

Smith v Cattani

2010 NY Slip Op 32138(U)

August 4, 2010

Supreme Court, Richmond County

Docket Number: 13678/03

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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BARBARA SMITH,

Plaintiff,

-against-

ROBERT V. CATTANI, M.D.,

Defendant.

Trial Part 9
Present:
Hon. Anthony I. Giacobbe

Decision and Order
Index No. 13678/03

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The following papers, numbered 1 to 3, were submitted on this motion this 19th day of February, 2010:

Notice of Motion with supporting papers (dated December 10, 2009)	1
Affirmation in Opposition with supporting papers (dated January 15, 2010)	2
Reply Affirmation (dated February 11, 2010)	3

Upon the foregoing papers and due deliberation thereon, plaintiff’s motion to set aside the jury’s verdict on damages is denied.

This is an action to recover compensatory damages for injuries allegedly incurred by plaintiff as the result of defendant’s negligence and malpractice in failing to provide adequate medical care in relation to his performance of breast augmentation surgery upon plaintiff. The case was tried before a jury, which returned a verdict in plaintiff’s favor on November 5, 2009.

At trial, plaintiff presented evidence that defendant’s use of a cautery device during

surgery caused a burn on plaintiff's skin over her left breast area, which resulted in a permanent scar. Plaintiff asserted that defendant's two post-surgery attempts to mitigate the scar were not successful.

The jury subsequently returned a verdict in the amount of \$15,000.00 for past pain and suffering and \$10,000.00 for future pain and suffering. *See*, Plaintiff's Affirmation in Support dated December 10, 2009, ¶4; Defendant's Affirmation in Opposition dated January 15, 2010, ¶4. Plaintiff now moves "for an Order, pursuant to CPLR 4404(a), finding that the jury's damages award materially deviates from what is reasonable compensation for plaintiff's injuries and to set aside the verdict on the issue of damages to the extent of granting a new trial on the issue of damages unless defendant stipulates to increase the damages award and for such other and further relief as to this Court seems just and proper."¹

The amount of damages to be awarded for personal injuries is primarily a question for the jury, although a trial court has "the power, on motion of the parties or on its own motion, to review the question of whether the jury's verdict on the issue of damages was against the weight of the evidence ... and to set it aside if it found that the verdict deviated materially from what would be reasonable compensation" *Ashton v. Bobruitsky*, 214 AD2d 630, 631 (2nd Dept.

¹ The Court notes that plaintiff has failed to submit relevant portions of the trial transcript in support of her motion. Plaintiff has also failed to attach a true copy of the verdict sheet considered by the jury, which was marked as a Court Exhibit at trial. While not fatal to the instant application, these omissions have made a meaningful review of issues raised therein inordinately time consuming and difficult. However, as both parties apparently have a copy of the trial transcript and equal access to the Supreme Court file in this matter, it cannot be said that defendant has not had a fair opportunity to respond to plaintiff's contentions. *See, generally*, CPLR Rule 2214; 22 NYCRR §202.8.

1995). However, a trial court lacks the power to simply substitute its own determination for the jury's as to what an appropriate award should be in a particular case, and proper procedure would require a court to grant a new trial on the issue of damages, absent an agreement between the parties as to a modification of the amount awarded. *Ashton v. Bobruitsky*, *supra* at 631-632.

Upon the instant application and grounded in the evidence adduced at trial, plaintiff details her pain and suffering, but does not set forth the dimensions of her scar, simply describing it as one that “can be seen and is of sufficient size as to be considered disfiguring” and attaching a photograph of the scar taken approximately July 2005 (Plaintiff's Ex. 8 in evidence), which she had testified depicted its appearance as of the time of trial. Defendant asserts that the scar measures 1.1cm x 0.9cm, while plaintiff had testified that her scar is perhaps “[a]n inch maybe,” although she was not certain. *See*, Plaintiff's Affirmation in Support dated December 10, 2009, ¶5, Ex. A; Defendant's Affirmation in Opposition dated January 15, 2010, ¶3, Ex. A at pp. 251-258.

Here, upon a review of the record herein and of reported cases involving awards for similar, though not exact, types of injuries², including those cases cited by the parties -- bearing

² *See, e.g., Dehaarte v. Ramenovsky*, 67 AD3d 724 (2nd Dept. 2009), *mod'g and aff'g* 20 Misc3d 1124(A) (Sup. Ct. Kings Co. 2008); *Fleming v. NYCHA*, 262 AD2d 525 (2nd Dept.), *lv dismissed*, 94 NY2d 781 (1999); *LeBron v. Brentwood UFSD*, 212 AD2d 512 (2nd Dept. 1995); *Artis v. City of New York*, 183 AD2d 685 (2nd Dept. 1992); *Shurgan v. Tedesco*, 179 AD2d 805 (2nd Dept. 1992); *Giglio v. Pignataro*, 54 AD2d 556 (2nd Dept. 1976); *Abdulai v. Roy*, 232 AD2d 229 (1st Dept. 1996); *Ditingo v. Dreyfuss*, 27 AD3d 1024 (3rd Dept. 2006); *Sutch v. Yarinsky*, 292 AD2d 715 (3rd Dept. 2002); *Hornicek v. Yonchik*, 284 AD2d 895 (3rd Dept. 2001); *Olsen v. City of Schenectady*, 214 AD2d 869 (3rd Dept. 1995); *Wagner v. Kenific*, 161 AD2d 1092 (3rd Dept. 1990); *Ferrari v. Schwartz*, 41 AD2d 783 (3rd Dept. 1973); *Paolini v. Sienkiewicz*, 278 AD2d 858 (4th Dept. 2000), *rearg denied*, __ AD2d __, 724 NYS2d 144 (4th Dept. 2001).

in mind that “while review of verdicts in other cases is useful in determining what constitutes reasonable compensation, each case must be evaluated on its own facts [as a] ‘[m]odification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible’” (*see, Weigl v. Quincy Specialties Co.*, 190 Misc2d 1, 4-5 [Sup. Ct. New York Co. 2001], citing *So v. Wing Tat Realty, Inc.* 259 AD2d 373, 374 [1st Dept. 1999]; *see also, Senko v. Fonda*, 53 AD2d 638 (2nd Dept. 1976); *Reed v. City of New York*, 304 AD2d 1 (1st Dept.), *lv denied*, 100 NY2d 503 (2003); *Kahl v. MHZ Operating Corp.*, 270 AD2d 623 [3rd Dept. 2000]) -- it is the opinion of this Court that, under the unique facts and circumstances of this case, the jury’s damages award is not against the weight of the evidence and does not deviate materially from what would be reasonable compensation. The nature, extent, severity and permanency of the injuries sustained by plaintiff due to defendant’s negligence, as reflected in the findings of the jury, warrant compensation commensurate with those injuries, and leads this Court to conclude that the jury returned a justifiable award. Therefore, the damages verdict for past and future pain and suffering will not be disturbed.³

In the Court’s view, plaintiff’s further argument, *i.e.*, that she was “punished” by the jury in connection with her absence during portions of the trial proceedings, is sheer conjecture, and affords no basis upon which to set the verdict aside as being against the weight of the credible

³ It is apparent that the jury’s award for future pain and suffering recognizes the scar’s permanence, *i.e.*, that it will remain for the period of plaintiff’s life expectancy as determined by the jury, which was an issue covered as part of the Court’s final jury instructions. Plaintiff’s attempt to illustrate the purported inadequacy of the amount awarded for this item of damages, by breaking down the total into a yearly sum, does not demonstrate that the jury’s award is not founded upon record evidence or materially deviates from reasonable compensation.

evidence, nor to grant a new trial in the interests of justice (*see e.g., Gomez v. Park Donuts, Inc.*, 249 AD2d 266 [2nd Dept. 1998]). *See*, Plaintiff's Affirmation in Support dated December 10, 2009, ¶14; Reply Affirmation dated February 11, 2010, ¶17. Notably, upon plaintiff's direct examination, her own attorney elicited testimony to explain the reason plaintiff would potentially not be present for part of the trial. *See*, Defendant's Affirmation in Opposition dated January 15, 2010, Ex. A at p. 237.

Thus, with respect to plaintiff's claim that the amount of damages awarded by the jury is inadequate, it is the opinion of this Court that such award does not deviate materially from what would be considered reasonable compensation.

Accordingly, it is

ORDERED that motion is denied; and it is further

ORDERED that the jury's verdict on damages shall not be disturbed.

ENTER

Dated: August 4, 2010

J.S.C.