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

PRESENT: HON. JUDITH J. GISCHE PART

Index Number : 112845/2004
LOWENSTEIN, SUSAN
vs
NORMANDY GROUP, LLC.
Sequence Number : 002
TRIAL DE NOVO

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

The following papers, numbered 1 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: FEB 14 2007

J.S.C.
HON. JUDITH J. GISCHE

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
----------x

SUSAN LOWENSTEIN,

Plaintiff,

-against-

THE NORMANDY GROUP, LLC
doing business as
IL POMODORO RESTAURANT and
210 E. 34 LLC.,

Defendants.
----------x

Decision/Order

Index#112845/2004
Mot. Seq. #002

Present:
Hon. Judith J. Gische, JSC

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	**NUMBERED**
Notice of Motion, RLL affirm., exhibits	1
APG affirm	2
Reply Affirm	3

Upon the foregoing papers the decision and order of the court is as follows:

This personal injury case was tried before a jury on September 26, September 28, October 3, October 5 and October 5, 2006. The jury found defendant negligent and awarded plaintiff $300,000 for past pain and suffering, $1.5 million for future pain and suffering covering a period of 28.2 years, $130,000 for past medical expenses and $42,500 for lost earnings. On the issue of comparative negligence, the jury found that although plaintiff had also been negligent, her negligence was not the proximate cause of the accident. The matter is otherwise awaiting a collateral source hearing. Plaintiff is willing to stipulate to reduce past medical expenses to $25,773.25, the amount of the lien now held by Rawlings, her medical insurer.

Defendant has brought a motion to set aside the verdict pursuant to CPLR §4404.

Defendant moved orally for the same relief at the conclusion of trial, which motion was denied. Plaintiff now argues that this motion is jurisdictionally barred because it was previously made. The court disagrees. Defendant had the right to bring a motion to set aside a verdict within 15 days of the discharge of the jury. CPLR §4405. Defendant also had the right to ask to reargue any decision rendered pursuant to CPLR §4404. See: CPLR §2221. Thus whether this motion is considered a reargument of the oral motion denying the relief or a motion *de novo*, it is properly before the court and will be considered on its merits.

If a jury verdict is against the weight of the evidence, a party may move to set it aside. CPLR § 4404. If a jury decides damages in an amount greater than the proof can possibly support, the court can order a remittitur by conditionally setting aside the verdict unless the plaintiff agrees to accept damages in a lower figure. McKinney's Practice Commentaries, C4404:4. A verdict is against the weight of the evidence if it could not have been reached on any fair interpretation of the evidence adduced. McDermott v. Coffee Beanery, Ltd., 9 AD3d 195 (1st dept. 2004); Sepulveda v. Aviles, 308 AD2d 1 (1st dept. 2003). Before setting a verdict aside, the court must determine that there is no valid line of reasoning and permissible inferences from the evidence that could support the decision reached by the jury. 1/5th LP v. HL One, LLC, 23 AD3d 170 (1st dept. 2005). The inherent discretion of the trial judge to set aside a verdict may only be made after the court has cautiously balanced the great deference to be accorded a jury's conclusion against the court's own obligation to assure the verdict is fair. The court may not employ its discretion simply because it disagrees with the verdict. McDermott v. Coffee Beanery, Ltd., *supra*.

Defendant's primary argument is that on the issue of comparative negligence it was inconsistent for the jury to have found that plaintiff was negligent, but that her negligence in this case was not a proximate cause of the accident. Defendant argues that a finding of negligence is inextricably interwoven with a finding that plaintiff was also a proximate cause of the accident. While there are cases where the issue of negligence and proximate causation are so interwoven that you cannot have one without the other (McCollin v. New York City Housing Authority, 307 AD2d 875 [1st dept. 2003]; Matonick v. Pudiak, 285 AD2d 935 [3rd dept. 2001]), the jury's finding, that such is not the case here, is supportable by the evidence adduced at trial.

Plaintiff fell into a street vault when she exited defendant restaurant on a rainy dark evening. The vault had been opened by defendant, and contrary to the position taken by defendant on this motion, there was substantial credible evidence that it was not properly barricaded or secured. Defendant's employee, who had been stationed to prevent people from falling into the vault, left his position at the time of the accident. Only the far vault door was open, with the closer door left flat. Plaintiff fell as she exited the restaurant through the front door when she stepped to the side to let a friend that was behind her exit the restaurant.

Defendant's only claim of comparative negligence is based upon evidence that plaintiff did not look at her feet as she walked out and that on the rainy night when the accident occurred, she opened up an umbrella in front of her which obstructed her view for those few seconds.

It is black letter law that in order for something to be a proximate cause, it has to be a substantial factor in causing the accident. It cannot be slight or trivial. Wallace v. Kuhn,

23 AD3d 1042 (4th dept. 2005); Pavlou v. City of New York, 21 AD3d 74 (1st dept. 2005); PJI 2:70. The jury reasonably concluded that opening an umbrella in the rain or Ms. Lownenstein's failure to look at her feet before she fell, even if in some slight or trivial measure caused her accident, were not a substantial factor in bringing it about. It is worth commenting that defendant's present argument, made with the benefit of hindsight, is inconsistent with the position it took at trial when its proposed jury verdict sheet requested separate questions on plaintiff's negligence and proximate cause on the issue of comparative negligence. At no time before verdict did defendant suggest that separate questions were unnecessary because the issues were interwoven.

The case of Karsdon v. Barringer, 20 AD2d 551 (2nd Dept 2005) relied upon by defendant is factually inapposite. While both Karsdon and the instant case involve someone who fell into a cellar, the plaintiff's negligence in Karsdon was a substantial factor in bringing about her accident. In that case, the plaintiff stepped outside while she was a dinner guest at defendant's home. When she found herself locked out, she decided on her own to walk around the house, with a glass of wine in one hand, to find another means of entry. It was so dark outside, that Ms. Karsdon was using her hands and feet to feel her way along the side of the house. Before she reached the back door, she fell into an unlit open cellar. In this case, Ms. Lowenstein left the defendant's restaurant through the only means of entrance and egress available. As she exited, she opened an umbrella because it was raining and then fell into an unguarded and open vault. It was not against the weight of the evidence for the jury to have concluded that these acts, even if negligent, did not substantially contribute to the occurrence of the accident.

Defendant also seeks to set aside the damages as excessive. An award of

damages must be set aside it if materially deviates from what would be reasonable compensation. CPLR §5501(c). Defendant urges this court to look at cases involving lower awards in factually similar cases involving ankle injuries. Plaintiff, on the other hand, urges the court to look at yet other awards of cases involving injuries to arms and legs with surgeries and the insertion of permanent hardware to illustrate that the monetary award by the jury was not excessive.

While the court may look at other cases in the due course of its analysis, the court is mindful that no two cases are identical and that even injuries involving the same body part may be more or less severe depending upon the particular factual circumstances of each case. In any event, given the standard of "material deviation" before a court makes any adjustment, the inquiry is not strictly a matter of reconciling this award with prior awards in similar cases.

Certain factors distinguish this case and justify the jury award of damages on the higher end. Plaintiff's injury to her ankle was severe. She sustained a bimalleolar fracture of her left ankle with substantial dislocation. She required surgery and the insertion of seven screws and a metal plate. Plaintiff was wheelchair bound for six months and out of work for 18 months. The insertion of hardware in her ankle is permanent, has resulted in chronic pain, limitation of motion, atrophy, increased risk of arthritis and the need for continued exercise to keep it limber. Plaintiff also fractured her left shoulder as a result of the accident, and the shoulder had to be immobilized. Medical testimony established that plaintiff has a residual hand and shoulder syndrome, with resulting loss of full use of that extremity. In addition, the medical testimony established that her injuries were made worse by the fact that the ankle and shoulder fractures were both on the same side of her

body. Under these circumstances, even if the damage award is on the high end, it is not so materially deviant from what is reasonable that the province of the jury should be tampered with by this court.

No express argument is made to set aside the lost earnings award, which stands. Although the defendant does not expressly address plaintiff's offer to stipulate to a reduced award for past medical expenses, in view of plaintiff's representations that this comprises the total medical lien, the court so reduces the award of medical costs to such amount. This is without prejudice to defendant's right to a collateral source hearing, if it believes other and further adjustments need to be made to the award.

CONCLUSION

The motion to set aside the verdict is granted only to the extent that the award for past medical expenses is reduced to $25,773.25 and is in all other respects denied. The matter is set for a conference before the court on **March 15, 2007 at 9:30 a.m.** at which the parties will be expected to address whether any further collateral source hearing is required.

Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York
February 14, 2007

SO ORDERED:

J.G. J.S.C.