Seigal v Mills
2008 NY Slip Op 32411(U)
August 25, 2008
Supreme Court, Nassau County
Docket Number: 9803-06/
Judge: William R. LaMarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

MATTHEW SEIGAL,

Plaintiff,

-against-

HUGH J. MILLS,

Defendant.

Motion Sequence # 1
Submitted May 23, 2008

INDEX NO: 9803/06

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Affirmation in Reply.....3

Requested Relief

Defendant, HUGH J. MILLS (hereinafter referred to as "MILLS") moves for an order, pursuant to CPLR §4404(a), setting aside the jury verdict in favor of the plaintiff, MATTHEW SEIGAL (hereinafter referred to as "SEIGAL"), on the grounds that the verdict was grossly excessive, at deviance from what would be considered reasonable compensation, against the weight of the evidence and, in the interests of justice, that the jury award be vacated and a new trial ordered. On March 24, 2008, the jury returned a verdict in favor of SEIGAL and awarded him $650,000 allocated as $250,000

for past pain and suffering and $400,000 for future pain and suffering. Counsel for plaintiff opposes the motion, which is determined as follows:

Background

SEIGAL, a Nassau County resident and father of two (2) children, is forty-two (42) years of age and is a self-employed electrician. On January 27, 2005, SEIGAL was injured when his vehicle was struck in the rear by a vehicle operated by defendant MILLS. The testimony at trial established that, before the accident, SEIGAL engaged in an active sports life, which included his children, but that he can no longer engage in those activities.

SEIGAL testified that, after the accident, the police arrived at the scene but he doesn't remember talking to them, that no ambulance was called and, after approximately one hour, SEIGAL drove himself home. The accident occurred in the morning of January 27, 2005 and, sometime in the afternoon of that day, he drove to Mercy Hospital to be examined for complaints of neck, back and shoulder pain. SEIGAL testified that he was out of work for a few days or a week after the accident.

On February 1, 2005, approximately four (4) days after the accident, SEIGAL was examined by Dr. Kerwin Hausknecht, a neurologist, who treated the plaintiff on said day and for several months thereafter. Dr. Hausknecht's examinations and treatments continued during March, April, September and October of 2005 and plaintiff's last visit was in November 2007. SEIGAL was also treated by Dr Pesa, a chiropractor, for approximately eight months, from March 2005 through October 2005, several times a week.

Dr. Hausknecht gave testimony at trial and described SEIGAL's continuing complaints of neck and back pain. The doctor advised SEIGAL that, with the exception of pain management injections which offer only temporary relief, the plaintiffs only alternative was surgery on his neck and lower back which had the potential to reverse the damage he sustained as a result of the accident. SEIGAL had neither the injections nor the surgery.

Matthew M. Chacko, M.D., a board certified neurologist, who examined SEIGAL on behalf of the defendant, testified as to his procedures in conducting Independent Medical Examinations (IME's) and that the process takes between twenty (20) to thirty (30) minutes. Dr. Chacko stated that the actual hands on examination of SEIGAL took ten (10) to fifteen (15) minutes, at which time he performed, *inter alia,* a number of range of motion tests, and found that SEIGAL had normal ranges of motion in both the cervical and lumbar areas of his spine. However, he did find limited range of motion in SEIGAL's shoulders. He opined that SEIGAL suffered a strain of the cervical and lumbar regions of the spine and, from a neurological standpoint, that the strains were resolved with no residual or neurological finding noted. Dr. Chacko testified that his clinical examination revealed no permanent neurological findings.

"Unit of Time" Measure of Damages

In support of the motion to vacate the jury verdict, counsel for MILLS asserts that, in summation, SEIGAL's counsel improperly employed a "time unit" theory in his presentation to the jury thereby injecting an element of false simplicity in determining the damages suffered by SEIGAL. In summation, plaintiff's counsel stated:

> I'm going to ask you for $200,000 for Mr. Seigal's future pain and suffering. That breaks down to about $500 per month or $6,000 per year for the next 34 or so years of Mr. Seigal's life". (Transcript of March 19, 2008, p 221).

Counsel for MILLS argues that the technique deflects the jury from its mission of exercising its sound judgment in determining a proper award for future pain and suffering. MILLS demands that the Court set aside the jury verdict, in the interests of justice, and persuasively cites a 1980 Second Department decision, *DeCicco v Methodist Hospital of Brooklyn*, 74 AD2d 593, 424 NYS2d 524 (2nd Dept. 1980) to support his argument. In *Decicco*, Second Department found that there is no mechanical method to translate pain and suffering into dollars and cents and held that, notwithstanding the delivery of a cautionary instruction by the trial judge, the error was not dispelled and a new trial was warranted upon the issue of damages in the interest of justice. The Court notes that at trial, counsel for MILLS never objected to the summation presented by SEIGAL's counsel.

In response counsel for SEIGAL cites two (2) cases from the Appellate Division, Second Department: *Chlystun v Frenmer Transportation Corp*, 74 AD2d 862, 426 NYS2d 55 (2nd Dept. 1980) and *Carroll v Roman Catholic Diocese of Rockville Centre*, 26 AD2d 552, 271 NYS2d 7 (2nd Dept. 1966). *Chylstun*, decided after *DeCicco*, and *Carroll*, decided before, hold that if no objection is raised to an improper summation, in particular a "unit of time" argument as a basis for appraising damages, the question is not later open for review. Although the Court finds that counsel for SEIGAL's summation suggested a "unit of time" measure of damages, on the record herein, the

Court concludes that the summation constituted harmless error. *Cf.*, *Meyers v Levine*, 273 AD2d 449, 711 NYS2d 742 (2nd Dept. 2000).

Award for Past and Future Pain and Suffering

In support of the motion to vacate the jury verdict, the Court reviewed SEIGAL's trial testimony and was reminded that he did not seek immediate treatment subsequent to the accident, drove himself home and later in the day, drove himself to the hospital. Additionally, SEIGAL, a self-employed electrician, lost less than one week of work and was treated by a neurologist on five (5) separate visits and on one (1) visit to an orthopedist. Also, SEIGAL received physical therapy for approximately eight (8) months.

Moreover, SEIGAL saw his neurologist, at the request of his counsel, for an exam in 2007 after a two (2) year gap in treatment, for the purpose of updating his report on SEIGAL's condition. The testimony reflects that, at the time of trial, SEIGAL was taking no prescription medication but was taking over the counter pain medications. Additionally, notwithstanding his neurologist's suggestion that he consider epidural injections or surgery to alleviate his complaints of pain, he did neither. The Court could find no reasonable explanation for a more than two (2) year gap in treatment and is cognizant of the import of the implications of that fact.

The Court reviewed both counsel's post trial briefs and was impressed by a recent Appellate Division, Second Department case, *Sanz v MTA-Long Island Bus*, 46 AD3d 867, 849 NYS2d 88 (2nd Dept. 2007). In *Sanz*, the plaintiff, as a result of a motor vehicle accident, sustained herniated discs in her cervical spine, with tingling and

numbness in both hands. In that matter the plaintiff underwent "an anterior cervical discectomy, with allograft and plate fusion", certainly a serious injury. However, surgical intervention notwithstanding, the Appellate Court reduced the jury verdict of $750,000 by $350,000, to a net of 400,000, for both past and future pain and suffering. When considering the *Sanz* case in comparison to the case at bar, the Court finds that the jury verdict for both past and future pain and suffering in this matter to be excessive.

The Law

CPLR §4404(a) provides:

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the 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, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

It is axiomatic that a jury verdict is entitled to the benefit of every fair and reasonable inference which can be drawn from the evidence and that it is the function of the jury, not the Court, to make credibility determinations. It has often been observed that "whether a jury verdict is against the weight of evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence". *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2nd Dept. 1985). In addition, "[a]lthough these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results". *Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (C.A. 1978).

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible inference which could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence presented at trial". *Cohen v Hallmark Cards*, *supra; Nicastro v Park, supra.* Moreover, as stated in *Nicastro*, "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent . . . [and] whether a jury verdict should be set aside as against the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors (citations omitted)". The rule has been stated as requiring that a jury verdict be set aside where "the jury could not have reached a verdict on any fair interpretation of the evidence". *Nicastro v Park, supra; see also, Burney v Raba,* 266 AD2d 174, 697 NYS2d 329 (2nd Dept. 1999); *Licker v Brangan,* 177 AD2d 547, 576 NYS2d 288 (2nd Dept. 1991).

The Court, having heard the testimony and seen the demeanor of the witnesses, has the power to set the verdict aside in the supervision of the jury's work before it. The Court has "the duty of maintaining reasonable consistency between the weight of the evidence and the verdicts reached". *Mann v Hunt*, 283 AD 140, 126 NYS2d 823 (3rd Dept. 1953). It must employ the sum total of its legal experience to determine whether a new trial is required, in a decision that would not be regarded in the profession as unreasonable. *Mann v Hunt, supra.*

The evaluation mandated by CPLR § 5501 (c) as to whether an award deviated materially from reasonable compensation is inherently subjective and cannot produce

results with mathematical procession. The task is to identify the factual similarities and apply reasoned judgment. *Donlon v City of New York*, 284 AD2d 13, 727 NYS2d 94 (1st Dept. 2001).

Conclusion

Based on the foregoing, it is hereby found that the jury verdict was excessive and at deviance with what would be considered reasonable compensation and it is, therefore

ORDERED, that the defendant's motion to set aside the jury verdict on damages is granted, to the extent that the verdict for past and future pain and suffering is set aside and a new trial is ordered on damages, unless plaintiff agrees to a reduction of past pain and suffering from $250,000 to $100,000, and to a reduction for future pain and suffering from $400,000 to $160,000, for a total of $260,000 for past and future pain and suffering, which represents reasonable compensation for the plaintiff's injuries. If said sums are agreed to, within thirty (30) days after service of a copy of this order, with Notice of Entry thereon, plaintiff shall submit a written stipulation consenting to reduce the jury award and the parties shall enter Judgment accordingly. If said sums are not agreed to by plaintiff, the Court vacates the verdict for past and future pain and suffering and directs a new trial on the issue of damages.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: August 25, 2008

ENTERED

SEP 02 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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