

Espinal v Glosser

2012 NY Slip Op 33901(U)

March 13, 2012

Supreme Court, Bronx County

Docket Number: 302644/2007

Judge: Robert E. Torres

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 29

RAFAEL ESPINAL,

Plaintiff.

-against-

PAUL D. GLOSSER and TRANS AM TRUCKING, INC,

Defendants.

Index No. 302644/2007

Present:

HON. ROBERT E. TORRES

AMENDED ORDER

The motion by defendants Paul Glosser and Trans Am Trucking, Inc. Pursuant to CPLR §§§ 4401, 4404 and 5501 for an order dismissing the action against the defendants for failure to prove a prima facie case; finding the verdict was against the weight of the credible evidence and setting aside the award as excessive is decided by this Court pursuant to C.P.L.R. § 9002 as follows:

Factual Background

On November 14, 2006, the plaintiff, Rafael Espinal was driving East on the Cross Bronx Expressway, when he was involved in an accident with a tractor trailer truck driven by the defendant, Paul Glosser and owned by the defendant Trans Am Trucking. The accident occurred when the truck driven by the defendant Paul Glosser merged onto the ramp leading from the Cross Bronx Expressway onto the Major Deegan Expressway. As a result of the accident, the plaintiff's vehicle, a 1995 Honda Accord, was forced into a guardrail and dragged for a minimum distance of thirty (30) feet.

As a result of the accident, the plaintiff sustained injuries as follows: traumatic osteoarthritis changes and exacerbation of pre-existing osteoarthritis of the left wrist; torn triangular fibro cartilage disk,(TFCC); internal derangement of the left wrist; torn scapohumeral ligament; articular cartilage injury; cervical herniated disc at C3-4, C4-5 and C6-7 and lumbar herniated disc at L5-S1.

As a result of said injuries, the plaintiff underwent two surgeries for his left wrist, which were performed by Dr. Louis Rose; and more than a year of treatment with his chiropractor, Dr. Michael Minnick. Additionally, Dr. Rose has opined that the plaintiff will need a wrist fusion in the

future.

A trial, covering twelve days, was conducted before the Honorable Patricia Ann Williams in June 2010. At the end of the testimony, the jury was presented with a verdict sheet containing nine (9) questions concerning liability and damages. After two (2) days of deliberations, the jury answered all but one of the questions in favor of the plaintiff; found the defendants one hundred percent (100%) liable and awarded the plaintiff a total of one million five hundred thousand (\$1,500,000.00) dollars in damages.

The Court notes that the defendants do not contest the finding by the jury that the defendants are 100% liable with regards to the accident itself. The defendants limit their arguments to 1) that there is no reasonable interpretation of the evidence before the jury to support a finding of serious injury threshold; 2) the injuries were not casually related to the accident; 3) the award for future medical expenses is not support by the evidence before the jury and; 4) the award for pain and suffering is excessive.

Defense argues that, "There is virtually no credible evidence of a new injury" (See, Paragraph 19, Fleming's Affirmation). In support of this argument, the defense correctly points out that Dr. Greenfield's testimony, with regard to causally relating his diagnostic findings to the accident, was struck by the trial court. The remainder of Dr. Greenfield's testimony, with regard to his findings themselves, were not struck. The defense acknowledges same when it relies upon Dr. Greenfield testimony (See, Paragraphs 21, 22 and 23, Fleming's affirmation) that some of his findings were related to "underline arthritis"(See Page 81, Line 7 of trial transcript). Dr. Greenfield stated that "there's lot of findings that have nothing to do with arthritis and everything to do with trauma" (See, Page 83, Line 1-3 of trial transcript). His testimony regarding such findings clearly confirmed and supported Dr. Rose's findings.

Dr. Rose found in his initial examination of plaintiff that plaintiff's range of motion at that time was about 20-25% of normal. Dr. Rose performed arthroscopic surgery on the wrist on two occasions, in both cases to remove loose cartilage, which was causing the plaintiff pain. Dr. Rose testified that he observed the cartilage during surgery, he was able to determine that the injury was acute, i.e., a recent injury, and was not related to any previous injury or condition. More specifically, the doctor, at the time of the surgery, found a traumatically induced tear of the triangular fibrocartilage ligament of the left wrist. Findings of related limitation of range of motion continued

post operation. Said doctor testified that the plaintiff will continue to have pain that can only be alleviated by performing a fusion of the wrist, which will severely limit the movement of plaintiff's wrist (See, Page 44 of Trial Transcript). This procedure will cost \$30-\$35,000 in total.

In addition to his wrist injury, the plaintiff made claim of Cervical injuries to with herniated discs at C3-4, C4-5, and C6-7 and a lumbar injury to with herniated discs L5-S1. His claim for said injuries was supported by the certified medical records of Dr. Haftel, together with the record and testimony of Michael Minnick, DC. Dr. Greenfield's testimony also confirmed these injuries.

Findings

In ruling on a motion to set aside the jury verdict, the Court must afford great difference to the fact finding function of the jury. Niewieroski v national Cleaning Contractors, 126 AD 2d 424. In order to set aside a jury verdict as against the weight of the evidence the court find that the verdict could not have been reached upon any fair interpretation of the evidence. Harris v City of New York, 2AD 3d 782; Nicastro v Park, 113 AD 2d 129.

Upon a careful review of the record, the Court finds there was sufficient evidence before the jury to support a finding of serious injury. Evidence that the jury, by virtue of its verdict, found credible. The defense has not presented any argument that would support a determination that the verdict was not based upon a fair interpretation of the evidence. The defense arguments center around an interpretation of the evidence that the jury clearly rejected and do not address the alleged lack of sufficiency required in order to set aside the verdict.

With regard to whether the injuries were casually related to the accident or not, again the defense argument is non persuasive. As mentioned above, the defense relies heavily upon the fact that Dr. Greenfield's testimony, with regard to causation, was stricken. However, the defense does not address the remainder of the testimony of Dr. Greenfield together with the other medical evidence which established sufficient evidence upon which the jury could fairly find that the claimed injures was causally related to the accident.

The award rendered by the jury for future medical expenses is clearly not support by the evidence presented. Notably, plaintiff concedes that in his opposition papers.

The defendants' final point is that the award for pain and suffering is excessive. "It is well settled that the amount of damages to be awarded for personal injuries is primarily a question of fact for the jury." See, Scharé v Welsbach, 138 AD 2d 477, see also Jandt v Abele, 116 AD 2d 699.

Senko v Fonda, 53 AD 2d 638. Defendants' arguments with regard to this point is unpersuasive. They rely on dated verdict and on verdict searches that are not consistent with the injuries sustained by the plaintiff. The defendants' arguments are likewise inconsistent with the evidence presented at trial. Viewing all of the evidence before the jury in light of the award rendered by the jury, this Court finds nothing that would support a determination that the award deviated materially from what would be reasonable compensation.

Accordingly, it is hereby

ORDERED that defendants' motion to set aside the verdict is granted to the extent that the jury award for future medical expenses is modified from \$250,000.00 to \$35,000.00 and is denied in all other respects. The remainder of the jury verdict is therefore sustained.

This constitutes the decision and order of this Court.

Dated: March 13, 2012



Hon. Robert E. Torres

**ROBERT E. TORRES
JUDGE**