

Sun v Rainbow Chimes, Inc.

2007 NY Slip Op 32206(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0028881/1998

Judge: Martin J. Kerins

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Ind No. 28881/1998

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 12-18-07
ADJ. DATE: 05-03-07
MOT. SEQ: 007-Mot D
008-MD

P R E S E N T :

Hon. MARTIN J. KERINS
J.S.C.

-----X
EMILY SUN, an infant under the age of 14 :
years by her parents and natural guardians, :
XIAO CUN CHEN and PEIQING SUN, and :
XIAO CUN CHEN and PEIQING SUN, :
Individually, :
:
Plaintiff(s), :
:
- against - :
RAINBOW CHIMES, INC., :
Defendant(s). :
-----X

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Upon the following papers numbered 1 to 14 read on this motion pursuant to CPLR §4404(a); Notice of Motion/ Order to Show Cause and supporting papers 1-5; 6-9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10-14; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (seq. 008) of defendant, Rainbow Chimes, Inc., for an order: 1) setting aside the jury's verdict as being against the weight of the evidence pursuant to CPLR 4404(a); and 2) reducing the amount of damages for past and future pain and suffering as being excessive, or, in the alternative, ordering a new trial is denied; and it is further

ORDERED that the stay previously ordered by the Court (Whelan, J.) by order dated, November 28, 2006, staying the entry, enforcement, and execution of a judgment in this action dated November 20, 2006, is hereby vacated; and it is further

Emily Sun v Rainbow Chimes, Inc.

Index No: 28881-1998

Page two of four

ORDERED that movant is directed to serve a copy of this Order with Notice of Entry within twenty (20) days of the date this order is entered and thereafter file the affidavit of service with the Suffolk County Clerk.

Initially, the Court notes that Justice Daniel J. Loughlin, presided over this jury trial. He retired from the Supreme Court effective January 1, 2007, and is therefore no longer available to hear this motion. In any event, counsel for the respective parties have provided the undersigned with a transcript of the trial and the exhibits, including photographs, that were received in evidence. The Court has reviewed the papers noted above that were submitted by the parties on this motion. It has also thoroughly reviewed the transcript of the trial and the exhibits in evidence in rendering its determination.

Pursuant to CPLR 4404(a) a “court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence ...” A jury verdict should not be set aside as against the weight of the evidence unless the evidence so preponderates in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence (*see Grassi v Ulrich*, 87 NY2d 954,956; *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493; *Mitchell v. Yueh S. Wu*, 38 AD3d 507). Issues of credibility are for the jury, which had the opportunity to see and hear the witnesses, and the jury’s resolution of credibility issues is entitled to deference (*see Bertelle v New York City Tr. Auth.*, 19 AD3d 343; *Robinson v City of New York*, 300 AD2d 384, 385). Moreover, a successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence (*see Louis Puccio Devs., Znc. v Dean*, 18 AD3d 826; *Miglino v Supermarkets Gen. Corp.*, 243 AD2d 451,452). The fact-finding function of the jury is accorded great deference (*see O’Brien v Barrefta*, 1 AD3d 330). Finally, the Supreme Court’s disposition of a motion to set aside the verdict as against the weight of the evidence is entitled to great respect (*see Harris v Murlow*, 18 AD3d 608; *Nicastro v Park*, 113 AD2d 129; *Patrella v. Atlantic Chiropractic Group*, 2007 N.Y. App. Div. LEXIS 8033).

Suffice it to say that the evidence here on the issue of liability was sufficiently established by plaintiff. Emily Sun was a toddler approximately eighteen (18) months of age at the defendant’s day care center located on the grounds of the Cold Spring Harbor Laboratory where both her parents were employed. On the date of her injury, September 8, 1998, the child was in the exclusive care and custody of the staff at the day care center. Members of the staff testified that the child was very “tactile”. It is common sense that all children of similar age put their fingers into and on things that can be dangerous for them. Obviously, this age group need vigilant supervision.

The door or gate to the classroom assigned to Emily’s age group was described as very heavy. Care had to be used when allowing the door to shut. On the date in question, Emily’s teacher shut the door. Without question, she shut the door without ensuring that she knew where all the children in the classroom were, including Emily. As a result, Emily received a severe injury to her right index

Emily Sun v Rainbow Chimes, Inc.

Index No: 28881-1998

Page three of four

finger after she placed her finger in the hinge as the door was shutting.

Defendant also argues that the trial court should have held a bifurcated trial. The defendant claims the failure to do so was prejudicial as it caused the jury to feel undo sympathy for the infant plaintiff. However, prior to trial this issue was raised and denied by the Hon. Howard Berler. Justice Berler is also retired. This court will not substitute its judgment for that of Justice Berler, who was in the best position to decide this motion. In any event, as defendant notes, this was the second jury to hear this case. The first jury found for the defendant on the issue of liability. However, the Appellate Division of the Supreme Court, Second Department [30 AD3d 582] reversed finding that the verdict was against the weight of the evidence and that the evidence “at trial so preponderated in favor of the plaintiffs that the verdict in favor of the defendant Rainbow Chimes, Inc., could not have been reached on any fair interpretation of that evidence”.

Here, defendant has failed to demonstrate that it was unduly prejudiced merely because the jury heard both the liability and damages portion of the trial. Further, defendant has failed to articulate how it was unduly prejudiced simply because plaintiff, Emily Sun, who was nine (9) years of age at the time of retrial, exhibiting her injured finger to the jury. In light of the foregoing, that portion of the defendant’s motion which seeks judgment in its favor or, in the alternative, a retrial is denied.

On the issue of damages, the jury here awarded plaintiff the sum of \$225,000.00 for her past pain and suffering. They awarded her \$225,000.00 for her future pain and suffering over her life expectancy that they found to be seventy-one (71) years. Defendant argues that the jury award was excessive.

In that regard, the reasonableness of a damage award must be determined by whether or not the jury’s decision is in any way supported by an examination of the record in evidence. Since the measure of damages is a question of fact, considerable deference should be accorded to the interpretation of the evidence by the jury. To successfully challenge a determination as to the amount of damages to be awarded, the record evidence must preponderate in favor of the moving party to such a degree that the verdict could not have been reached on any fair interpretation of the evidence (*Simeon v. Urrey*, 278 A.D.2d 624).

This Court can not say that the awards for past pain and suffering and future pain and suffering deviate materially from what would be reasonable compensation and notes that there is limited utility in comparing damage awards in different cases. The reason is obvious, the Court is without access to the full records in those cases. Further, many of defendant’s cites involve cases that were settled. It is beyond dispute that there are myriad reasons for settlements of cases.

In any event, this plaintiff clearly suffered a severe and traumatic injury to her index finger of her right hand, which is her dominant hand. She endured two surgeries and needs another.


Emily Sun v Rainbow Chimes, Inc.

Index No: 28881-1998

Page four of four

Moreover, she lost the tip of her finger up to the first joint. Between her first and second surgery her finger needed daily attention which caused her pain and trauma. Plaintiff is teased at school, is embarrassed to wear nail polish, and lost the most sensitive part of her dominant hand. She has difficulty feeling small things and grabbing a hold of small objects. Under these circumstances, this Court will not substitute its judgment on the issue of damages for that of the jury, which saw and heard the witnesses, photographs and exhibits in evidence. In light of the foregoing the defendant's motion is denied in its entirety.

Dated: July 17, 2007
RIVERHEAD, NY



Martin J. Kerins, J. S. C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION _____