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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Jankoff, Judy

- v -

Recess Restaurant

INDEX NO. 106020/06

MOTION DATE 2/27/09

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for modify award

	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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff motion pursuant to CPLR Rule 4404(a) to modify the jury's verdict to reflect the stipulated amount of $2,672.84 for past medical expenses is granted, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR Rule 4404(a) to modify the jury's verdict for future pain and suffering by increasing same in an amount to be determined by this Court as reasonable compensation, or n the alternative, for a new trial on the issue of future pain and suffering only, is denied; and it is further

ORDERED that the branch of defendants' cross-motion pursuant to CPLR § 4545 to reduce plaintiff's award for past medical expenses is denied; and it is further

ORDERED that the branch of defendants' cross-motion pursuant to CPLR § 4545 to reduce plaintiff's award for future medical expenses is denied, at this juncture; and it is

ORDERED that the branch of defendants' cross-motion for an order setting this matter down for a collateral source hearing to determine what medical expenses have been and will be reimbursed by collateral sources is granted solely as to plaintiff's award for future medical expenses; and it is further

ORDERED the parties shall appear in Part 35 for a collateral source hearing on July 8,2009, 10:00 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/28/2009

J.S.C.

HON. CAROL EDMEAD

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

JUDY JANKOFF,

Plaintiff, Index No. 106020/06

-against-

RECESS RESTAURANT, INC.
and 86 BH LLC d/b/a BURGER HEAVEN,

Defendants.

---------- X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Judy Jankoff ("plaintiff") moves pursuant to CPLR Rule 4404(a) to modify the jury's verdict to reflect the stipulated amount of $2,672.84 for past medical expenses and to modify the jury's verdict for future pain and suffering by increasing same in an amount to be determined by this Court as reasonable compensation. In the alternative, plaintiff seeks a new trial on the issue of future pain and suffering only.

In response, defendants Recess Restaurant, Inc. and 86 BH LLC d/b/a Burger Heaven ("defendants") cross move pursuant to CPLR § 4545 to reduce plaintiff's awards for past *and* future medical expenses, and setting this matter down for a collateral source hearing to determine what medical expenses have been and will be reimbursed by collateral sources.

Factual Background[1]

On October 14, 2005, plaintiff, then 57 years old, tripped and fell while walking over the sidewalk cellar doors in front of the defendants' Burger Heaven restaurant, sustaining injuries to,

[1] The factual background is taken from plaintiff's motion.

inter alia, her dominant arm and rotator cuff. A jury trial was held before this Court, and on January 21, 2009, the jury returned a verdict in plaintiff's favor, awarding her $75,000 for past pain and suffering, $12,000 for future pain and suffering over a period of four (4) years, and $13,000 for future medical expenses.

Plaintiff's Motion

Plaintiff argues that the jury's award for past medical expenses should be modified based on the parties' stipulation. Prior to the close of evidence, the parties stipulated that the issue of plaintiff's past medical expenses would not be submitted to the jury, and that in the event plaintiff received a verdict in her favor, the resulting verdict would be increased by the fair and reasonable value of plaintiffs past medical expenses, a sum equal to the lien being asserted by Oxford Health Plans ("Oxford") ($2,672.84). Since the jury rendered a verdict in plaintiff's favor, the Court should increase the verdict by the fair and reasonable value of plaintiff's medical expenses and enforce the terms of the stipulation reached between the parties.

Plaintiff further argues the jury's verdict for future pain and suffering should be increased on the ground that the jury's award of $12,000 for same deviates materially from what would be reasonable compensation where plaintiff will need future shoulder surgery and warrants an additur or new trial on the limited issue of future damages. At trial, plaintiff adduced expert testimony from an orthopedic surgeon, Dr. Jeffrey Kaplan ("Dr. Kaplan"), that she would require future arthroscopic surgery for her right shoulder and that the cost of such surgery would be $10,000. Arthroscopic surgery is necessary in order to repair multiple tears to the rotator cuff, together with other articular surface damage. Dr. Kaplan further testified that as a result of the accident, plaintiff had developed post-traumatic arthritis, a permanent condition. This testimony

was apparently accepted by the jury as reflected by their award of $13,000 for the surgery and the therapy associated therewith. Shoulder surgery to repair the tears in plaintiff's right shoulder would require an incision to her right shoulder to expose her rotator cuff; decompression of inflamed bursa with a shaver and the repair of any torn ligaments; and the insertion of anchors to bring the rotator cuff back into place. Plaintiff would also be required to undergo between 12 and 24 physical therapy visits over a period of two to three months to increase her range of motion and strength.

Plaintiff contends that notwithstanding the pain and suffering attendant with undergoing shoulder surgery, together with the pain and suffering that plaintiff would endure from permanent arthritis, the jury only awarded her $12,000 for future pain and suffering over four years. Plaintiff argues that comparable cases involving shoulder injuries demonstrates that the jury's $12,000 award for future pain and suffering was inadequate and deviated materially from what would be reasonable compensation.

Opposition and Cross-Motion

Defendants argue that plaintiff's motion is moot, as this Court already deemed the instant motion made and denied. Following the reading of the jury verdict, plaintiff sought permission to file the instant motion. This Court ruled that any such motions were deemed made and denied.[2] Although the Court later gave permission to file the instant motion, it has already been heard and deemed denied. The Court made no error in law to warrant reargument of the motion,

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[2] After the trial, the following occurred:
MS. DUNLEAVY: I'd like to-I'm going to reserve my motions. I'm not going to make motions orally; I'll make them on paper. May I reserve motions.
THE COURT: I don't to any post-trials. You are to go straight up. Deem all motions denied. . . .

so had plaintiff filed this motion as one to reargue (which she should have), it should be denied.

However, in the event that this Court grants plaintiff leave to re-file her motion, defendants also seek leave to re-file a post-trial motion setting aside all awards for past *and* future medical expenses for which plaintiff has been or will be reimbursed by a collateral source pursuant to CPLR § 4545, and set this matter down for a collateral source hearing to determine what medical expenses have been and will be reimbursed by collateral sources.

While defendants do not object to enforcing the terms of the stipulation, the collateral source rule (CPLR § 4545(c)) requires that the court reduce the verdict for any amount that the plaintiff has or will likely be reimbursed by medical insurance. The stipulated amount that plaintiff seeks to add to the jury verdict ($2,672.84) is based on the records from Oxford, which show that the above amount was paid for medical bills on plaintiff's behalf. Therefore, this entire amount was reimbursed by a collateral source, and the award must be reduced by that amount.

Additionally, the jury's award for $13,000 in future medical expenses must be reduced to zero, as there is a "reasonable certainty" that plaintiff will be reimbursed this amount by plaintiff's Oxford. Should plaintiff dispute this sum as being completely covered by health insurance, defendants request a collateral source hearing to determine what medical expenses, if any, have not been or will not be reimbursed by collateral sources.

Defendants also argue that the jury's verdict on future pain and suffering should not be disturbed. Plaintiff failed to meet her burden of proof in establishing what testimony was given at trial and what evidence was submitted with respect to the future pain and suffering award in dispute. Plaintiff submits no evidence in support of her application to set aside the verdict-no

medical records, trial testimony, or deposition testimony. Counsel's affirmation is insufficient to establish what occurred at trial. In any event, plaintiff's motion seeking to set aside the jury's award for future pain and suffering should be denied in its entirety as it was reasonable based on the evidence submitted at trial. Defendants argue there is no basis under CPLR § 4404(a) for the court to conclude "that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial." Although the Court has discretion to grant a new trial where the verdict is against the weight of the evidence, a court is not free to interfere with the verdict simply because it views it as unsatisfactory, is in disagreement with it, or simply wishes to substitute its own determination for that of the jury.

Defendants maintain that the jury's award of $12,000 for future pain and suffering over four years does not deviate materially from what would be reasonable compensation, and should not be disturbed. Plaintiff admitted that she only missed a month from work and her last prescription for the injuries was in October 2005. These facts could be taken by the jury as an indication of the relatively modest injuries and resultant pain. The 15-20 degree loss of range of motion on forward flexion testified to by Doctors Kaplan and Kulick was demonstrated during the trial as only a minor limitation on pain-free movement in lifting her arm over her head. Dr. Kulick testified to external rotation (moving the arm outwards with the elbow to the body) being fifteen degrees better on her (non-injured) left arm. Her loss of internal rotation (touching the back) from T8 to T6 was shown by Dr. Kulick to equal only two inches on her back. Dr. Kulick described this as a fully functional range of motion. Evidence was submitted through Dr. Kulick's testimony that the proposed arthroscopic surgery would be a one-day

minimally-invasive procedure. The evidence at trial could be interpreted by a rational jury to show that any future pain and suffering would be minimal. The jury's finding of only four years of future pain and suffering only supports that theory. Further, the evidence at trial could lead a rational jury to disregard much of the testimony of Dr. Kaplan. The jury considered evidence of an original MRI reading sent to Dr. Kaplan which found no rotator cuff tear and no atrophy, which contradicted the later MRI report relied upon by Dr. Kaplan. This earlier report was not contained in Dr. Kaplan's file and was not considered by him. The jury specifically asked for this evidence in a note during deliberations. It can be inferred that this issue was considered by the jury in evaluating the credibility of each doctor. The jury, when considering the above evidence, clearly did not agree with Dr. Kaplan's and plaintiff's arguments of significant future pain and suffering. Defendants are "entitled to the benefit of every favorable inference which can reasonably be drawn from the facts." Based on the evidence, the jury had a reasonable basis to award only a modest amount for future pain and suffering. Further, argues defendants, the cases cited by plaintiff are factually distinguishable.

Plaintiff's Opposition

Defendants failed to submit any evidence that plaintiff's past, stipulated medical expenses have been or will be replaced or indemnified, with reasonable certainty, by a collateral source or that plaintiff is legally entitled to the continued receipt of any such collateral source. Further, the Court should not reduce any award for past medical expenses on the grounds that such an award is necessary to satisfy a lien being asserted by Oxford in the amount of $2,672.84. The parties recognized the validity of this lien when they stipulated that the issue of past medical expenses would not be submitted to the jury, but that any verdict in favor of the plaintiff would be

increased by the amount of the subject lien. Thus, there is no basis to reduce plaintiff's stipulated, past medical expenses. Modification of the jury's verdict to include an award for past medical expenses, therefore, is necessary so that this lien can be satisfied. Reduction of the jury's award for past medical expenses, on the other hand, would unfairly require plaintiff to satisfy the lien with monies that were awarded by the jury for past pain and suffering and would abrogate the intent of the parties' stipulation.

Further absent from the defendants' moving papers is any evidence that future medical expenses will, with reasonable certainty, be replaced or indemnified from a collateral source. Defendants have not submitted any evidence that plaintiff currently receives health insurance benefits, no less evidence that plaintiff is legally entitled to the continued receipt of such benefits, pursuant to a contract or otherwise enforceable agreement, subject to the continued payment of a premium. The defendants' failure to submit such evidence is fatal to their motion and warrants a denial of their request for a collateral source hearing on this issue.

Plaintiff's Reply

In reply, plaintiff contends that defendants' claim that the stipulated amount of $2,672.84 for past medical expenses should be reduced to zero because it was replaced by a collateral source is not only incorrect and violates the stipulation. Plaintiff's past medical expenses have not been replaced by any collateral source. Although Oxford paid for plaintiff's past medical benefits, it has asserted a lien in connection with plaintiff's recovery in this action. Thus, plaintiffs past medical expenses have not been replaced at all but remain outstanding and will continue to remain outstanding until such time as Oxford's lien is satisfied in its entirety. Additionally, the fundamental purpose of the stipulation was to ensure that Oxford's lien was

satisfied from a jury verdict in favor of the plaintiff. By agreeing to increase any jury award in favor of the plaintiff by an amount equal to the lien being asserted by Oxford, the defendants necessarily waived any claim that past medical expenses would be subject to a collateral source reduction. The stipulation also reflected the understanding that an award for past medical expenses would be used to satisfy the lien being asserted by Oxford. To permit otherwise would unjustly require plaintiff to satisfy the lien with monies that the jury awarded her for past pain and suffering.

Also, although the Court initially deemed all post-trial motions as denied, it retreated from this position and ultimately permitted the plaintiff to seek the appropriate relief upon written submission.[3] The Court never prohibited plaintiff from bringing the within post-trial motion and explicitly reserved decision on any such motion which can be brought as-of-right pursuant to the CPLR. Thus, the within motion is not moot and need to have been brought as a motion to reargue.

Lastly, defendants' argument that the jury's award for future pain and suffering is not against the weight of the evidence ignores the legal standard that is to be used when evaluating the sufficiency of same. The question presented by plaintiff is whether the jury's award deviates materially from what would be reasonable compensation, a determination that can only be made

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[3] MS. DUNLEAVY: Well, Your Honor, I have a right to make a motion under the statute, under CPLR -
THE COURT: You can make it if you wish.
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MS. DUNLEAVY: I intend to. I hope you will give it attention and not just say it's denied because that's your policy.
THE COURT: We'll read it if you make it.
MS. DUNLEAVY: Thank you.

by comparing the jury's award to cases involving similarly injured persons.

A review of the cases cited by plaintiff demonstrates that the jury's award for future pain and suffering materially deviated from what would be reasonable compensation.

In each such case, all of which involved plaintiffs who sustained injuries similar to those sustained by the plaintiff herein, the Appellate Division increased the jury's award for future pain and suffering from as little as $40,000 to as much as $200,000. Inasmuch as the jury accepted as truthful plaintiffs claim that she I would be required to undergo future arthroscopic surgery to her dominant shoulder (and that she would in fact undergo the surgery), plaintiff submits that reasonable compensation for future pain and suffering would be closer to the higher range awarded by the Appellate Division.

Defendants' Reply

Defendants point out that plaintiff not only admits to having Oxford as a collateral source, but also admits that Oxford actually paid the medical bills on her behalf. By counsel's own admission there is indeed a collateral source, and that same collateral source actually paid benefits on her behalf related to the accident at issue. As to the future medical expenses, plaintiff submits no affidavit denying that she has medical insurance to cover her for the $13,000 awarded, and counsel does not address this issue. Thus, the jury's award for $13,000 in future medical expenses must be reduced to zero, as this amount will also be reimbursed by plaintiff's Oxford. The undisputed evidence of medical coverage through Oxford demonstrates that the award for past medical expenses should be reduced, and that a collateral source hearing should be held if plaintiff contests that she no longer has medical coverage through Oxford or another collateral source provider.

As to plaintiff's claim of a lien, CPLR §4545 contains no exception for amounts subject to liens from a private medical insurance company, and plaintiff cites no caselaw holding that such a lien exempts an amount from the collateral source rule. Further, while the amount paid for past medical expenses is undisputed, there is no proof of whether any amounts in the case are subject to a lien; the documents submitted show that certain amounts were paid on plaintiff's behalf. The amount plaintiff seeks to add pursuant to the stipulation, *i.e.*, $2,672.84 was paid for medical bills on plaintiff's behalf. Therefore, this entire amount was reimbursed by a collateral source.

Analysis

At the outset, the Court finds that plaintiff's motion is not moot. The Court essentially declined to address any post-trial motions at the close of the trial, but indicated that the Court would later consider any motion in the event one was made. Therefore, the Court proceeds the address the plaintiff's motion, as well as defendants' cross-motion for relief.

Past and Future Medical Expenses

CPLR § 4545(c) states that: In any action brought to recover damages for personal injury...where the plaintiff seeks to recover for the cost of medical care...evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance... If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified by any collateral source, it shall reduce the amount of the award by such finding...

As to past medical expenses, it is uncontested that the parties entered into a stipulation,

and that said stipulation is enforceable and binding against the parties (*see also*, *Parsons v. City of New York*, 195 AD2d 282, 599 NYS2d 594 [1st Dept 1993] [stating that trial court should have reduced the original award amount to $20,270 for past lost earnings where total amount of past lost earnings was agreed to be $20,270]).

Defendants' contention that this amount was paid by plaintiff's health insurer, Oxford, therefore resulting in a reduction of $2,272.84 from any past medical expense award, lacks merit. While the Oxford records indicate that amounts were paid on plaintiff's behalf, plaintiff claims that Oxford has a lien against plaintiff's recovery for this amount. Further, defendant does not dispute that the amount to which the parties stipulated was reflective of the subject lien. Although the statute and caselaw do not contain an exception for liens asserted by collateral sources such as the health insurance provider herein, defendants do not deny that the parties *agreed by stipulation* that the plaintiff would be entitled to increase the award by $2,272.84 for past medical expenses, and that this amount was premised upon the existence of a lien by Oxford. Therefore, the branch of plaintiff's motion for a modification of the jury award to include $2,272.84 for past medical expenses is granted, and the branch of defendants' motion to reduce said amount of past medical expenses awarded by the Court is denied.

As to *future medical expenses*, defendant must demonstrate "with reasonable certainty" that plaintiff's future medical expenses were or would be replaced from collateral sources (*French v Schiavo*, 58 AD3d 475, 870 NYS2d 339 [1st Dept 2009] *citing* CPLR 4545[c]). In order for a defendant to be entitled to a collateral source hearing, "the defendant must tender some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral

sources" (*Dehaarte v Ramenovsky*, 20 Misc 3d 1124 [Sup Ct New York County 2008]). Here, the submissions include a print out from Oxford detailing the amounts billed and paid for on plaintiff's behalf. However, it is unclear as to whether Oxford has, or will in fact continue to receive such insurance, and if so, whether such insurance will replace plaintiff's future medical expenses. Further, it cannot be determined whether Oxford will assert a lien affecting plaintiff's award for future medical expenses. Therefore, a hearing is required to determine whether plaintiff's future medical expenses will be reimbursed by Oxford (*see Brewster v Prince Apartments, Inc.*, 264 AD2d 611, 695 NYS2d 315 [1st Dept 1999] [where plaintiff's health insurance plan was modified to cover 30 visits a year for psychiatric treatment with a $10 co-payment, a hearing is required to determine the amount of the collateral source set-off for past and future psychiatric expenses]). Therefore, the branch of defendants' motion for a collateral source hearing is granted as to future medical expenses.

Future Pain and Suffering

To set aside the jury's verdict as excessive or inadequate, the court must conclude that the jury's award materially deviates from reasonable compensation, by looking to awards in analogous actions that have been approved on appellate review and determining that the current award departs substantially from those benchmarks (*Medina v Chile Communications, Inc.*, 15 Misc 3d 525, 832 NYS2d 750 [Sup Ct Bronx County 2006] *citing* CPLR § 5501(c); *Donlon v City of New York*, 284 AD2d 13, 14-15, 18, 727 NYS2d 94 [1st Dept 2001]). CPLR 4404(a) provides that "the court may set aside a verdict. . .and. . . may order a new trial. . .where the verdict is contrary to the weight of the evidence, [or] in the interest of justice." However, "In reviewing a money judgment. . .in which it is contended that the award is excessive or inadequate

and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501(c) ;*see e.g. Watanabe v Sherpa*, 44 AD3d 519, 844 NYS2d 27 [1st Dept 2007]).

The cases cited by plaintiff do not support of an upward modification of the award for future pain and suffering and involve either more serious injuries or fail to indicate the number of years for which the award was to cover (*see e.g., Singh v Catamount Dev. Corp.*, 21 AD3d 824 [1st Dept 2005] [finding that award of *$0* for future pain and suffering, deviated materially from what was reasonable compensation, where unrebutted testimony established that 14-year plaintiff needed future surgery, and would suffer partial permanent disabilities to shoulder *and* left leg/hip area]); *Elescano v Eighth-19th Co., LLC*, 17 AD3d 250 [1st Dept 2005] [holding that award for future pain and suffering for 37 years deviated materially from what was reasonable compensation where 37 year-old plaintiff required more than 150 physical therapy visits during a one-year period, additional surgery, and permanent and worsening chronic pain]; *Elias v Linder*, 4 AD3d 136 [1st Dept 2004] [future pain and suffering award deviated materially from what was reasonable compensation where the award was to cover 36 years, plaintiff's remaining life expectancy, and *two* future surgeries]). Here, although the expert testimony established that plaintiff would suffer from permanent arthritis, plaintiff's future pain and suffering award covered a period of four years, requiring surgery only to her shoulder and 12 visits for physical therapy during a three-four month period (*cf. Lamb v Babies 'R' Us. Inc.*, 302 AD2d 368 [2d Dept 2003] [74-year-old plaintiff sustained two fractures, suffered from limitation of motion and residual effects from the injury for the rest of her life]). In light of conflicting opinions of the

experts, and nature of plaintiff's injuries, it cannot be said that the jury's award of future pain and suffering deviated materially from what would be reasonable compensation

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff motion pursuant to CPLR Rule 4404(a) to modify the jury's verdict to reflect the stipulated amount of $2,672.84 for past medical expenses is granted, and the Clerk may enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR Rule 4404(a) to modify the jury's verdict for future pain and suffering by increasing same in an amount to be determined by this Court as reasonable compensation, or n the alternative, for a new trial on the issue of future pain and suffering only, is denied; and it is further

ORDERED that the branch of defendants' cross-motion pursuant to CPLR § 4545 to reduce plaintiff's award for past medical expenses is denied; and it is further

ORDERED that the branch of defendants' cross-motion pursuant to CPLR § 4545 to reduce plaintiff's award for future medical expenses is denied, at this juncture; and it is

ORDERED that the branch of defendants' cross-motion for an order setting this matter down for a collateral source hearing to determine what medical expenses have been and will be reimbursed by collateral sources is granted solely as to plaintiff's award for future medical expenses; and it is further

ORDERED the parties shall appear in Part 35 for a collateral source hearing on July 8,

2009, 10:00 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 28, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

MAY 28 2009

COUNTY CLERK'S OFFICE
NEW YORK