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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT: _____ PART 5

Index Number : 115258/1993
MITCHELL, CHARLA
VS.
PORT AUTHORITY
SEQUENCE NUMBER : 002
TRIAL DE NOVO

INDEX NO. 115258/93
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
APR 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/3/09

_____ J.S.C.
HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 5

----------X

CHARLA MITCHELL,

Plaintiff,

- against -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

----------X

Index No.
115258/93

Mot. Seq. No.: 002
003
Decision After Trial

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Charla Mitchell, brings this action for personal injuries she allegedly sustained when she fell and broke her ankle while walking near her home in New Jersey on March 8, 1993. Plaintiff alleges that she fell as a consequence of walking down 100 floors in order to exit the World Trade Center after it was bombed by terrorists on February 26, 1993. Defendant takes the position that plaintiff's fall, ten days later, was not caused by her decent down the steps. Rather, defendant claims that the fall was caused by plaintiff's slip on the earthen path upon which she was traveling.

Plaintiff alleges that she sustained the following injuries: a severely shattered right ankle (trimalleolar fracture involving tibia and fibula) requiring open reduction and the placement of several screws, a major dislocation of the right ankle joint, three torn ankle ligaments, and injuries to both knees. A jury trial on damages only was commenced on December 9, 2008 and a verdict was rendered on December 15, 2008. The jury found that plaintiff was entitled to $20,000 for past pain and suffering and $480,000, over a period of 24 years, for pain and suffering damages to be incurred in the future.

Plaintiff now moves for an order setting aside the verdict to the extent that the jury awarded plaintiff $20,000 for past pain and suffering, and to grant a new trial only with respect to that issue pursuant to CPLR §4404(a). Defendant the Port Authority of New York and New Jersey, moves by separate motion, for an order setting aside the verdict and directing a new trial concerning that part of the jury

verdict which found that plaintiff's evacuation of the World Trade Center was a substantial factor in causing her injuries of March 8, 1993 and setting aside that part of the damages verdict granting $480,000 for future pain and suffering.

Plaintiff, in support of her motion, argues that, in view of the nature and extent of plaintiff's injuries, as well as relevant case law, the award for past pain and suffering in the amount of $20,000 for almost sixteen years from the time of the accident to the time of trial, cannot be sustained. Defendant, in support of its motion, claims that Dr. Grover, plaintiff's treating physician was improperly questioned about an MRI film which had been excluded from evidence. Defendant also argues that the verdict was so inconsistent between past and future damages that it must have been the product of an impermissive compromise.

CPLR 4404(a) states, in relevant part:

> 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 . . . where the verdict is contrary to the weight of the evidence . . .

Initially, whatever prejudice defendant claims to have suffered as a result of Dr. Grover's testimony was cured when that portion of Dr. Grover's testimony relating to the MRI was stricken from the record and a curative instruction was given by the court. (see *Boruch v. Morawiec*, 51 AD3d 429[1st Dept. 2008]). Although defendant now argues that the curative instruction was inadequate, defendant failed to object or request further instruction at the time of trial. (see *Venancio v. Clifton Wholesale Florist, Inc.*, 1 AD3d 505[2nd Dept. 2003])(where the court found that it was not reversible error for plaintiff's expert to be permitted to read from an MRI report not in evidence where the court later instructed the jury to disregard any reading of the report). Indeed, defendant's counsel explicitly requested a curative instruction in lieu of a mistrial, thereby waiving defendant's right on appeal. (see Trial Transcript 12/15/08 Pages 3&4) (see *Picon v. Moore*, 15 AD3d 188[1st Dept. 2005]).

As to the inconsistencies in the awards for past and future pain and suffering, such a vast discrepancy points to an impermissible compromise among the jury. During the liability phase of the trial, a jury found defendant liable for injuries which

occurred at the World Trade Center site. However, the jury's inquiry did not stop there. Indeed, the first question on the verdict sheet here reads:

> WAS PLAINTIFF'S DECENT DOWN 100 FLOORS OF STAIRS ON FEBRUARY 26, 1993, A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S ACCIDENT ON MARCH 8, 1993?

If the jury answered no to Question "One", they were instructed to proceed no further and report to the court. Having answered yes to the first question, the jury went onto the second question which read:

> QUESTION "2:" STATE THE TOTAL AMOUNT AWARDED TO PLAINTIFF FOR THE FOLLOWING ITEMS OF DAMAGES FROM THE DATE OF OCCURRENCE TO THE DATE OF YOUR VERDICT.
>
> . . .
>
> Pain and Suffering, including loss of enjoyment of life: _____
>
> . . .

The jury awarded plaintiff $20,000 for past pain and suffering for a period of nearly sixteen years (from the time of the injury to the time of trial).

The court in *Rivera v. City of New York*, 253 AD2d 597[1st Dept. 1998] found that "where liability is sharply contested and plaintiff's injuries are serious . . . an inexplicably low award for such injuries makes it "most likely" that the jury has rendered a compromise verdict. (*Id.* at 600.) Similarly, in *Woods v. J.R. Liquors, Inc.*, [1st Dept. 1982], the court set aside the verdict and ordered a new trial on all issues where the "issue of liability was sharply and substantially contested, plaintiff's injuries were serious and the jury's award inexplicably low for such serious injuries." The court found that "the verdict of the jury was probably a compromise verdict . . . the jury . . . compromised on liability and damages by finding the total amount for plaintiff's injuries much too low." "Where there is a substantial likelihood that the jury's verdict results from a trade off on a finding of liability, in return for a compromise on damages, the retrial should be on all issues." (*Farmer v. A&T Bus Co., Inc.*, 96 AD2d 783[1st Dept. 1983]).

During the trial the jury heard extensive testimony from plaintiff's treating

physician and her expert doctor regarding her injuries. Dr. Grover stated that plaintiff's injuries included a trimalleolar fracture involving both the tibia and fibula which required that plaintiff undergo open reduction and placement of four screws in her ankle; a major dislocation of the right ankle joint; and three torn ligaments in her right ankle. Additionally, plaintiff's expert testified that his examination revealed injuries to plaintiff's knees, including tenderness, swelling and Crepitus. Plaintiff's injuries necessitated her wearing a full leg cast for several months which was replaced by a half leg cast for a period of time after that. Plaintiff attended physical therapy sessions once or twice a week. Both doctors opined that plaintiff's injuries were permanent.

The jury awarded $480,000 for future pain and suffering and only $20,000 for sixteen years of past pain and suffering. Such an award is "irreconcilably inconsistent,"in light of the fact that the jury found that the decent down the stairs was a substantial factor in causing plaintiff's injuries. (see *Torres v. City of New York*, 226 AD2d 701[2nd Dept. 1996]). An impermissible compromise is strongly indicated considering the severity of plaintiff's injuries and the "sharply and substantially contested" issue of whether plaintiff's descent down the stairs was a substantial factor in the injuries she sustained on March 8, 1993. (see *Woods*). Thus, the verdict must be set aside and a new trial ordered.

Wherefore it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's motion is granted; and it is further

ORDERED that the verdict rendered on December 15, 2008 is set aside and a new trial is ordered; and it is further

ORDERED that the parties are directed to appear in Part 40 of the Supreme Court, 60 Centre Street, Room 242, on May 11, 2009 at 9:30 am for jury selection.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 3, 2009

EILEEN A. RAKOWER, J.S.C.