

Weiner v Jacobs

2008 NY Slip Op 32971(U)

October 30, 2008

Supreme Court, New York County

Docket Number: 101267/06

Judge: Nicholas Figueroa

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

PRESENT: HON. Nicholas FIGUEROA
Justice

PART 46

Index Number : 101267/2006

WEINER, JASON

vs

JACOBS, ELLIOT W., M.D.

Sequence Number : 001

OTHER

INDEX NO. 101267/06
MOTION DATE 7/1/08
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

443
45
6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Be accompanied by decision at order.

FILED

NOV 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: OCTOBER 30, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

JASON WEINER,

Index No. 101267/06

Plaintiff,

**DECISION
AND ORDER**

- against -

ELLIOT JACOBS, M.D.,

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NEW YORK

Nicholas Figueroa, J.:

Defendant moves to set aside the verdict (CPLR §4404) on the grounds that the court interrupted defendant's counsel's opening statement and because it permitted a physician to testify without furnishing a report to defendant. Defendant also argues that the court improperly interrupted his attorney's closing statement. He argues that the court made improper comments about the nature of an independent medical examination. Defendant additionally moves to set aside the verdict of \$200,000 for past pain and suffering as excessive.

Plaintiff cross moves for a new trial on future damages, arguing that the jury should have made an award for this item.

The court did not make any errors requiring a mistrial.

The court instructed defendant's counsel that he was arguing his opening as if it were a closing argument. Counsel's proper task on an opening statement is to summarize what he or she intends to prove. Defendant's counsel went beyond the bounds of this role during a repetitious opening and the court properly advised him to confine himself to the correct limits of an opening statement.

Nor did the court do anything improper on defense counsel's summation. Defendant has not demonstrated any error on the court's part by his argument that the court should not have informed the jury that they were to assess the credibility of expert witnesses. Indeed, that is specifically addressed in PJI 1:90, permitting a jury to apply the same tests concerning reliability that they would apply to any ordinary fact witness.

Notably, defendant did not move for a mistrial on the grounds it now asserts regarding its opening or closing statements. Therefore, it has waived its objection (see *Lind v. City of New York*, 270 AD2d 315).

The court did not err in allowing Dr. Marfuggi, defendant's expert, to demonstrate and comment on plaintiff's condition in court. Marfuggi did not testify about his pre-trial examination or give any findings based on it. His testimony based on his contemporaneous examination of the plaintiff's breast, in front of the jury, was not "inexorably intertwined" to his pre-trial examination (*Neils v. Diamond*, 6 AD3d 589, 590), because the principal issue for the jury was one of esthetics. Therefore, the court did not err in allowing his testimony (*id.*).

The court's comment on the definition of IME, independent medical examination, did not constitute reversible error. The court felt compelled to comment in order to balance defense counsel Paley's use of the word "independent" which would tend to leave the impression that his witness was more reliable because of his independence. Again, defendant did not move for a mistrial after this alleged error.

In any event, in response to a juror's question as to what the initials stood for, the court stated:

"Now you must keep in mind that an IME means an independent medical examination. The operative word is independent. Is it really independent? One guy is summoned to come in to testify on its

behalf. So an IME can be a misnomer is what I'm saying. You can realize that. All right."

Conversely, when plaintiff's counsel argued on summation, that "...the IME, which by the way it means independent medical exam but it's not independent at all.", the court struck the remark, stating to the jury that, "Keep in mind that he [defendant's IME physician] came and testified. The fact that one side called him is not really of any paramount importance. He came here as a doctor to testify."

The standard of review in determining whether a damage award is excessive or inadequate is whether the award "... deviates materially from what would be reasonable compensation." (CPLR §5501(c)). The award for past pain and suffering in the instant case is not unreasonable based on similar awards in this case (see *Sutch v. Yarinsky*, 292 AD2d 715; *Baez v. Dombroff*, 142 AD2d 705).

The remaining issue is whether the jury's denial of an award for future pain and suffering was based on a fair interpretation of the evidence (see *McKenzie v. New York City Transit Authority*, 278 AD2d 207).

Because the question is whether the verdict was based on a fair interpretation of the evidence, defendant's argument, in opposition to the cross motion, that plaintiff's failure to request that the jury resolve an inconsistency, was a waiver of its right to challenge the verdict is without merit. Similarly, plaintiff's failure to argue the question of future damages on summation is not a waiver of his rights. The case relied upon for this argument, *Califano v. City of New York*, 212 AD2d 146, is inapposite. The question the First Department decided in that case was whether the failure to ask for a mistrial when an allegedly improper argument was made on summation was an error (*id.* at 152, 153).

However, while defendant's reasoning is incorrect, there was sufficient evidence in the record to allow the jury to conclude that plaintiff will not have any future pain and suffering (see *McKenzie v. New York City Transit Authority, id.*).

The question of whether plaintiff continues to consider himself disfigured is a question of credibility. He did not offer psychological or psychiatric testimony on his emotional status. Further, the record shows that plaintiff failed to have surgery that could correct the condition he complains of. The jury was able to evaluate the competing evidence on whether plaintiff is entitled to future damages, and the court will not interfere with that determination (see *Brown v. Taylor*, 221 AD2d 208).

Accordingly, it is

ORDERED that defendant's motion to set aside the verdict is denied, and it is further

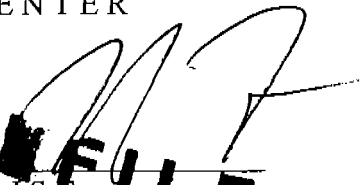
ORDERED that plaintiff's cross motion for a new trial on the issue of future damages is denied, and it is further

ORDERED that the plaintiff shall have judgment consistent with the jury verdict, together with interest as calculated by the Clerk and costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the court.

Dated: October 30, 2008

ENTER


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