Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

MICHAEL NUTLEY,
Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

Index No. 11230/06

Motion Date May 12, 2009

Motion Cal. No. 26

Motion Sequence No. 3

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant New York City Transit Authority moves for an Order pursuant to CPLR 4404(a), setting aside a jury damages verdict rendered on December 1, 2008 in favor of plaintiff and, ordering a new trial in the interest of justice on the grounds: (a) the award of damages for past pain and suffering in the amount of three hundred thousand ($300,000.00) dollars to plaintiff is excessive and not supported by the evidence adduced at trial; and (b) the award of damages for future pain and suffering in the amount of two hundred thousand ($200,000.00) dollars over thirty-eight (38) years is excessive and not supported by the evidence adduced at trial. Defendant's motion is denied for the following reasons:

I. PROCEDURAL HISTORY

Plaintiff commenced this action seeking to recover money damages for personal injuries that plaintiff sustained on October 8, 2005 when while performing duties related to his employment as a New York City Police Officer he slipped and fell on a stairway injuring his dominant right hand and wrist. This Court presided over a bifurcated jury trial. On November 20,

2008, the jury rendered a liability verdict finding plaintiff 10% at fault and defendant 90% at fault. Thereafter, a damages trial followed. On December 1, 2008, the jury rendered a verdict in favor of plaintiff finding: a) for past pain and suffering in the amount of three hundred thousand ($300,000.00) dollars; and (b) the amount of two hundred thousand ($200,000.00) dollars over thirty-eight (38) years. By leave of the Court, defendant was granted an extension to file a post-trial motion pursuant to CPLR 4404(a).

II. DISCUSSION

The question of whether a jury verdict should be set aside as against the weight of the evidence pursuant to CPLR 4404(a) is essentially a discretionary and factual one (*Nicestro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]). Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (*see*, *Higbie Constr., Ltd. v. IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]). Defendant seeks to set aside the verdict as against the weight of the evidence pursuant to CPLR 4404. If a verdict for a plaintiff is based on a fair interpretation of the evidence, it should not be set aside as being against the weight of the evidence (*Brosnam v. Pratt*, 37 AD3d 388 [2d Dept 2006]). To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v. Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed with considerable caution, 'for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict"' (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v. Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v. Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, New York Practice § 406, at 687 [4th ed]).

DAMAGES. With respect to damages, "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation," (*see*, CPLR 5501[c]) and a trial court may set aside a jury's award of damages and grant a new trial if it materially deviates from what would be reasonable compensation (*Inya v. Ide Hyundai, Inc.*, 209 AD2d 1015 [4th Dept 1994]). However, the exercise of such discretion should be employed sparingly (*Shurgen v. Tedesco*, 179 AD2d 805 [2d Dept 1992]). "The amount of damages to be awarded to [a plaintiff] for personal injuries is a question for the jury, and its determination will not be disturbed unless the awards deviate materially from what would be reasonable compensation." (*Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 28 [2d Dept 208; *see*, *Vasquez v. Jacobwitz*, 284 AD2d 326 [2d Dept 2001] [holding that the amount of damages to be awarded for personal injuries is primarily a question for the jury, and great deference is given to its interpretation of the evidence and findings of fact, provided there is sufficient credible evidence to support the findings]).

"Although economic awards are quantifiable, awards for pain and suffering, or for loss of services and society, do not lend themselves as easily to computation'." (*Okraynetes v. Metropolitan Tr. Auth.*, 555 F Supp 2d 420, 435 [SDNY 2008]). "Prior awards are regarded as instructive, but not binding, by courts performing § 5501(c) review." (Id. 436 [citing, inter alia, *Senko v. Fonda*, 53 AD2d 638, 639 (2d Dept 1976]). Even where a jury damages verdict is in the upper range for comparable injuries, the inherently factual findings of damages for pain and suffering is generally left to a jury's common sense and judgment in light of its common knowledge and experience, and with due regard to the evidence at trial (*Apuuzzo v. Ferguson*, 20 AD3d 647 [3d Dept 2005]).

Here, the testimony of damages and injuries to plaintiff's right hand and wrist placed sufficient evidence before the jury of plaintiff's infirmities and it would be inappropriate to simply focus on prior decisions submitted by defendant dealing with purportedly comparable damages and injuries (*see*, *Gehrer v. Eisner*, 19 AD3d 851 [3d Dept 2005]; *Van Nostrand v. Froehlich*, 18 AD3d 539 (2d Dept 2005); *Cromas v. Kosher Plaza Supermarket, Inc.*, 300 AD2d 273 [2d Dept 200]2). Modification of damages cannot be based on case precedent alone because comparison of injuries is virtually impossible and it is the jury whose particular function is fixation of damages (*So v. Wing Tat Realty, Inc.*, 259 AD2d 373 [1st Dept 1999]).

STANDARD OF REVIEW. On a motion to set aside a jury's verdict as against the weight of the evidence, the standard is whether the evidence "so preponderated in favor of the other side that the verdict could not have been reached on any fair

interpretation of the evidence." (*Lolik v. Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]; *Voiclis v. International Association of Machinist and Aerospace Workers*, 239 AD2d 339 [2d Dept 1997]). A verdict would not be against the weight of the evidence "unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion." (*Sperduti v. Mezger*, 283 AD2d 1018 [4th Dept 2001]).

The awards here are not based on speculation, and there is ample proof in the record of the injuries sustained to plaintiff's dominant right hand and wrist (*O'Donnell v. Blanaru*, 33 AD3d 776 [2d Dept 2006]). Plaintiff's claim was adequately supported by witness testimony and exhibits. Plaintiff testified at great length as to his pain and discomfort emanating from his hand, as well as to surgical procedures to his hand and inability to perform some ordinary functions of daily life. This testimony was corroborated and supported by medical records and the expert medical testimony of Dr. Raz Winiarsky. Defendant elicited evidence in rebuttal. Defendant had ample opportunity to present its contradictory evidence to the jury including the expert medical testimony of Dr. Louis C. Rose.

This Court finds that a jury reviewing plaintiff's evidence, by a fair interpretation of the evidence could have reached its verdict that plaintiff suffered a permanent serious injury to his right dominant hand and wrist, and there were valid lines of necessary and permissible inferences that would have led a rational jury to have concluded that plaintiff should be awarded the amount of damages found in this case (*Kennedy v. New York City Health and Hosp. Corp.*, 300 AD2d 146 [1st Dept 2002]). The jury having considered the evidence of the parties, chose to accept plaintiff's view of the evidence. If a verdict for a plaintiff is based on a fair interpretation of the evidence, it should not be set aside as being against the weight of the evidence (*Brosnan v. Pratt*, 37 AD3d 388 [2d Dept 2007]). The jury's assessment of all the evidence, including the credibility of the witnesses, is reflected in the verdict which this Court determines should be not be disturbed.

III. CONCLUSION

Accordingly, defendant's motion for an Order pursuant to CPLR 4404(a) setting aside the jury verdict rendered on December 1, 2008 in favor of plaintiff is denied as the verdict was not contrary to the weight of the evidence.

The Court has considered the defendant's remaining arguments and finds them to be without merit.

The foregoing constitutes the decision and order of this Court.

Dated: August 4, 2009

.....
Howard G. Lane, J.S.C.