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

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Index Number : 112305/2006

METAYER, MAARIE J.

vs.

TRANSIT AUTHORITY

SEQUENCE NUMBER : 002

TRIAL DE NOVO

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
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 is decided in accordance with the annexed order.

FILED

AUG 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/23/11

HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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MARIE J. METAYER,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN and BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Defendants.

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DECISION AND ORDER

Index No. 112305/2006

HON. ANIL C. SINGH, J.:

This is a personal injury action. Defendants move pursuant to CPLR 4404 for an order: 1) setting aside the jury's verdict on liability or, in the alternative, granting a new trial on liability and damages; and 2) setting aside the jury award as to past and future damages as both contrary to the weight of the evidence and excessive. Plaintiff opposes the motion.

A jury trial was held before the undersigned on April 11, 12, 14, and 15, 2011.

Plaintiff Marie J. Metayer was the first witness. She testified under oath with the assistance of a Creole interpreter.

Ms. Metayer lives at 870 Saint Nicholas Avenue in Manhattan. She testified that on June 6, 2005, she left her apartment to go to church at 96th Street and

Amsterdam Avenue. She boarded an M3 bus without incident and took it to 125th Street and Saint Nicholas Avenue. She got off the M3 and walked across the street to transfer to an M101 bus. The door was open, and people were boarding the bus.

Ms. Metayer testified that she waited for a man in front of her to board the vehicle. Plaintiff then put her right foot on the step of the bus, put her left hand on a handrail and held her Metrocard in her right hand.

While her right foot was on the bus and her left foot was still on the ground, the bus started moving. Plaintiff stepped back a little bit, and the bus driver closed the door. Ms. Metayer lost her balance and fell back. She hit her head, and her right hand hit the curb.

Plaintiff was transported by ambulance to the emergency room at St. Luke's Hospital. An X-ray was taken, and her arm was bandaged. She was instructed to return to the hospital in one week.

Upon returning to the hospital, plaintiff went to the orthopedic department. Her right hand was X-rayed, and her right arm was put into a hard cast from the top of her wrist to her elbow. She wore the cast for one-and-a-half months.

When she returned to the hospital a month later, her fingers were swollen, and she was feeling a lot of pain.

When she returned to the hospital for her next appointment, she was still in

pain. The original cast was removed, and her arm was put into a new, shorter cast. She wore the new cast for a month-and-a-half.

She was in physical therapy for three months. Ms. Metayer testified that she went for therapy two or three times a week. Following the three months of therapy, she did exercises at home.

Plaintiff testified that she was working as a "room attendant" at the time of the accident. She described her job as working with senior citizens. She washed, cooked, went to the supermarket and "took general care" of the seniors. According to plaintiff, she missed six months of work as a result of her injury. She earned between $500 and $700 every two weeks.

Ms. Metayer stated that she still feels pain in her right hand, especially when it is cold or when she lifts anything heavy. She cannot work anymore, and the hand is "kind of paralyzed." When the weather is very cold, she "can't do almost anything" because she has to wrap her arm to keep it warm. She always has to put some bandage on the hand when it is cold, and she has to keep it warm to alleviate the pain.

Ms. Metayer testified that she went to see an orthopedist named Dr. Crone in January 2009.

On cross-examination, Ms. Metayer testified that she did not remember going

for any treatment in 2007 or 2008, but she had some therapy as late as January 2006.

On re-direct, Ms. Metayer testified that she was 66 years old when the accident happened.

A jury charge conference was held upon the conclusion of the trial. Plaintiff moved to strike any affirmative defense of culpable conduct on the part of the plaintiff. The Court denied the motion, ruling that the issue of comparative fault was for the jury.

Defense counsel argued that PJI 2:165, which is the duty to passengers by a common carried for sudden stops and jerks, should be included in the jury charge. Over the exception of defense counsel, the Court declined to charge the jury with PJI 2:165.

After its deliberations, the jury returned a verdict in favor of plaintiff on April 15, 2011, finding that defendants were 100% responsible for the accident. Plaintiff was awarded the sum of $100,000 to compensate her for past pain and suffering; the sum of $50,000 for future pain and suffering for fifteen years; and the sum of $2,764 for medical expenses.

Discussion

Defendants are moving to set aside the jury's verdict and award pursuant to CPLR 4404. The first branch of defendants' motion seeks to set aside the verdict on

liability or, in the alternative, a new trial on liability and damages. The second branch of the motion asks the Court to set aside the jury award as to past and future damages as both contrary to the weight of the evidence and excessive.

"A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" (Delva v. New York City Transit Authority, 85 A.D.3d 712, 712 [2d Dept., 2011]). In other words, "[a] verdict should be set aside as against the weight of the evidence only where it seems palpably wrong and it can be plainly seen that the preponderance is so great that the jury could not have reached their conclusion upon any fair interpretation of the evidence" (Bernstein v. Red Apple Supermarkets, 227 A.D.2d 264, 265 [1st Dept., 1996]).

"Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors" (Jean -Louis v. City of New York, 2011 WL 3198182 [2d Dept., 2011]).

"It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (Id.) (internal quotation marks and citations omitted). "The trial court may set aside the verdict as against the weight of the evidence if the

jury acted arbitrarily or capriciously" (105 N.Y. Jur.2d section 592). "But a new trial will not be granted where the facts are sufficient to sustain the verdict" (Id.).

In the present case, there is adequate evidence in the trial record to support plaintiff's allegation that she stepped back because the bus started moving and the door closed without warning just as she was about to board the vehicle.

A bus driver is under a duty to allow a reasonable amount of time for passengers to get on or off a vehicle (see, for example, Masterson v. Crosstown Street Railway Co. of Buffalo, 201 N.Y. 499 [1911]; Sheridan v. City of New York, 6 N.Y.2d 765 [1959]; McDonald v. Long Island R. Co., 116 N.Y. 546 [1889]). Here, the plaintiff testified that the bus was stopped; that the man in front of her had just boarded the vehicle; and that the bus started moving moments after she put her foot on the first step. "Accordingly, viewing the evidence in the light most favorable to the plaintiff, it simply cannot be said that the verdict against NYCTA was utterly irrational so as to warrant setting it aside and entering a judgment in favor of NYCTA" (Amachee v. Mohammed, 57 A.D.3d 812, 812-813 [2d Dept., 2008] (internal quotation marks and citations omitted)).

Defendant contends that the verdict should be set aside because the Court failed to charge the jury with PJI 2:165, which states:

Common Carrier – Duty to Passenger – Sudden Stop or Jerk

> A common carrier, such as (a railroad, subway, bus company, taxi cab company, etc.), owes a duty to use reasonable care for the safety of its passengers. However, because starting, slowing or stopping may not always be done smoothly, and occasionally there may be some jolting, a carrier is not liable for injuries to a passenger when that happens. A passenger must also use reasonable care for his or her own protection. But, in the absence of an emergency, the carrier must avoid sudden, unusual and violent jerks, lurches or stops. If you find that the movement or stop of the (bus, cab, subway, railroad) was unnecessarily sudden, unusual and violent, or, if necessary, it resulted from an emergency created or contributed to by the carrier's own conduct, then you will find that the carrier was negligent. If, however, you find that the stop or movement was not sudden, unusual or violent, or that, if it was, such stop or movement was made necessary because of an emergency and that such emergency was not created by or contributed to by the carrier, your finding will be that the carrier was not negligent.

The record reflects that there was absolutely no testimony whatsoever that a violent, jolting or jerking motion of the bus caused plaintiff to fall. Rather, plaintiff testified that she stepped back because the bus started moving and the doors began closing. She then lost her balance and fell. Accordingly, the Court found that the specific facts of this case were not amenable to PJI 2:165, as we explained on the record (Notice of Motion, exhibit A, pp. 61-63).

The second branch of defendants' motion seeks to set aside the jury award as to past and future damages as both contrary to the weight of the evidence and excessive.

"Generally, the amount of damages awarded for personal injury is primarily a question for the jury, the judgment of which is entitled to great deference based upon

its evaluation of the evidence, including conflicting expert testimony" (Ortiz v. 975 LLC, 74 A.D.3d 485, 486 [1st Dept., 2010]). "No precise rule can be formulated by which pain and suffering can be accurately measured and compensated for in money" (36 N.Y. Jur.2d Damages section 65).

A court should not set aside a jury's award for pain and suffering unless the award deviates materially from what would be considered reasonable compensation under the circumstances of the case (CPLR 5501[c]; Raniola v. Montefiore Medical Center, 85 A.D.3d 641, 641 [1st Dept., 2011]; Sanders v. New York City Transit Authority, 83 A.D.3d 811, 813 [2d Dept., 2011]; Conway v. New York City Transit Authority, 66 A.D.3d 948, 949 [2d Dept., 2009]; Lamb v. Babies 'R' Us, Inc., 302 A.D.2d 368, 369 [2d Dept., 2003]).

The Court's research has unearthed several cases offering some guidance where, as here, the plaintiff injured or fractured a wrist.

In Nutley v. New York City Transit Authority, 79 A.D.3d 711 [2d Dept., 2010], the plaintiff suffered an injury to his dominant hand and wrist which required surgery. Despite the surgery, the plaintiff continued to experience pain, numbness, tingling, loss of strength, and loss of motion in his wrist and hand. The jury verdict found that plaintiff sustained damages in the sums of $300,000 for past pain and suffering and $200,000 for future pain and suffering. The Court found that the jury's

award did not deviate materially from what would be reasonable compensation.

In Harris v. City of New York, 2 A.D.3d 782 [2d Dept., 2003], a police officer who injured his right wrist commenced a personal injury action against the city. The plaintiff injured the primary tendon in his wrist and the tendon was surgically reconstructed and stabilized. Although his orthopedic surgeon described the surgery as successful, the plaintiff continued to experience pain, weakness, numbness, and loss of motion in his wrist. The Court found that the jury's award for pain and suffering were excessive to the extent the award for past pain and suffering exceeded $200,000 and to the extent the award for future pain and suffering exceeded $350,000.

In Garcia v. Spira, 273 A.D.2d 57 [1st Dept., 2000], the injured plaintiff sustained a fracture of her nondominant wrist in a fall on a defective sidewalk. She was able to perform most of her usual pre-accident activities and felt pain only when the weather was bad. The Court found that the jury's award was excessive to the extent that the awards for past and future pain and suffering exceeded $130,000 and $160,000, respectively.

In Diouf v. New York City Transit Authority, 77 A.D.3d 600 [1st Dept., 2010], a 55-year-old tailor brought a personal injury action against the transit authority. Plaintiff fractured both wrists after falling on uneven stairs leading into a

subway station. The fracture to the left wrist was a comminuted intra-articular fracture of the distal radius and ulnar styloid, which required reduction surgery and a second surgical procedure to remove the metal hardware inserted into his wrist. After occupational therapy, the fractures healed, but he had reduced ranges of motion, tenderness and reduced grip strength, and traumatic arthritis causing pain in both wrists. The Court found that the jury's award of $800,000 for future pain and suffering did not deviate materially from what is reasonable compensation.

In the instant case, defendants contend that the jury's award of $100,000 for past pain and suffering and $50,000 for future pain and suffering over 15 years was excessive and deviates materially from reasonable compensation.

Defendants point out that plaintiff was seen in the emergency room where she was treated and released. They note that Eric Crone, M.D., treated plaintiff on only three occasions and merely confirmed the emergency room diagnosis of a fractured wrist. Julio Westerband, M.D., examined plaintiff on June 12, 2009, and found her to have a mild orthopedic disability and noted that she could continue to work with a restriction on carrying items over 15 pounds. Furthermore, no surgery was conducted or recommended by any provider.

Plaintiff exhibits two medical reports in opposition to the motion.

The first report was written by Dr. Crone (Affirmation in Opp., exhibit A,

p.1). He diagnosed a distal radius and ulna styloid fracture with persistent pain and limitation of function with associated weakness. According to the report, radiographs revealed evidence for a united distal radius fracture with impaction shortening. Dr. Crone noted, "Intercarpal swelling is present consistent with inflammation."

The second report was written by Dr. Westerband (Affirmation in Opp., exhibit B). His diagnosis was "post-right wrist fracture with post-traumatic destructive deformity." Dr. Westerband found that plaintiff had "mild orthopedic disability."

After careful consideration of the testimony, medical reports, and caselaw, we find that, under the circumstances of this case, the jury's award as to past and future damages is neither contrary to the weight of the evidence nor excessive.

For the above reasons, defendants' motion is denied.

The foregoing constitutes the decision and order of the court.

Date: August 23, 2011
New York, New York

Anil C. Singh