

Beato v Cosmopolitan Assn. LLC

2008 NY Slip Op 32465(U)

September 5, 2008

Supreme Court, Queens County

Docket Number: 0001811/2005

Judge: Robert J. McDonald

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employed by the management company, several times about a group hanging out there to sell drugs, about whom the plaintiff was anxious.

The jury returned a liability verdict in favor of the plaintiff, finding Cosmopolitan seventy-five percent liable for the occurrence of the beating the plaintiff had sustained, and the assailants were twenty-five percent liable.

At the damages portion of the trial the plaintiff offered evidence from two plastic surgeons and a neurologist who testified about the injuries which the plaintiff sustained as a result of the beating. Not only was there proof as to the psychological component of the injury, but there was the evidence of plaintiff having sustained permanent injury to his nose, cheek, and left eye. In particular, there was evidence that the plaintiff, who had twice been operated upon as result of the injuries sustained and in need of further surgery, had continuous physical pain as a result of the beating and difficulty breathing, which was exacerbated in cold weather. The jury found that the adequate amount of compensation to the plaintiff for past pain and suffering was \$ 1,500,000.00, and \$250,000.00 for past medical expenses. The jury found that the adequate amount of compensation to the plaintiff for future pain and suffering which he will have to endure was \$ 3,500,000.00 and \$1,500,000.00 for future medical expenses. The two awards for future compensation was based on the plaintiff's life expectancy which the jury found to be 30 years.

Cosmopolitan's counsel in his affirmation recites that he is essentially seeking relief pursuant to CPLR 4404(a) which permits a post-trial Court to address alleged errors in the liability and/or damage portion of a trial. The basis for relief, set forth several times in Cosmopolitan's papers, is the allegation that the plaintiff (1) failed to show a pattern of violent crime on the premises or that his assailants were unlawfully on the premises; (2) defendant's share of culpability, as a matter of law, cannot approach the degree of culpability of plaintiff's attackers; (3) improper and prejudicial remarks in plaintiff's summation which is demonstrated by the jury's excessive verdict; (4) error committed through the introduction of portions of plaintiff's deposition in violation of CPLR 3117, and an incomplete missing witness charge; (5) the jury's excessive award for pain and suffering; and (6) the jury's excessive award for past and future medical expenses. The specific basis for the requested relief is set forth in defendant's Memorandum of Law.

The Court will just generally respond to the allegations of legal error committed during the course of the trial. The questions of fact presented in Cosmopolitan's "Point I" that the "Plaintiff Failed To Show That The Attack Was Foreseeable", "Plaintiff Failed To Show That His Attackers Were Unlawfully On The Premises" and "The Criminal Acts Of Plaintiff's Assailants Severed Any Causal Nexus Between Defendant's Alleged Negligence And Plaintiff's Injuries" are all questions of fact which were resolved in

the plaintiff's favor. As part of the defendant's argument the defendant's rely on *Johnson v City of New York*, 7 AD3d 577 *lv denied* 4 NY3d 702, which is in apposite to the case at bar. In *Johnson* the Court found that the defendant's foreseeability could not be established through the use of crime statistics dealing with similar incidents.

In *Cosmopolitan's* "Point II" they argue that "The Jury's Apportionment of Liability Was Against the Weight of the Evidence". This too was a factual determination. The cases cited by *Cosmopolitan* are all fact related. The case of *Cabrera v Hirth*, 8 AD3d 196, *lv dismissed* 4 NY3d 796, is such an example, because the Appellate Division recited that basically the apportionment of liability is a question of fact, however in *Carbrera* where the wrongdoer lived at the premises the Court found that the apportionment of liability, as a matter of law, should be modified. In the case at bar, the wrongdoer was not a tenant at the premises involved.

In "Point III" the defendants argue that "Improper And Highly Prejudicial Comments In Plaintiff's Summation Warrant A New Trial, Since These Comments Resulted In An Apportionment of Liability That Was Against The Weight Of The Evidence And A Markedly Excessive Damage Award". The alleged characterization of the Plaintiff's summation as presenting the issue as one of a Corporation versus the rights of an individual is to distort the nature of the plaintiff's summation. In the instant motion the defendant asserts its corporate capacity as a defense, and here, as a offense.

The Court finds that the plaintiff-counsel's summation, while passionate for his client, was not improper or so prejudicial to the defendant that it rose to the level where a new trial should be ordered.

In "Point IV" the defendant alleges that the "Trial Court Error Also Deprived Defendant of A Fair Trial", defendant's counsel asserts that the Court was in error as to its permitting the reading of certain portions of the plaintiff's deposition, and giving a "missing witness" charge as to a defendant's neurologist who failed to testify. The Court has reviewed the defendant's arguments and finds them to be without merit. The plaintiff's counsel did not read from his own client's pre-trial deposition to bolster his testimony but rather read those parts not read by the defense counsel in order to provide the jury with a complete picture of the plaintiff's testimony and were only used to the extent necessary to clarify the portions read by the defense counsel (*see*, CPLR 3017(b)).

The defendant's other argument that the Court should not have given the jury the Missing Witness charges with respect to its examining doctors who did not testify is similarly without merit. The doctors

were within the control of the defendant and would be expected to testify if they found plaintiff's injuries to be not as significant as the plaintiff's surgeon described them at trial.

Accordingly the defendant's motion to set aside the verdict on liability is denied. The evidence was not so preponderate in favor of the defendant that the jury could not have reached its determination on a fair interpretation of the evidence presented (*Capolino Construction Corp v. White Plains Housing Authority*, 275 AD2d 347). In fact, the evidence adduced at trial was strongly in favor of the plaintiff, including, but not limited to, substantial inconsistencies in the testimony of the defendant's witnesses.

In "Point V" in which the defendant asserts "The Jury's \$5 Million Dollar Award for Pain and Suffering Is Markedly Excessive And Should be Substantially Reduced" the question which is presented is whether in similar cases the award is so disproportionate that to permit such a verdict would ultimately result in an unfair award as to plaintiff (*see, Donlon v City of New York*, 284 AD2d 13).

It is well-settled that the amount awarded in negligence cases for personal injury is primarily a question of fact for the jury (*Bondi v Bambrick*, 308 AD2d 330). A jury's verdict represents the combined judgment of people from various walks of life who are charged with the responsibility of determining compensation for injuries sustained (*Senko v Fonda*, 53 AD2d 638). The New York Pattern Jury Instruction 2:280 calls for compensating a party for Pain and Suffering in an amount "which will justly and fairly compensate" him. The Court may upon a motion made by a party, or, on its own initiative, modify an award which it finds to be either inadequate or excessive (*Ashton v Bobruitsky*, 214 AD2d 630). When dealing with the issue of pain and suffering a jury's verdict can not be a "neat mathematical calculation" (*Caprara v Chrysler Corp*, 52 NY2d 114, 127), and a jury's verdict will be sustained as long as it is not "contingent or speculative" (*Steitz v Gifford*, 280 NY 15). In the instant case, the Court must determine whether the award for both past as well as future pain and suffering was excessive, given the facial pain and numbness that the plaintiff must endure (*Pavis v Scott*, 82 AD3d 800).

At trial, the plaintiff's treating surgeon testified to the extensive injuries suffered by the plaintiff that continue to this day. He also testified as to the extent of two surgeries and the likelihood of even more surgeries in the future and how they were proximately caused by the incident. The plaintiff also testified as to his injuries and the extent of pain and suffering he has endured to the current time. None of this was challenged by the defense and no medical expert was called to testify on behalf of the defendant to contradict the testimony of the plaintiff's surgeon as to the extent of the injuries or the necessity of future surgery.

Despite this, the Court finds that the award for future pain and suffering and future medical expenses to be excessive and hereby reduces the future pain and suffering to \$2,000,000.00 and future medical expenses to \$200,000.00.

Defendant's motion for a collateral source hearing pursuant to CPLR 4545(c) is denied with leave to renew if the parties can not agree on a appropriate dollar figure.

So Ordered

Dated: September 5, 2008

Robert J. McDonald, J.S.C.