

Ahmad v Alshorbagi

2011 NY Slip Op 32071(U)

July 22, 2011

Supreme Court, New York County

Docket Number: 115755/2008

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Justice

Index Number : 115755/2008
AHMAD, JISHAN
vs.
BIVOMI, ALSHORBAGI M.
SEQUENCE NUMBER : 004
OTHER RELIEFS

INDEX NO. _____

MOTION DATE 5/4/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-7
7-14
15

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and Order

FILED

JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/22/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

FILED**JUL 27 2011****SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**NEW YORK
COUNTY CLERK'S OFFICE-----X
JISHAN AHMAD,

Plaintiff,

Index No. 115755/08

-against-

Decision and OrderALSHORBAGI BIVOMI, M.
and JACAL HACKING CORP.Defendants.
-----X

JOAN B. LOBIS, J.S.C.:

Defendants Bivomi M. Alshorbagi and Jacal Hacking Corp. ("Jacal") bring this post-trial motion for an order, pursuant to "C.P.L.R. Rule 4401(a)"¹ and C.P.L.R. Rule 4404(a), setting aside the verdict on the grounds that plaintiff did not make a prima facie showing that he sustained a serious injury within the no-fault law; granting defendants a new trial on the grounds that prejudicial and extraneous testimonial evidence was permitted; vacating the jury's monetary awards on the grounds that they were excessive, unproven, and against the weight of the credible evidence; or directing a verdict in favor of defendants. Plaintiff opposes the motion. For the reasons stated below, the motion is denied.

While plaintiff was standing by a public telephone stand at LaGuardia Airport, he was struck and injured by a taxi driven by Mr. Alshorbagi and owned by Jacal. By decision and order dated April 7, 2010, the Honorable George Silver granted plaintiff summary judgment on the issue of liability. In February 2011, the case proceeded to a jury trial on damages before the undersigned. In addition to testifying on his own behalf, plaintiff called Police Officer Ryan of the Port Authority

¹ As addressed later in the decision, C.P.L.R. Rule 4401(a) does not exist.

Police Department, and Ali Guy, M.D., a doctor of physiatry. Defendants called two witnesses, Robert Tanlift, M.D., a radiologist, and Charles Bagley, M.D., a neurologist. The jury found that plaintiff had suffered a serious injury in that he sustained a medically determined injury or impairment of a non-permanent nature which prevented him from performing his usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the accident. The jury found that plaintiff sustained a permanent consequential limitation of use of a body organ or member. The jury also found that plaintiff sustained a significant limitation of use of a body function or system. They assessed damages for past pain and suffering at two hundred thousand dollars (\$200,000) and future pain and suffering at two hundred and twenty-five thousand dollars (\$225,000) over a thirty-five (35) year period. The jury awarded three hundred thousand dollars (\$300,000) for future medical expenses over a period of thirty-five (35) years and seventy-five thousand dollars (\$75,000) for future rehabilitative expenses over ten (10) years.

In this motion, defendants argue that Dr. Guy's testimony was insufficient to support the jury's award. They assert that Dr. Guy testified that, according to his findings, plaintiff's neck showed tenderness and spasm and his back had a 15% loss in range of motion two years after the accident. Defendants contend that Dr. Guy further testified that the range of motion in plaintiff's extremities and muscle power was normal and that magnetic resonance imaging ("MRI") studies showed a disc bulge at the level of L1-L2 and a midline herniation at C5-C6 with radiculopathy. Given these findings, defendants argue, a jury could not find that plaintiff had sustained a serious injury. Defendants also point out that Dr. Guy admitted during cross-examination that no treatises

exist that state that disc bulges are traumatically induced and that plaintiff's disc bulge could be age-related. Defendants assert that their radiologist, Dr. Tanlift, testified that all visible changes were unrelated to the accident and not attributable to acute or recent trauma. They criticize the jury's findings of future medical and rehabilitation expenses as speculative and unproven and argue that all of the awards materially deviate from reasonable compensation. Finally, they contend that Police Officer Ryan's testimony about his observations at the accident scene were irrelevant, highly prejudicial, and had no probative value.

In opposition, plaintiff argues that defendants' failure to attach the entire trial transcript to the motion is fatal to their motion, especially since defendants failed to submit key portions of their own experts' testimony. Plaintiff argues that the court must view the evidence most favorably to him and that portions of Dr. Bagley's testimony corroborate plaintiff's contentions regarding his injuries. Plaintiff further asserts that Dr. Guy's review of plaintiff's medical records, physical therapy records, and MRI studies, together with Dr. Guy's own findings from testing administered by him, support the awards for pain and suffering and for future expenses. Plaintiff asserts that the jury's verdict is supported by sufficient evidence and that the award is sustainable under case law. Plaintiff further argues that the court did not err in allowing the testimony of Police Officer Ryan and that his testimony was harmless.

In reply, defendants reiterate their positions. They maintain that Dr. Bagley's testimony did not support plaintiff's contentions. To the contrary, they assert, Dr. Bagley testified that there was no evidence of a permanent neurological disability.

Defendants seek relief under C.P.L.R. Rule 4404(a) and "Rule 4401(a)." The court notes that there is no such statute as C.P.L.R. Rule 4401(a). There is a C.P.L.R. § 4401-a, but that statute concerns medical and dental malpractice actions based on lack of informed consent. There is a C.P.L.R. Rule 4401, which allows a party to move for judgment as a matter of law, but a party must preserve the right to make such a motion by making it during trial at the end of the opposing party's case. There is nothing in the papers that indicates that defendants preserved their right to make a Rule 4401 motion.

Turning to that branch of the motion seeking relief under C.P.L.R. Rule 4404(a), to prevail on a motion to set aside the verdict, a party must establish that the verdict is against the weight of the evidence or that the party is otherwise entitled to judgment as a matter of law. On a Rule 4404(a) motion, the court cannot disturb the jury's assessment of the evidence, its credibility findings, nor its resolution of disputes between experts. See Manne v. Museum of Modern Art, 39 A.D.3d 368 (1st Dep't 2007). Defendants' failure to attach a full transcript of the trial inhibits the court from determining if the verdict must be set aside as a matter of law. Furthermore, even considering just the portions of the transcript annexed to the motion, defendants have not established that the jury verdict cannot be sustained. There is no bright-line rule regarding which medical tests must be presented to a jury before it can rationally determine that a plaintiff suffered a "serious injury." A plaintiff must instead show "objective proof of . . . injury." Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350 (2002). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member,


function or system.” Id. (Emphasis in original). Dr. Guy’s testimony was based on more than one examination of plaintiff and covered plaintiff’s medical records and MRI studies. He offered testimony on the nature and extent of plaintiff’s injuries and what further treatment would be required. In light of all the evidence in the record, Dr. Guy’s testimony was sufficient to support the jury’s findings and the court cannot disturb their rejection of defendants’ experts’ testimony. The arguments based on limited portions of Dr. Guy’s and defendants’ experts’ testimony do not establish that the jury verdict must be set aside.

As to the alleged prejudicial testimony of Police Officer Ryan, his testimony was limited to his role and observations in the aftermath of the accident. Such testimony “is probative and admissible as it describes the force of an impact or other incident that would help in determining the nature or extent of injuries and thus relate to the question of damages.” Homsey v. Castellana, 289 A.D.2d 201 (2d Dep’t 2001) (quotations and citations omitted).

The damages awarded by the jury do not deviate from reasonable compensation when compared with the range of sustained verdicts. The awards shall not be modified. Accordingly, it is hereby

ORDERED that defendants’ motion is denied.

Dated: July 22, 2011



JOAN B. LOBIS, J.S.C.

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