

Hamer v City of New York

2011 NY Slip Op 32554(U)

September 28, 2011

Supreme Court, New York County

Docket Number: 110618/2007

Judge: Lottie E. Wilkins

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

PRESENT:

PART 18

Index Number : 110618/2007

HAMER, LUISA

vs

CITY OF NEW YORK

Sequence Number : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

SEP 30 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

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

Post-trial motion by plaintiff to increase or set aside the jury's verdict is denied in accordance with attached decision and order.

Dated: September 28, 2011

Lottie E. Wilkins
Lottie E. Wilkins 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

-----X

LUISA HAMER,

Plaintiff,

- against -

THE CITY OF NEW YORK and THE NEW YORK
CITY DEPARTMENT OF EDUCATION a/k/a THE
NEW YORK CITY BOARD OF EDUCATION,

Defendant.

-----X

PART 18

Index No. 110618/07

DECISION and ORDER

Lottie E. Wilkins, J.:

Plaintiff moves pursuant to CPLR 4404 to set aside the jury's verdict on past and future damages on grounds that the awards are inadequate. Defendant opposes the motion arguing that the award of damages in this case was a question of fact which the jury properly determined.

This is a personal injury action arising from trip and fall that occurred on January 30, 2007 on or near the sidewalk of 168th Street some distance away from its intersection with St. Nicholas Avenue.¹ Plaintiff sustained a comminuted supra-condylar fracture of her left femur which required surgical reduction and internal fixation. Plaintiff was discharged with prescriptions for pain medication following

¹ In an order made on the record at trial, this Court held that defendant, New York City Department of Education a/k/a The New York City Board of Education, was legally responsible for maintenance of the sidewalk because of its status as an abutting property owner.

surgery. Plaintiff testified that she received physical therapy following her surgery and was required to use a walker for several months after the accident. Testimony at trial also revealed that plaintiff sustained a subsequent injury to the same leg several months after the accident at issue. The Court excluded both plaintiff's and her physician's testimony relating to the second injury and the effects thereof.

In its verdict, the jury awarded damages of \$40,000.00 for past pain and suffering and \$15,000.00 for future pain and suffering over one year.

In the moving papers, plaintiff asserts that the jury's pain and suffering awards amount to a material deviation from what would be reasonable compensation for these injuries. Plaintiff relies on a number of cases involving various leg and back injuries where both the past and future pain and suffering awards far exceed the amounts awarded by the jury in this case. Defendant counters that, in light of the particular circumstances present in this case and the different injuries involved in plaintiff's precedents, the verdict should stand.

The appropriate amount of damages to be awarded at trial lies squarely within the province of the jury. CPLR 4404(d) permits a court to set aside a verdict at trial and order a new trial where the verdict is contrary to the weight of the evidence or where a new trial would serve the interests of justice. The legal standard by which a claim of an inadequate jury award is measured is whether the award deviates

materially from what would be reasonable compensation (see, CPLR 5501[c]). The court undertakes the analysis for a material deviation from reasonable compensation by comparing past awards approved by appellate courts in similar cases (see, Watanabe v Sherpa, 44 AD3d 519 [1st Dept. 2007]).

Here, plaintiff has failed to present authority for the proposition that the jury's award for pain and suffering, both past and future, are a material deviation from the amount of reasonable compensation awarded in similar cases. Although plaintiff cites to a number of cases awarding higher damages than those awarded here, the injuries discussed in those cases are substantially different from the injury at issue here. Moreover, those cases do not appear to deal with the presence of a second, nearly identical, injury to the same part of the body subsequent to the original injury. Thus, from the authorities presented by plaintiff, there is no basis to disturb the jury's award for past and future pain and suffering.

From the testimony offered at trial, the jury could have reasonably concluded that plaintiff had recovered well from her injury prior to her second accident. Indeed, plaintiff's decision to forego some of her physical therapy appointments after the first accident could have led a reasonable juror to conclude that plaintiff had recovered from her injuries more quickly than her doctors had anticipated. Additionally, given the second injury to the same area of plaintiff's body, this Court

cannot say as a matter of law that the jury failed to adequately compensate plaintiff for the ongoing pain and suffering caused by her first accident.

Under the facts of this case, plaintiff has not presented persuasive authority to warrant increasing the jury's pain and suffering awards for the injuries at issue. For this reason, the jury's awards should stand. Accordingly, it is

ORDERED that plaintiff's motion is denied.

This constitutes the decision and order of the Court.

FILED

SEP 30 2011

Dated:

September 28, 2011

L. Wilkins
NEW YORK
COUNTY CLERK'S OFFICE
Lottie E. Wilkins, J.S.C.