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

PRESENT: RAKOWER PART 5

Index Number : 111940/2007
BOUZAS, DOROTHY
VS
KOSHER DELUXE RESTAURANT
Sequence Number : 001
OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

...ing papers, numbered 1 to _____ were read on 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

FILED
AUG 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 8/24/09

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

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

BILL BOUZAS and DOROTHY BOUZAS,

Plaintiffs,

Index No.111940/07

Mot. Seq. No.: 001

- against -

Decision After Trial

KOSHER DELUXE RESTAURANT, MIDTOWN FOOD CORP.,

Defendant.

----------X

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

Plaintiff, Bill Bouzas, brought this action for personal injuries he sustained when he slipped and fell on a wet floor inside defendant's restaurant on February 1, 2007. Dorothy Bouzas brought a derivative action. The matter was tried before a jury before this Court from April 30, 2009 through May 7, 2009. A unanimous jury found that defendant was negligent and that defendant's negligence was a substantial factor in causing Bill Bouzas' injuries. Further, a unanimous jury found that Bill Bouzas was not negligent. The unanimous jury awarded Bill Bouzas damages for medical expenses and for pain and suffering, including loss of enjoyment of life. The unanimous jury did not award future damages. Finally, the unanimous jury awarded Dorothy Bouzas damages for the past loss of services of her husband.

Plaintiff, pursuant to CPLR §4404(a), brings this motion to set aside the jury's verdict as to past pain and suffering, as to their failure to award future damages, and as to the award to Dorothy Bouzas as being both against the weight of the evidence and the result of a compromise and as deviating materially from what would be reasonable compensation for the injuries suffered.

Plaintiff presented evidence at trial that he suffered an acute dislocation of the right (dominant) shoulder. He was taken by ambulance to the hospital, where, plaintiff was x-rayed, and then, through closed reduction, the shoulder was put back into place. Plaintiff described that "she has me down and she was trying to twist my arm, my shoulder back into place, but I was – I was crying out for help, and they

knocked me out, and the next thing, I woke up – it was about two hours later – and I was all tied in one place." The arm remained immobilized for some time after the accident and plaintiff began physical therapy. Plaintiff claimed to make little progress and, after seeking further medical attention, he had surgery on May 7, 2007. The surgery, among other things, repaired a torn rotator cuff. Prior to the surgery, and after the accident, plaintiff described that his shoulder "was aching and I had pains. I couldn't sleep at night well and all those things, but I couldn't lift my arm. That was my major thing."

Plaintiff alleged that, as a result of this accident, his injuries included a rotator cuff tear of the right shoulder, which required surgery, continued physical therapy, and left him with permanent limitation of motion and weakness of the dominant shoulder. Dr. Mark Klion, plaintiff's treating surgeon, testified for plaintiff. He testified that he saw Bill Bouzas for the first time on April 27, 2007. He reviewed plaintiff's x-rays, an MRI scan, and did a physical examination of plaintiff, finding limitation of motion. He performed arthroscopic surgery on May 7, 2007, when he testified that he found the following:

> Upon looking inside of his shoulder, there were two distinctive abnormalities. One is that he had some arthritic change, some wear and tear issues inside of the shoulder, and unfortunately, even with modern science and technology, we don't have great solutions for that. . . . So we do what's called a chondroplasty where we kind of clean things up a little bit, but the more significant injury with him was he had a rotator cuff tear. The tendons that hold the shoulder into place had torn, and in doing so, we decided that we would try and repair that. . . . because of the nature of the tear, we, instead of doing it all arthroscopically through very small little holes, we actually had to make an open incision, which is more of a complicated procedure, where we actually visualize the tendons with our fingers and eyes and much like seamstress, take sutures, put it into the rotator cuff and pull it down to the bone. ...

The doctor went on to explain the term "Acute on chronic massive right shoulder rotator cuff tear" as follows:

> Interestingly enough, what we are learning more so now than ever before, after the age of 40, due to wear and tear issues, individuals will start to develop rotator cuff tearing. It doesn't mean that you are painful.

> . . . there are individuals who have rotator cuff tears that don't ever know that they have it. They don't complain of anything, they don't describe any issues related to their shoulder, but it is an entity that is part of aging. . . . [Acute on chronic] implies that these individuals that have this kind of silent rotator cuff tear who are functioning normally who sustain an injury, it is almost as if it is the straw that breaks the camel's back.

Ultimately, he opined that plaintiff, 54 years old at the time of the surgery, had sustained an acute on chronic massive right shoulder rotator cuff tear, and that the fall on February 1, 2007 was a competent producing cause of that injury. He further confirmed that plaintiff suffered a dislocated shoulder as a result of the fall.

> This fall created a dislocation where he had a prior what we consider to be chronic – asymptomatic chronic rotator cuff tear that has now become, you know, something much more symptomatic. . . . if he never had that fall, there is no telling whether or not he would have ever had to have surgery on the shoulder.

The doctor found plaintiff's injuries were permanent, and projected that in the future he could require "physical therapy, medications, an injection, possible surgery."

On cross examination, Dr. Klion identified osteophytes (bony spurs which can be responsible for limitation of joint motion) on x-rays in evidence. Dr. Klion acknowledged degenerative changes, which preexisted the fall. However, he indicated that "some of it could have been caused by the shoulder dislocation itself. Impossible to quantify."

> Q: So he's got osteoarthritic disease, he's got bone spurs, he's got – I'm sorry – arthropathy and he's got – I think I said osteophyte – extensive degenerative changes. All of these things were there before this accident ever took place, right?
>
> A: I would say that a good portion of it was there, yes.

Ultimately, under cross examination, Dr. Klion opined:

> You know, this is a situation that is not uncommon, to have someone

> who presents to my office that has a chronic rotator cuff tear that is asymptomatic. I mean, that's documented in the literature. I see that very commonly. And this is a classic injury that is the straw that broke the camel's back. He was functioning, doing fine, and he had a rotator cuff tear. I mean, I don't think anybody could have conceivably denied that, but he obviously went from a situation in which he didn't have pain to a situation where he had pain and couldn't lift his arm. I mean, this is what's described in textbooks as an acute on chronic rotator cuff tear.

Specifically, plaintiff alleges that the jury's award of $0 for future pain and suffering was against the weight of the evidence, as the evidence demonstrated permanent injury as a result of the accident. Further, the award of $10,000 for past pain and suffering was woefully insufficient in light of the injuries plaintiff proved. Plaintiff urges that these awards are the result of compromise and deviate materially from what would be reasonable compensation, citing CPLR 5501(c).

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 . . .

CPLR §5501 (c) state, in relevant part:

> The appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Defendant presented evidence at trial challenging the extent of plaintiff's injuries. Doctor Jerry Lubliner, a board certified orthopedic surgeon, testified as an expert witness. After review of Dr. Klion's operative report, he concluded that there was no indication of anything acute.

> If you had an acute tear – you would be able to move it. And sometimes you have something called an acute on chronic tear where you had an old

> tear and then it got worse with an event. However, there is no evidence of this either, because if you did, the rotator cuff that was acute would be able to be moved, it would not be fibrotic, it would not be yellow, and, more importantly, it would not be adhering to bone. Being adherent to bone means it has been there for years.

Dr. Lubliner opined "that the incident of 2-01-07 did not -- is not related to the arthritis, the spur, and rotator cuff." He also stated that there is "no indication that he aggravated the condition because there was nothing in the operative report that was new."

Thus, Dr. Lubliner did not find a tear of the rotator cuff and permanent injury to have been caused or aggravated by the February 1, 2007 accident.

Maintaining this position, on cross examination, Dr. Lubliner discussed having a partial tear of the rotator cuff which became a full thickness tear with an acute injury.

> You would know in this case because if I had a 50, 60, or 70 percent tear and then it became 100 percent tear, it wouldn't have been so retracted, it wouldn't have been scarred in, and it wouldn't have been adherent to bone. There would be no yellowing and no fibrotic changes. There would be no fatty infiltration, so because all that appeared he did have a full thickness tear prior [to the accident].

Later, on cross examination, he explained that in reaching his conclusions , Dr. Lubliner considered, in addition to the report that Dr. Klion prepared, "the MRI report and the fact that he had arthropathy and the fact that he had upward migration of the humeral head, which can only be found in long-standing rotator cuff disease."

Plaintiff urges that a full thickness rotator cuff tear would not be asymptomatic, as plaintiff's tear was before this accident. Thus, Dr. Lubliner's testimony that the dislocation of the shoulder did not cause a partial tear to become a full thickness tear is against the weight of the evidence. Plaintiff maintains that the dislocation is uncontested and the tear, which resulted from the dislocation is a permanent injury. Thus, the jury's failure to award future damages is also against the weight of the evidence.

Defendant argues that the jury did not accept Bill Bouzas' testimony that he did not have shoulder pain prior to this accident. Defendant maintains that the jury accepted Dr. Lubliner's testimony, that the rotator cuff tear was complete and that the tear preexisted this accident, and that all injuries flowing from the rotator cuff tear were not compensated. Defendant concludes that the award was wholly consistent with a finding that the only injury which was attributable to this accident was the dislocation of the shoulder. That injury was limited and not permanent.

Defendant points to the medical records and the testimony of Dr. Lubliner which show that the dislocated shoulder was put back into place, or reduced. Dr. Lubliner opined, as noted above, that the remainder of the injuries plaintiff complains of were present prior to this accident. Further, defendant points to notes of Dr. Klion, which tend to negate the extent of the suffering plaintiff endured. Notably, defendant turns to the September 6, 2007 visit with Dr. Klion, where the doctor notes minimal discomfort, almost full range of motion and no pain at night. Thus, defendant concludes that, even if the jury considered the rotator cuff injury compensable, there is a view of the evidence that the surgery resolved the issue and there was no permanent injury.

Defendant correctly points out that the jury could have accepted the testimony of Dr. Lubliner and found the plaintiff's testimony regarding pain in his shoulder and range of motion of that shoulder prior to the accident to have been incredible. The jury is free to accept or reject any part of the testimony of an interested witness, even though it is not otherwise controverted. There was no medical evidence presented to the jury regarding the condition of plaintiff's shoulder prior to the accident. There was only evidence of a visit to Bill Bouzas' family doctor before the accident which did not include any complaints regarding the shoulder. Assuming, as defendant does, that the jury rejected plaintiff's testimony that he had no symptoms in the shoulder prior to the accident, and assuming the jury accepted Dr. Lubliner's conclusion that a full thickness tear of the rotator cuff preceded the accident, the verdict does not appear to be against the weight of the evidence.

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]).

Here, issues of liability were contested, but the jury had the opportunity to compromise on those issues, to find plaintiff was also at fault, and to apportion the fault between plaintiff and defendant. The jury unanimously found that plaintiff was not negligent and there was no such apportionment. Thus, it does not appear that the seemingly low award for plaintiff's injuries was the result of some compromise. Therefore, the Court denies a new trial on all issues.

Additionally, assuming the jury did reject the testimony of Bill Bouzas to the extent that he claimed he had no pain or limitation of motion in his right shoulder prior to the accident, their award of $10,000 for pain and suffering for the dislocated shoulder alone is not against the weight of the evidence. Rather, it is consistent with an acute injury, which was reduced in the emergency room, and which required immobilization and physical therapy, but produced minimal pain post reduction.

However, the award may deviate materially from what would be reasonable compensation for the injuries found to have been suffered as a result of the accident. The Court has searched verdicts for the limited injury of a dislocated primary shoulder and found awards of not less than $80,000 for pain and suffering. All parties refused to stipulate to replacing the $10,000 award with an award fo $80,000. This Court is not empowered to adjust the verdict, and the matter is best addressed by the Appellate Division pursuant to CPLR §5501(c).

Wherefore it is hereby

ORDERED that plaintiff's motion is denied.

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

DATED: August 24, 2009

EILEEN A. RAKOWER, J.S.C.