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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Index Number : 401600/2009
MILLER, PAMELA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
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 decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
FEB 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/13/2013

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

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 61

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PAMELA MILLER,

Plaintiff,

-against-

THE CITY OF NEW YORK, MANHATTAN and BRONX SERVICE TRANSIT OPERATING AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, METROPOLITAN TRANSIT AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, TROCOM CONSTRUCTION CORP., and JOHN DOE, name being fictitious intended for that of the driver,

Defendants.

----------X

DECISION AND ORDER
Index No. 401600/2009

HON. ANIL C. SINGH, J.:

Plaintiff Pamela Miller moves for an order to set aside the jury's award of $5,000 in damages for pain and suffering and grant additur pursuant to CPLR 4404(a). Defendants New York City Transit Authority and MTA Bus Company oppose the motion. Plaintiff's causes of action against TROCOM and Con Ed were previously dismissed.

Plaintiff brought this personal injury action after she got off an M66 bus on February 14, 2008, and fell on the sidewalk near the corner of East 67th Street and Lexington Avenue in Manhattan. Plaintiff alleged that as a result of the defendants' negligence she suffered serious injury as well as pain, shock, and mental anguish that affected and continue to affect her ability to perform normal activities and duties and caused her to incur medical expenses.

Plaintiff testified that she twisted her right ankle as she got off the bus on raised

asphalt. She had to snap her ankle back in place. Her ankle was swollen, black and blue. She took a cab to Montefiore Hospital. An x-ray was taken, and she was diagnosed with a hairline fracture. Plaintiff's ankle was placed in a soft cast, and she was given crutches.

Plaintiff testified that she went to an orthopedist, Dr. Dov Berkowitz, who recommended physical therapy. Plaintiff attended physical therapy for three weeks. Her soft cast was removed after four weeks.

Plaintiff returned to work six to nine weeks after the accident. Plaintiff testified that she was in a lot of pain and limped for a while. Plaintiff stated that more than two years after the accident she continues to experience pain when the weather changes and when she walks long distances or climbs stairs.

Dr. Berkowitz testified that he first treated plaintiff on February 29, 2008. A review of the x-ray film revealed a small displaced avulsion fracture of the talus bone. According to the doctor, an avulsion fracture does not heal like a regular fracture as a fragment of the bone is pulled off. Plaintiff started to improve in June 2008. There was no treatment between 2009 and 2012. The doctor testified that plaintiff would suffer from recurrent pain and inflamation in the future and that stressful activity will irritate the ankle.

Dr. Ronald Mann, defendants' expert witness, examined the plaintiff. He confirmed that plaintiff sustained an avulsion fracture. However, the bone chip was outside the joint and not medically significant. Dr. Mann testified that plaintiff's ankle had a normal range of motion. There was no swelling, fluid, abnormality, or atrophy in the ankle. Plaintiff needed no further treatment and could return to her job.

The jury found both parties negligent and apportioned liability at 50 percent each with respect to the plaintiff and remaining defendants. The jury awarded the plaintiff $5,000 for pain and suffering up to the date of the verdict. No award was made for future pain and suffering.

Plaintiff moves to set aside the verdict with respect to the amount of damages and obtain a new trial on that issue – not, as defendants assert, with respect to the issue of liability. In his affirmation, plaintiff's attorney cites jury verdicts from New York Supreme Court as examples of reasonable damages in cases where the plaintiff sustained an avulsion fracture. The New York City Transit Authority and MTA Bus Company opposed the motion, arguing that the jury's verdict pertaining to damages was not contrary to the weight of the evidence and that the amount awarded constituted reasonable compensation (defendants' affirmation in opposition at 7).

The defendants cite *McCarthy v. 390 Tower Associates* (9 Misc 3d 219 [Sup Ct 2005]) for the proposition that a motion to set aside a verdict is defective and should not be considered by the court if it does not include any relevant portion of the trial transcript (defendants' affirmation at 2). Although the court in *McCarthy* dubbed the moving party's application "defective" on that basis, in fact, the court addressed the merits of the motion (*id.* at 882). Furthermore, this court is not aware of any provision in the CPLR or binding case law on point that requires a party moving pursuant to CPLR 4404 to include the entire, or a relevant portion of, the transcript in its papers (*see* CPLR 4405 *and* 4406; *see also Kruseck v. Ross*, 82 AD3d 939 [2d Dept 2011], holding that, *on appeal*, the appellant must assemble a

proper record that includes relevant portions of the transcript of the trial before the lower court). Therefore, the absence of a transcript or any portion thereof from plaintiff's papers in support of her motion is of no import.

The sole issue to be determined is whether the jury's verdict on the amount of damages is "contrary to the weight of the evidence" (CPLR 4404[a]). The rationale behind the discretion to set aside verdicts granted to courts by CPLR 4404(a) is that the presiding judge is best placed to determine if errors were made during the trial (*Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 382 [1976]). In exercising this discretion, a trial judge should rely on his or her common sense rather than precedent (*id.*). A judge may properly be persuaded to set aside a verdict by one or more of myriad factors (*see McCarthy v. Port of New York Authority*, 21 AD2d 125, 128 [1st Dept 1964]; Siegel, NY Prac § 406 at 712 [5th ed 2011]).

Where a party seeks additur, the court must determine whether the award sought to be modified "deviates materially from what would be reasonable compensation" (CPLR 5501[c]). Although trial courts traditionally applied a more stringent standard by requiring that an award must "shock the conscience" for it to be altered, today trial and appellate courts alike apply the standard enshrined in the CPLR (*see Once v. Service Center of New York*, 96 AD3d 483 [1st Dept 2012]; *Shurgan by Shurgan v. Tedesco*, 179 AD2d 805 [2d Dept 1992]); *Wendell v. Supermarkets General Corp.*, 189 AD2d 1063 [3d Dept 1993]; *Prunty v. YMCA of Lockport*, 206 AD2d 911 [4th Dept 1994].

The court must "look to awards approved in similar cases" for guidance (*Reed v. City*

of New York, 304 AD2d 1, 7 [1st Dept 2003]). In *Colon v. New York Eye Surgery Assoc., P.C.* (31 Misc 3d 1201[A] [Sup Ct 2009]), plaintiff suffered an avulsion fracture of her ankle when she tripped and fell on the sidewalk in front of defendant's premises. The jury awarded the plaintiff $750,000 for past pain and suffering and $1.5 million for future pain and suffering (*Id.*). The court noted that plaintiff's injury had healed, that she never required surgery, that the avulsion fracture did not require internal fixation, that she had stopped her "limited" medical treatment nearly two years prior to the beginning of the trial, and that she might be the victim of a mild form of reflex sympathetic dystrophy (*Id.*). In light of these facts, the court reduced the jury's award to no more than $300,000 for past pain and suffering and no more than $650,000 for future pain and suffering. The facts in the case at bar are comparable, and yet the court in *Colon* reduced the jury's award to an amount that dwarfs plaintiff's award here.

Plaintiff has also provided the court with reported summaries of verdicts in personal injury cases where the plaintiff suffered an avulsion fracture, which show that the $5,000 awarded here materially deviates from what would be reasonable compensation (*see Pineman v. Above and Beyond Heating and Cooling Inc.*, 2010 WL 5065370 [Sup Ct 2010] (award of $40,000 for pain and suffering reduced to $26,000); *Januskiewicz v. City of New York*, 2002 WL 34704528 [Sup Ct 2002] (award of $1,502,000 for past pain and suffering reduced to $1,126,500)]; *Santulli v. City of New York*, 1991 WL 447018 [Sup Ct 1991] (award of $20,000)). The First Department has granted additur in a similar case (*see Brandwein v. New York City Transit Authority*, 14 AD3d 396 [1st Dept 2005]). In *Brandwein*, plaintiff slipped

on a broken step in defendant's subway station and fractured her ankle. The court held that the jury's award of $30,000 for past pain and suffering deviated materially from what would be reasonable compensation (*Id.*, at 397). In light of the fact that plaintiff was forced to wear a cast for one month and use crutches for at least six weeks, the court granted the plaintiff additur in the amount of $60,000 (*Id.*).

Modification of an award, particularly with respect to damages for pain and suffering, is somewhat speculative, and precedent alone cannot provide sufficient guidance (*see So v. Wing Tat Realty, Inc.*, 259 AD2d 373 [1st Dept 1999]; *Reed*, 304 AD2d 1). Moreover, the circumstances here reveal that the award deviates materially from what is reasonable compensation (*see Jordan v. County of Suffolk*, 670 AD3d 779 [2d Dept 2010]; *Nutley v. New York City Transit Authority*, 79 AD3d 711 [2d Dept 2010]; *see also Giraldez v. City of New York*, 214 AD2d 461 [1st Dept 1995]; *Jakalow v. Consoli*, 175 AD2d 826 [2nd Dept 1991]; *Welty v. Brown*, 57 Ad2d 1000 [3d Dept 1997]; *Fenocchi v. City of Syracuse*, 216 AD2d 864 [4th Dept 1995]). Plaintiff suffered an avulsion fracture of her right ankle as a result of defendants' negligence, which caused the inversion in her right ankle to decline by 10 degrees in addition to considerable pain and suffering at the time of, and following, the injury. Based on the evidence presented to the jury, plaintiff had neither suffered a prior injury, nor was she the victim of a degenerative condition that would render the $5,000 awarded on this evidence reasonable (*see Teller v. Azano*, 263 AD2d 647 [3d Dept 1999]; *Brandwein*, 14 AD3d 396). Finally, because both plaintiff and defendants here were found to have been negligent, plaintiff will be entitled to recover only half of the amount to be

stipulated to by the parties in the event that a new trial on the issue of damages is not held.

Therefore, it is

ORDERED that the plaintiff's motion is granted; and it is further

ORDERED that a new trial solely on the issue of damages be held, unless the defendants stipulate to additur in the sum of $50,000 within 30 days of today.[1]

The foregoing constitutes the decision and order of the court.

Date: 2/13/13
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

[1]In the event defendants stipulate to the additur, the amount shall be reduced by plaintiff's comparative negligence of 50% for a total recovery of $25,000.