

Moskowitz v Katz

2012 NY Slip Op 32106(U)

August 3, 2012

Sup Ct, NY County

Docket Number: 114529/08

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 114529/2008
MOSKOWITZ, MAURY
vs.
KATZ, RICHARD
SEQUENCE NUMBER : 002
TRIAL DE NOVO

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

FILED

AUG 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/12

CR _____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
MAURY MOSKOWITZ,

Plaintiff,

Index No. 114529/08

-against-

DECISION/ORDER

RICHARD KATZ, M.D. and EAST RIVER
MEDICAL IMAGING, P.C.,

FILED

Defendants.

AUG 09 2012

-----X
HON. CYNTHIA KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Maury Moskowitz commenced the instant medical malpractice action asserting that defendants departed from good and accepted medical practice in failing to diagnose a crack in an orthopedic plate used in the reconstruction of his femur, and that as a result, the plate failed, resulting in the need for resection of the distal femur, placement of a rod and total prosthetic knee replacement. A trial was held before this court and the jury rendered a verdict in favor of the plaintiff and against defendants. The jury awarded plaintiff \$375,000 for past pain and suffering and \$200,000 for future pain and suffering. Defendants Richard Katz, M.D. ("Dr Katz") and East River Medical Imaging, P.C. ("East River") (hereinafter "defendants") now move to set aside the jury's verdict as contrary to the weight of the evidence pursuant to CPLR §4404(a) and

(1) dismiss the claim for damages for future pain and suffering on the ground that plaintiff failed to establish proximate causation with respect to future damages, and granting a new trial as to damages for past pain and suffering unless plaintiff stipulates to a substantial reduction in the award for past pain and suffering, or in the alternative, (2) granting a new trial as to damages for both past and future pain and suffering unless plaintiff stipulates to substantial reductions in the awards for past and future pain and suffering. For the reasons set forth below, defendants' motion is denied.

The relevant facts are as follows. On February 7, 2007, plaintiff underwent surgery for removal of a low-grade malignant fibrous tumor from his right femur. In connection with that surgery, his treating orthopedic surgeon, Dr. Patrick Boland, used a piece of cadaver bone, known as an allograft, to reconstruct the portion of the femur that had been removed along with the tumor. It was hoped that by doing so, plaintiff could avoid the necessity of a prosthetic knee replacement. On January 16, 2008, x-rays of plaintiff's femur were taken at East River and were reviewed by Dr. Katz. When Dr. Katz reviewed the x-rays, he failed to diagnose a crack in the orthopedic plate used in the reconstruction of plaintiff's femur. Less than a week later, on January 22, 2008, plaintiff complained to Dr. Boland of severe pain and a deformity of his right thigh and it turned out that the plate broke in between the time the x-rays were taken on January 16, 2008 and plaintiff's visit with Dr. Boland on January 22, 2008. Dr. Boland then reviewed the x-rays which had been taken at East River and interpreted by Dr. Katz on January 16, 2008, as well as new x-rays of the area and it was clear to both Dr. Boland and plaintiff that there was a visible crack in the plate on January 16, 2008.

Section 4404(a) of the CPLR provides that "upon a motion of any party or on its own

initiative, a court may set aside a verdict . . . and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence, [or] in the interest of justice.” The standard for setting aside a verdict is very high. The Court of Appeals has held that a verdict may be set aside only when “there is simply no valid line of reasoning and permissible inferences” which could have led to the conclusion reached by the jury. *Cohen v Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978). The First Department held that a verdict “will not be set aside “unless the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence.” *Pavlou v City of New York*, 21 A.D.3d 74, 76 (1st Dept 2005). Moreover, the evidence must be construed in the light most favorable to the party that prevailed at trial. *See Motichka v Cody*, 279 A.D.2d 310 (1st Dept 2001). Where the case presents conflicting expert testimony, “[t]he weight to be accorded the conflicting testimony of experts is ‘a matter peculiarly within the province of the jury.’” *Torricelli v Pisacano*, 9 A.D.3d 291 (1st Dept 2004) (citation omitted); *see also Cholewinski v Wisnicki*, 21 A.D.3d 791 (1st Dept 2005).

Defendants’ motion to set aside the jury’s verdict as contrary to the weight of the evidence is denied as defendants have not established that the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence. Defendants’ primary argument is that there was no evidence upon which the jury could have reached its verdict based on the fact that Dr. Boland testified that he might have performed the same surgery on plaintiff even if Dr. Katz had properly read plaintiff’s x-rays, but he was not certain. However, there was evidence presented at trial to support the jury’s verdict that Dr. Katz’s failure to diagnose the crack in the plate proximately caused plaintiff’s injury. At

trial, plaintiff's expert Dr. Shervin Vatani Oskouei testified that in this case, Dr. Katz's failure to diagnose the crack in the plate led to damage to the plaintiff and that the displaced fracture necessitated a much more extensive operation than would otherwise have been necessary had the crack been diagnosed sooner. Further, Dr. Oskouei testified that because plaintiff had to have a prosthetic knee replacement, additional pain and discomfort will be experienced by plaintiff. Moreover, Dr. Jonathan Luchs, plaintiff's expert radiologist testified that although there are accepted "miss" rates in radiology, Dr. Katz's failure to see the crack in the x-rays taken on January 16, 2008 was not an acceptable miss. Dr. Boland's testimony that on January 16, 2008, there were less-invasive surgical options, such as simply replating or replacing the allograft, which became "less palatable" by January 22, 2008 due to the undiagnosed crack in the plate also supported such a finding. Thus, the jury's verdict was not against the weight of the evidence. The jury listened to the testimony of the experts and evaluated their credibility and, on that basis, resolved the conflict in favor of plaintiff. It was not unreasonable for the jury to do so as the testimony allowed the jury to find that defendants' departure from accepted standards of care caused plaintiff pain and discomfort for five days and the eventual detrimental outcome of prosthetic knee replacement surgery. Thus, defendants' motion to set aside the verdict is denied.

The next issue the court must address is whether the jury's award of \$375,000 for past pain and suffering and \$200,000 for future pain and suffering was excessive and if so, whether a new trial on the issue of damages should be ordered. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation." CPLR §5501(c). In order to determine whether the award was excessive, the court must compare the instant case with analogous cases with awards that have been previously upheld. *See Donlon v City of New*

York, 284 A.D.2d 13, 18 (1st Dept 2001). The First Department has specifically addressed the issue of what is an appropriate award in a case such as this in *Cruz v. Manhattan & Bronx Surface Transit Operating Auth.*, 259 A.D.2d 432 (1st Dept 1999). In *Cruz*, plaintiff's injuries required three arthroscopic knee surgeries with the possibility of a total knee replacement in the future. The jury awarded plaintiff \$375,000 in damages for past pain and suffering and \$1,875,000 for future pain and suffering. Defendants moved to set aside the verdict and the trial court granted the motion and reduced the award of damages to \$200,000 and \$400,000, respectively. On appeal, the Appellate Division reinstated the award of \$375,000 for past pain and suffering and set the award for future pain and suffering at \$650,000 based on plaintiff's surgical procedures and the possibility that he would need a total knee replacement.

Based on the foregoing, the court finds that the award of \$375,000 for past pain and suffering and \$200,000 for future pain and suffering in the instant case is not excessive in light of the severe pain and discomfort plaintiff experienced over the five-day period between January 16, 2008 and January 22, 2008 due to the plate breaking, the surgery for a total knee replacement and the pain plaintiff has had to and will have to endure in the future because of the surgery. Further, Dr. Boland testified at trial, four years after the surgery, that the plaintiff continued to have chronic pain in his knee. Moreover, Dr. Oskeoui testified that the surgery has greatly reduced plaintiff's quality of life and has led to a vastly diminished prognosis. Thus, this court finds that the amounts awarded by the jury for past and future pain and suffering are appropriate. That portion of defendants' motion which seeks a dismissal of the claim for damages for future pain and suffering on the ground that there is no proof upon which a reasonable jury could have concluded that plaintiff could have avoided the necessity for a prosthetic femur and a total knee

