

Cohen v Metropolitan Tr. Auth.
2010 NY Slip Op 32192(U)
August 12, 2010
Supreme Court, New York County
Docket Number: 117896/06
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 117896/2006

COHEN, JUDITH

VS.

METROPOLITAN TRANSIT AUTHORITY

SEQUENCE NUMBER : 002

AMEND

CAL #27

INDEX NO. 117896/06

MOTION DATE 7/20/10

MOTION SEQ. NO. 002

MOTION CAL. NO. 27

this motion to/for set aside verdict

PAPERS NUMBERED

1, 2

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/12/10
AUG 12 2010

[Signature]
BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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
JUDITH COHEN AND JOSEPH COHEN,

Index No. 117896/06

Plaintiffs,

Argued: 7/20/10
Mot. Seq. No. 002
Cal. No. 27

-against-

METROPOLITAN TRANSIT AUTHORITY and
THE LONG ISLAND RAIL ROAD,

Defendants.

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA JAFFE, JSC:

For plaintiffs:
Leonard Chipkin, Esq.
Sackstein, Sackstein & Lee, LLP
1140 Franklin Avenue Suite 210
Garden City, NY 11530
516-248-2234

For defendants:
Karla R. Alston, Esq.
Catherine A. Rinaldi, Esq.
Law Department - 1143
Jamaica Station Building
718-558-7760

By notice of motion dated March 10, 2010, defendants move pursuant to CPLR 4404 for an order setting aside the damages portion of a jury verdict rendered in plaintiff Joseph Cohen's favor and directing a new trial on the issue of damages on the ground that the jury's award on his loss of services claim is excessive and against the weight of the evidence. By notice of cross-motion dated May 12, 2010, plaintiff Judith Cohen moves pursuant to CPLR 4404 for an order setting aside the damages portion of a verdict rendered in her favor and directing a new trial on the issue of damages on the ground that the jury's award for past and future pain and suffering is inadequate and against the weight of the evidence.

I. EVIDENCE AT TRIAL

On March 12, 2006, plaintiff Judith Cohen stepped in a gap between a train and train

platform at a Long Island Railroad station, and suffered a painful comminuted fracture of her left femur and a fractured right shoulder. She was operated on the following day to repair the femur and to revise a prior knee replacement, and remained hospitalized for nine days. Judith recovered gradually after a six-week period of confinement in her bedroom, an additional several months of periodic doctor visits, physical therapy, and the successive use of a long brace and walker, cane, and shorter brace.

Although retired at the time of the accident, Judith Cohen had continued to teach part-time at Dowling College and, as a result of the accident, could not return to school until the fall of 2006. During her recovery period, her husband Joseph, who also taught at Dowling, took on her two courses in addition to his own two courses, managed the household chores, and assisted with her home care. In December 2006, Judith underwent a second knee revision and remained in the hospital for five days, followed by another period of recuperation including physical therapy. As a result of her injuries, plaintiffs' lifestyle, which had been unusually active, was significantly reduced.

On February 23, 2010, a jury rendered a verdict for Judith in the amount of \$200,000 for past pain and suffering, and \$100,000 for future pain and suffering, based on her life expectancy of 14 years, and for Joseph in the amount of \$150,000 for loss of services and companionship.

II. CONTENTIONS

Defendants claim that the award to Joseph deviates materially from what is reasonable compensation, relying on *Zavurov v City of New York*, 241 AD2d 491 (2d Dept 1997), *Durso v City of New York*, 96 AD2d 458 (1st Dept 1983), and *Hoerner v Chrysler Financial Co., LLC*, 21 AD3d 1254 (4th Dept 2005). (Affirmation of Karla R. Alston, Esq., dated Mar. 10, 2010).

Plaintiffs disagree, relying on *Parris v Shared Equities Co.*, 281 AD2d 174 (1st Dept 2001) (Affirmation of Leonard B. Chipkin, Esq., dated May 12, 2010 [Chipkin Aff.]), which defendants distinguish, additionally citing *Grant v City of New York*, 4 AD3d 158 (1st Dept 2004). (Reply Affirmation in Opposition of Karla R. Alston, Esq., dated June 16, 2010 [Alston Reply Aff.]).

Plaintiffs claim that the awards to Judith deviate materially from what is reasonable compensation, relying on *Carl v Daniels*, 268 AD2d 395 (1st Dept 2000). (Chipkin Aff.). Defendants disagree, arguing that the evidence provided a rational basis for the awards. (Alston Reply Aff.).

III. ANALYSIS

Pursuant to section 4404(a) of the CPLR:

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 . . . order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . .

The assessment of damages is a function of the jury. (Siegel, NY Prac § 407 [4th ed]).

The standard against which an allegedly inadequate verdict is measured is whether the sum awarded “deviates materially from what would be reasonable compensation.” (*Id.*; see CPLR 5501[c]). “To determine whether an award ‘deviates materially from what would be reasonable compensation,’ New York state courts look to awards approved in similar cases.” (*Gasperini v Center for Humanities*, 518 US 415, 425 [1996]).

As plaintiffs do not cite a sufficiently analogous case warranting a new trial on damages and given Judith’s satisfactory recovery and prior knee surgery, I find that plaintiffs have failed to establish that substantial justice was not done or that the awards deviate materially from what

would be reasonable compensation. That a reasonable juror may have awarded more does not establish that the awards deviate materially from reasonable compensation. The same holds true for Joseph's derivative claim.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion and cross-motion are denied.

This constitutes the decision and order in this matter.

ENTER:



Barbara Jaffe JSC
BARBARA JAFFE
J.S.C.

DATED: August 12, 2010
New York, New York
AUG 12 2010

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE