]; Flynn v General Motors Acceptance Corp., 179 Misc2d 374 [1998]).

With respect to the verdict of $3,700,000.00 for rehabilitation services and medication for 25 years, the Court also finds that this award is supported by a fair interpretation of the evidence and does not deviate materially from reasonable compensation. Plaintiffs' rehabilitation expert, Edmond Provder,

testified as to plaintiff Rupert Natoo's future care needs, based upon his review of all of the medical and psychiatric records, which included recommendations from treating physicians to continue therapy. Mr. Provder testified as to individual modes of therapy, and medications. Upon re-direct, Mr. Provder testified as to the range of services provided at Fairview. Plaintiffs' expert economist, Thomas Fitzgerald, testified as to the projected costs of these services, including the cost of a full time home attendant. The jury, in considering the cost of these projected services and medications, reduced the amount sought by plaintiffs by $500,000.00. To the extent that defendants' reply papers seek to challenge the testimony of Mr. Provder and Mr. Fitzgerald, such new matters will not be considered as they should have been included as part of the initial moving papers. (See generally Hoyte v Epstein, supra; Jackson-Cutler v Long, supra; Perre v Town of Poughkeepsie, supra; Wosyluk v L.T.L. Developers, Inc., supra). Moreover, defendants have failed to present any basis for vacating or reducing the award of $300,000.00 to Christiana Natoo for pecuniary loss.

Finally, defendants' request to set aside the verdict and grant a new trial based upon statements made by plaintiffs' counsel during his summation is denied. Any error in allowing a comment made by plaintiffs' counsel in the presence of the jury regarding defendants' counsel's tactics, and certain other remarks regarding any witness' bias made by counsel during summation was corrected by the Court's curative instructions (see Pitera v Winzer, 18 AD3d 457 [2005]; Dailey v Keith, 306 AD2d 815, 816 [2003]; Blanar v Dickinson, 296 AD2d 431 [2002]; Bacigalupo v Healthshield, Inc., 231 AD2d 538 [1996]). Plaintiffs' counsel's reference to surveillance films was corrected when the Court sustained defendants' objection and instructed the jury to disregard any reference to what might have happened (see Pitera v Winzer, supra). With respect to the statement that Mr. Browne had not been fired, plaintiffs' counsel concedes that this was an error. The Court finds, however, that this remark was harmless in light of the strong evidence in favor of plaintiff. Finally, to the extent that plaintiffs' counsel made reference to insurance with respect to an action arising out of an automobile accident, the Court finds that there was ample testimony during the trial regarding said insurance. Therefore, the Court finds that these isolated comments did not deprive defendants of a fair trial.

In view of the foregoing, those branches of defendants' motion which seek either an order setting aside the judgment notwithstanding the verdict, pursuant to CPLR 4404(a), or an order reducing the jury's award or granting a new trial, are denied.

Defendants' request for a collateral source hearing is granted as the parties have stipulated to such a hearing to be held on April 17, 2007. Defendants' request for a hearing for the reduction of future damages to present value, pursuant to CPLR Article 50-B, is denied, and the parties are directed to make their submissions regarding the structured judgment no later than 20 days after the collateral source hearing.

Dated: April 16, 2007 .....

J.S.C.