

Person v Keybar, GHD, Inc .

2011 NY Slip Op 30119(U)

January 19, 2011

Sup Ct, NY County

Docket Number: 116386/07

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: _____
Justice

PART 55

Index Number : 116386/2007

PERSON, KAREN

VS.

KEYBAR

SEQUENCE NUMBER : 002

OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

Its ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in*
attached memorandum decision.
Plaintiff is entitled to judgment on
the jury's verdict.

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

FILED

JAN 20 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/19/11

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
KAREN PERSON,

Index No. 116386/07

Plaintiff,

DECISION and ORDER

-against-

KEYBAR, GHD, INC. and ABC CO.
and ABC CO. (fictitious defendants
believed to have owned, leased,
controlled, supervised, maintained
and/or managed the subject premises),

FILED

JAN 20 2011

Defendants.

-----X

NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Defendant GHD, Inc., trading as Keybar, moves for judgment notwithstanding the verdict, or in the alternative, for a new trial (CPLR 4404).

Plaintiff Karen Person (Person) suffered personal injuries when she tripped and fell over a small ottoman or stool in the East Village night club operated by Keybar. Briefly stated, Person, a 27 year old woman, was dancing with friends in a dark night club. She claimed that she fell over a low stool that was difficult to see in low light. She fractured her left humerus, or upper arm, and underwent three surgeries to treat the fracture.

She brought this negligence lawsuit against Keybar, and after discovery was complete, Keybar moved for summary judgment to dismiss the complaint. The motion was denied as follows:

First, there is a factual issue as to how the accident occurred. Second, if the accident occurred as the

plaintiff alleges, there is a triable issue of fact as to whether, given the number of persons present and the alleged dark lighting, the ottoman posed a tripping hazard and whether the defendants created this hazard or knew or should have known about it.

(Order, dated August 5, 2009, annexed to Aff. In Opposition Of Charles J. Gaynor, Esq., Ex. A).

The action went to trial, where Person prevailed.

Witnesses testified regarding the conditions in the bar and the events on the night of the accident. Person gave testimony describing her pain and suffering and treatment she received, that she continued to feel pain and numbness at times, and the jury heard expert testimony regarding her condition from a non-treating physician, Robert Gluck, M.D. Dr. Gluck testified that Person had lost some grip strength, suffered some arthritis as a result of her injury, and that she had complaints of numbness and tingling. He described her progress as having reached a "plateau", meaning that it was not improving.

The jury found that Keybar was 66% at fault for the accident, and awarded Person \$325,000 for past pain and suffering, \$450,000 for future pain and suffering, \$5,000 for medical bills and \$2,500 for lost earnings.

Keybar contends that the facts adduced at trial should have resulted in a defense verdict because no reasonable jury could have found in Person's favor as to liability. The testimony of Keybar's principal, Kristof Szabo, was offered by a video deposition. He testified that Person was dancing with

friends, that the bar occupied by only a few people, that she appeared to be drunk, and that she just fell backward while dancing, having nothing to do with any furniture. The jury heard from Person and an eyewitness, Christina Grady, that the bar was dark and crowded, and that Person tripped over a low stool. There also was testimony that the low stools were kept out of the way of Keybar staff because there was concern that they presented a tripping hazard to the staff.

In short, the jury credited the testimony presented by plaintiff, and it did not credit Keybar's witnesses when there was a fact issue.

Under CPLR 4404(a), the court may set aside a jury verdict where the verdict is contrary to the weight of the evidence, in the interest of justice, or where the jury cannot agree on a verdict. "It is axiomatic that the verdict should be set aside only if it cannot be sustained by any fair interpretation of the evidence" (*Martinez v Te*, 75 AD3d 1 [1st Dept 2010]). In arriving at this conclusion, the court must carefully balance the deference due to a jury determination with its obligation to ensure that the verdict is fair and supported by evidence (*1/5th, L.P. v HL One, LLC*, 23 AD3d 170, 171 [1st Dept 2005], citations omitted). The verdict in Person's favor as to liability is supported by plaintiff's evidence, even if many key facts were disputed. Resolving such factual disputes is a proper function for the jury. In arriving at this conclusion,

the court finds not only that the verdict is supported by evidence, but that it was fairly arrived at.

Moreover, Keybar's argument that plaintiff's claim should be dismissed as a matter of law, even if her testimony is believed, was considered and rejected by the court when Keybar's motion for summary judgment was denied. There is no reason to revisit that ~~our~~ prior determination here, and in any event, Person's verdict is supported by evidence (*supra*).

Finally, a jury's determination of the amount of past and future damages is accorded considerable deference (*Karney v Arnot-Ogden Mem. Hosp.*, [3rd Dept, 1998], *lv to appeal dismissed*, 92 NY2d 942 (1998)). A method of inquiry for reviewing damage awards used by the Appellate Division, First Department under CPLR 5501(c), requires the court to determine what awards have been previously approved on appellate review and decide whether the instant award falls within those boundaries (*Donlon v City of NY*, 284 AD2d 13 [1st Dept 2001][citations omitted]). In support of its motion, Keybar cites to several decisions where damage verdicts were reduced. The decision involving an injury not unlike Person's is *Jansen v Raimondo & Son Construction Corp.*, 293 AD2d 574 (2d Dept 2002). In *Jansen*, the plaintiff sustained a fractured left humerus and clavicle, dislocated shoulder and carpal tunnel syndrome, for which he underwent two surgeries and fourteen months of therapy, and a doctor opined that further treatment would be needed. The court reduced his jury award for

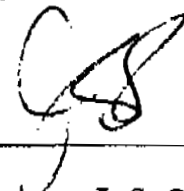
future pain and suffering from \$730,000 to \$400,000. The verdict was made in the Supreme Court, Suffolk County, in January 2001. Arguably, Jansen's injury was more severe than Person's, but the \$450,000 award for future pain and suffering is not out of the boundaries of reasonableness in comparison to the Jansen decision, especially when one considers that the Jansen verdict was made nine years earlier.

Keybar's other arguments have been considered and are unavailing. Accordingly, it hereby is

ORDERED that defendant Keybar's motion for judgment notwithstanding the verdict and for a new trial on the issues liability and damages is denied.

Dated: January 19, 2011

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

JAN 20 2011

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