[* 1]

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

PRESENT: ALICE SCHLESINGER PART IA Part 16

Index Number : 119133/2001
SERRANO, GERMAN
VS
432 PARK SOUTH REALTY
Sequence Number : 012
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The ... to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED
JUN 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: MAY 23 2007

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

GERMAN SERRANO,

Plaintiff,

Index No. 119133/01
Motion Seq. No. 012

-and-

432 PARK SOUTH REALTY CO., LLC.,

Defendant.

----------X

432 PARK SOUTH REALTY CO., LLC,

Second Third-Party Plaintiff,

-against-

FORTUNE INTERIOR DISMANTLING CORP.,

Second Third-Party Defendant.

----------X

SCHLESINGER, J.:

Before the Court at this time is a motion by the Defendant/Third-Party Plaintiff 432 Park South Realty Co., LLC for an order pursuant to CPLR §4404 setting aside the jury verdict against it. A summary of the facts adduced at trial follows.

Plaintiff German Serrano suffered an accident on October 18, 2000. He was working approximately eight feet up on a ladder while attempting to dismantle a heating, ventilation and air conditioning duct. He fell from the ladder and landed first on his left hand. The force was so great that it shattered his left wrist. There was undisputed radiological testimony that Mr. Serrano sustained multiple, comminuted, intra-articular impacted crushed fractures of the distal radius with crushing of the cartilage and a displaced fracture of the ulna styloid. Mr. Serrano first required the application of an external fixation device with screws and pins into the radius and ulna and metacarpal bone. However the fractures failed to heal so that

in December 2001, he had a metal rod put in his arm and wrist attached with 4 screws in the radius and 4 screws in the index finger. The distal ulnar bone was cut out during that surgery and there was a fusing of the carpal bones and radius. Also, a rod was inserted which caused a permanent loss of mobility of the wrist. The second surgery was needed not only because the fractures had failed to heal, but also because Mr. Serrano was in continuing pain.

The wrist fusion surgery left Mr. Serrano's ulna, which had been sawed off, without an attachment to his wrist. This led to the development of an unstable ulna which caused Mr. Serrano to suffer a great deal of pain whenever he turned his hand, pain which ran to the ulnar nerve from his neck to his fingers. After the second surgery and as the years passed, he developed Complex Regional Pain Syndrome which caused him extraordinary pain from his hand to his shoulder. He had other symptoms as well, including progressive loss of motion, discoloration of the hand, weakness, swelling and burning.

Mr. Serrano's his treating physician, Dr. Jeffrey Kaplan, an orthopedic surgeon, prescribed narcotic pain medication, anti-inflammatory medication and injections. When all this proved inadequate, Mr. Serrano was referred to a pain management specialist, Dr. Gary Thomas. Dr. Thomas prescribed more severe pain medication, percocet at first, then oxycontin and finally methadone. The testimony was that his patient was in the end stage phase of RSD, and that it was expected his pain would get worse. Today, Mr. Serrano, for all intents and purposes functionally cannot use his left hand. Certainly he can no longer work or do anything of a meaningful nature with that hand.

But there was more. As a result of the accident, Mr. Serrano also developed cervical radiculopathy due to a herniated disc at C5-C6 which caused an impingement on the nerve

root. This led to spinal surgery in July 2005. Here fusion was done to remove the C5-C6 disc, anteriorly through an incision in his throat. Then a bone graft and permanent metal plate were inserted. This, of course, permanently restricted movement in his head and neck.

At the trial, there was some discussion by the many doctors who have treated and examined Mr. Serrano of the possibility of future surgical interventions, but there seemed a consensus that good results could not necessarily be predicted.

As a result of these multiple, far from successful surgeries, an inability to work, and constant pain even with heavy medication, Mr. Serrano sought psychiatric care with a Dr. Hugo Morales. That doctor testified that Mr. Serrano suffered from major depression as well as post-traumatic stress disorder, both permanent conditions. His patient would have to be on anti-depressant medications for life. Dr. Morales also testified that Mr. Serrano had revealed to him that he cried often from his pain and depression, and that he had repeated harrowing nightmares. The doctor concluded that he was totally emotionally destroyed. Mr. Serrano has a 38-year life expectancy.

Based on all of the above, amply proved via essentially undisputed medical evidence, the jury hearing Mr. Serrano's case (only two issues were being tried) awarded him $600,000 for past pain and suffering, $4,240,000 for future pain and suffering and $2,302,425 for future medical and other expenses.

The other issue, in addition to damages, that the jury was asked to resolve was that of grave injury. I had earlier granted summary judgment on the issue of liability pursuant to §240(1) of the Labor Law against defendant 432 Park South Realty Co., LLC, the owner of the building where the accident occurred. I also denied 432 Park South's motion for summary judgment on their claim for indemnification against Fortune Interior Dismantling,

Mr. Serrano's employers. This issue, "grave injury" as defined in Section 11 of the Worker's Compensation Law, could determine which defendant, the building owner 432 Park South or the employer, Fortune would be responsible for damages. 432 Park South, as the third-party plaintiff, had the burden of proof. The jury was asked the question, "Did German Serrano suffer the permanent total loss of use of his left hand?" They answered this question "No".

Now the defendant/building owner is moving to set aside the verdict on this issue and direct judgment as a matter of law in its favor or set the matter down for a new trial. Defendant argues that the verdict is against the weight of the credible evidence. Alternatively, they are moving to reduce damages or for a new trial on this issue.

The motion is denied in its entirety. With regard to the grave injury issue, specifically here the permanent and total loss of the use of Mr. Serrano's left hand, I do find that the verdict is sustainable. The moving defendant and plaintiff produced a number of medical witnesses to attest to the terrible, permanent injuries the plaintiff suffers from. However, consistent with the earlier summary judgment motion, Fortune presented its own witnesses and its own version on this issue.

Their attorney, John McCusker, in his summation, cogently and convincingly argued to the jury Fortune's position that there was a failure of proof on the grave injury question, while acknowledging that Mr. Serrano had suffered significant, permanent injuries. He first discussed the several inconsistencies in the medical testimony presented by his adversaries. He also pointed out that all of the plaintiff's treating physicians were aligned professionally. It should be noted here that throughout the trial 432 Park South and the plaintiff were in no way adverse to each other. An example of this is that counsel for 432 Park South did

virtually no cross-examination of any of plaintiff's witnesses. Mr. McCusker also pointed this out and suggested 432's motive.

Essentially what Fortune relied upon was the forceful and convincing nature of the testimony provided by the doctor it called, Dr. Thomas Joseph Palmieri, a hand surgeon and Professor of Surgery at Albert Einstein School of Medicine, who had examined Mr. Serrano. Fortune also called a Dr. David Kaufman, a board certified neurologist and Full Professor and Chief of Neurology at Montefiore Hospital. He discussed RSD.

Mr. McCusker emphasized what he termed was the objective evidence that Dr. Palmieri relied upon to conclude that Mr. Serrano had not suffered a permanent and total use of his left hand. These included the most recent x-ray of Mr. Serrano's hand taken in November 2006. This indicated that the plaintiff's fingers on his left hand could be straightened, as his index finger and thumb were extended. He also spoke about the lack of osteoporosis in Mr. Serrano's left hand and commented on the significance of this.

So while it is true that many more doctors testified that there was a total and permanent loss of use of the hand than did not, as the jury was instructed, it was the quality of the evidence, the convincing quality, and not the quantity, that should control. Fortune was able to present qualitatively more persuasive evidence on this issue. Therefore, I find it is entitled to the verdict the jury returned.

However, despite this finding, I do not mean to suggest that the award was excessive. I find it was not. I make this finding despite argument by counsel for 432 Park South that the verdict is excessive. Counsel's position is a contrary position from the one he took all through the trial, one he argues now he was forced by circumstances to take.

In reviewing the issue of damages, I have read all of the First Department cases cited by the moving defendant and plaintiff. This is not simply a permanent hand and wrist injury as defense counsel argues. Rather, it is a much more pervasive combination of injury and disability which causes Mr. Serrano continuing intense pain, as well as emotional suffering. Therefore, I find that the award of $600,000 for past pain and suffering and $4,240,000 for future pain and suffering does not deviate materially from comparable injuries. What the jury seemed to do in these categories was to award Mr. Serrano approximately $100,000 for each of the years that he has suffered. Hence the $600,000 for the past 6 years (the injury was October 2000 and his trial January 2007.) This might then justify a $3.8 million award for the future. But the jury instead gave $4,240,000, which is $440,000 more. However, the testimony was clear that things would only get worse for Mr. Serrano, that his condition was progressive, and his suffering would probably intensify. There was very little hope that either surgery or other pain interventions would help. Therefore, I believe these amounts should be sustained.

I feel the same for the $2,302,425 awarded for future medical and other expenses. As testified to by Dr. Jane Mattson, a PhD life care planner and Dr. Joel Evans, a PhD economist, this category was made up of the following items: Care, Rehabilitation, Case Management, Medical, Prescription Drugs, Durable Medical Equipment and Household Services.

As noted above, counsel for the moving defendant failed to challenge any of these items or numbers during the trial. He did not even cross-examine the witnesses. Fortune's counsel did, however. And he did manage to put into issue allocations for items such as physical therapy and modifications to Mr. Serrano's home. However, the figure the jury

chose was the lowest figure given by the economist, i.e., a flat figure for the next 38 years without any adjustment for inflation. Dr. Evans had given this figure plus two others, based on different inflationary rates. The jury chose the flat figure.

That being the case, I would be loathe to pick and choose several items which may or may not have been proved to a reasonable certainty. One could certainly argue that the jury was fair but conservative in accepting the undisputed testimony that Mr. Serrano would need these things but not increasing the amounts in any way for inflation.

Finally, the motion by Fortune to dismiss 432 Park South's claim for contribution is denied, as no such claim was ever made. The sole claim was for indemnification and that claim has been disposed of, first by the jury through its finding of no grave injury and now by this Court.[1]

Accordingly, the Clerk may proceed to enter judgment on the verdict.

Dated: May 23, 2007

MAY 23 2007

J.S.C.

ALICE SCHLESINGER

[1]The third-party action commenced by 432 Park South against defendant United Environmental Enterprises, Inc. under index number 590671/05 was severed and dismissed by this Court by decision and order dated January 5, 2007. On that same date, the third-party complaint by 432 Park South against Partimer, Inc. under Index No. 591071/03 was severed but allowed to continue. Should 432 Park wish to pursue that action, it must file a Request for Judicial Intervention and a conference request by June 15, 2007 or the action will be deemed abandoned.