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| <b>Kun Sik Kim v State St. Hospitality, LLC</b>                                                                                                                                                                                                                  |
| 2012 NY Slip Op 33731(U)                                                                                                                                                                                                                                         |
| June 14, 2012                                                                                                                                                                                                                                                    |
| Supreme Court, Queens County                                                                                                                                                                                                                                     |
| Docket Number: 21167/08                                                                                                                                                                                                                                          |
| Judge: Phyllis Orlikoff Flug                                                                                                                                                                                                                                     |
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## SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9  
Justice

KUN SIK KIM,

Index Number..21167/08

Plaintiff,

Sequence No... 8 & 10

-against-

STATE STREET HOSPITALITY, LLC,  
NYTEX DEVELOPMENT, INC., and  
MARTIN ENVIRONMENTAL SERVICES,  
INC.,

Defendant.

The defendants have moved to set aside the jury verdict of damages rendered on October 9, 2010. In support of its application, they set forth nine (9) grounds:

- 1) Misconduct of plaintiff's attorney so tainted the proceedings that it deprived defendants of a fair trial, warranting a new trial;
- 2) The jury's verdict on the issue of damages was not supported by the weight of credible evidence and deviated materially from reasonable compensation, warranting a new trial;
- 3) The improper admission of certain evidence was prejudicial, warranting a new trial;
- 4) The improper exclusion of certain evidence was prejudicial, warranting a new trial;
- 5) Errors in the court's charge to the jury was prejudicial to defendants, warranting a new trial;
- 6) The improper exclusion of special interrogatories to the jury regarding causation was prejudicial to defendants, warranting a new trial;
- 7) The improper inclusion of interrogatories to the jury regarding past and future medical expenses was

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- prejudicial to the defendants, warranting a new trial;
- 8) Misconduct of plaintiff so tainted the proceedings that it deprived defendants of a fair trial, warranting a new trial;
  - 9) The interests of justice require a new trial.

Grounds three (3) through nine (9) as well as ground one (1) are all issues that properly belong before the Appellate Division and will not be addressed by the Court other than to deny the application.

This is an action for personal injuries arising out of an incident on September 20, 2005 while plaintiff was performing hand demolition and fell from a step on a A-Frame Ladder.

Summary judgment dismissing the action against Dan's Demolition and Hauling, Inc., was granted by order dated September 20, 2010. Summary judgment dismissing the plaintiff's negligence and Labor Law 200 claims against State Street Hospitality, NYTEX and Martin was granted on September 20, 2010.

Summary judgment granting plaintiff's motion for summary judgment under Labor Law 240 against State Street was granted on September 20, 2010.

The Appellate Division affirmed all the lower Court decisions on April 3, 2012.

All defendants are represented by the same attorney who was trial counsel.

The jury found for the plaintiff and rendered a verdict in the following amounts:

Up to the date of verdict:

Pain & Suffering - \$500,000.00

Medical Expenses - \$83,214.52

Future:

Medical Expenses - \$345,000.00 - 14 years

Physical Therapy - \$294,000.00 - 14 years

Pain & Suffering - \$700,000.00 - 14 years

CPLR 4404 (a) provides in part:

After a trial of a cause of action ...  
by a jury, upon the motion of any party ...  
the court... may order a new trial of a  
cause of action or separable issue where the  
verdict is contrary to the weight of the  
evidence (or) in the interest of justice ...

Further, "...the trial 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" A court may  
set aside jury [\*\*\*4] verdict as unsupported  
by legally sufficient evidence only if  
there is "simply no valid line of reasoning  
and permissible inferences which could possibly  
lead rational [individuals] to the conclusion  
reached by the jury on the basis of the evidence  
presented at trial" (Cohen v Hallmark Cards, 45 NY2d  
493,m 499, 382 NE2d 1145, 410 NYS2d 282 [1978]).

In evaluating whether an assessment amount of damages is  
reasonable compensation, the court must take cognizance of the  
fact that conflicting evidence and expert opinion present issues  
of credibility for a jury to resolve. It is the jury's  
obligation to assess credibility and great deference must be  
given to a jury's interpretation of evidence that has sufficient  
support on the record, even if there is credible evidence to the  
contrary (Zapata v. Dagostino, 265 AD2d 324 [2d Dept. 1999];  
Birnbaum v. All-State Vehicle, Inc., 139 AD2d 553 [2d Dept.  
1988]).

"While the amount of damages to be awarded  
for personal injuries is primarily a  
question for the jury, it may be set aside  
if it deviates materially from what would  
be reasonable compensation (see CPLR 5501[c];  
Pitera v Winzer, 18 AD3d 457, 457-458,  
794 NYS2d 437 [2005]). Here, upon consideration  
of the nature and extent of the injuries sustained  
by the plaintiff, the jury awards for  
past and future pain and suffering  
deviate materially from what would be reasonable  
compensation to the extent indicted herein  
(see Pitera v Winzer, 18 AD3d at 457-458;  
Lifshits v Variety Poly Bags, 5 AD3d 566,  
773 NYS2d 304 [2004]; Lamuraglia v  
New York City Tr. Auth., 299 AD2d at [\*\*870] 325;

Komforti v New York City Tr. Auth., 292 AD2d 569,  
739 NYS2d 438 [2002])".

Further:

"At the end of the analysis, the court is still confronted by a difficult task in terms of comparing consistent jury beliefs with inconsistent court response to jury findings with similar injuries. The dynamic of a trial can result in considerable variation; geography of the jury pool is said to play a role also." (Harding v. Onibokun, 14M3 790).

"review of the adequacy of a damage award entails its comparison to awards in similar cases as well as consideration of various factors, including the life-threatening nature of the injuries, the length of hospitalization, surgeries required, complications experienced, medication needed to stabilize the patient and relieve pain, post confinement convalescence, rehabilitative efforts and the success of treatment" (Edwards v. Stamford Healthcare Socy., 267 AD2d 825, 827 [3d Dept 1999] [citations omitted]).

Notwithstanding that an award is supported by the evidence, the court is constrained to declare that under the circumstances of this case, the plaintiff's respective awards of damages for past pain and suffering, as well as the award for future medical expenses, physical therapy and pain and suffering deviated materially from what would be reasonable compensation to the extent indicated (see generally Clark v N-H Farms, Inc., 15 AD3d 605, 791 NYS2d 122 [2005]; Condor v City of New York, 292 AD2d 332, 738 NYS2d 587 [2002]; [\*\*\*3] Madrit v City of New York, 210 AD2d 459, 620 NYS2d 468 [1994]).

The motion to set aside the jury award therefore is granted to the extent that damages are reduced to:

|                         |              |
|-------------------------|--------------|
| Past Pain & Suffering   | \$250,000.00 |
| Future Pain & Suffering | \$ 75,000.00 |
| Future Physical Therapy | \$100,000.00 |
| Future Medical Expenses | \$250,000.00 |

Regarding plaintiff's new motion for leave to serve a supplemental Bill of Particulars, the jury determination regarding future pain and suffering as well as medical expenses clearly encompassed the surgery alleged in the motion papers. It is also noted that the operating report dated January 31, 2012 contains a diagnose of degenerate disc disease.

Accordingly, the plaintiff's motion is denied.

June 14, 2012

  
J.S.C.

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