

Matta v Anastassov

2014 NY Slip Op 31988(U)

July 18, 2014

Supreme Court, New York County

Docket Number: 109676/08

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART:8

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NANCY MATTA,

Plaintiff,

109676/08
Index # ~~106559704~~

-against-

GEORGE E. ANASTASSOV, M.D.,
D.D.S. and MAXILLOFACIAL SURGERY
SERVICES, LLC,

**Post Trial
Decision & Order**

Defendants.

-----X

HON. JOAN M. KENNEY, J.:

Papers considered in review of this motion to set aside a verdict:

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1-5
Opposition Papers, Affirmation with Exhibits	6
Reply Affirmation	7

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Plaintiff's application seeks an Order pursuant to CPLR 4404, setting aside a jury verdict, as to the value of damages and additionally compensating plaintiff for injuries proven at trial. Defendant opposes the motion.

FILED

BACKGROUND

JUL 31 2014

Testimony

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This is a dental malpractice case that was tried before this Court and a jury on June 11-12, June 14, June 18-19, June 21, and June 24, 2013. The jury rendered a verdict on June 24, 2013. The verdict of the jury was as follows: an award of \$31,600.00 for past

dental expenses (the amount was stipulated to by the parties) and awarded \$10,000.00 for plaintiff's pain, suffering and loss of enjoyment of life, from July 20, 2005 up to and including the date of the verdict. The total amount of the plaintiff's recovery was \$31,600.00.

Plaintiff testified that she had a tooth extracted and a bone graft performed on June 20, 2005. These procedures resulted in receding gums, and that the bone above the extracted tooth was "destroyed." Defendant testified that plaintiff presented with a missing tooth (#7) and a failing tooth (#6). Further, the soft tissue in the area of #6 was infected, and plaintiff was suffering from bone loss in the area around both teeth (#6 and #7).

Defendant testified that he offered plaintiff the choice of either a single step procedure or a two step procedure. The single step procedure consisting of the removal and replacement of #6 and a bone graft. The two-step procedure would have consisted of the extraction of #6, and grafting the new bone; followed by a 4-6 month dormant period before the prosthetic teeth could be implanted. According to defendant's testimony, plaintiff chose the one step procedure, rather than extend the treatment with the two step procedure. Defendant also testified that either choice would have been appropriate course of treatment.

Plaintiff testified that defendant told her the single step procedure would save time and money, and as a result she chose the

single step option. Plaintiff signed an informed consent form and the single stage procedure was performed. During the trial, plaintiff stated that if she had fully understood the risks of the single step procedure, which were explained to her by a subsequent treating dentist, she would have not made the choice she did.

The parties did not dispute the following facts. Plaintiff suffered complications from the procedure that was performed on July 20, 2005. On August 1, 2005, defendant treated plaintiff because she developed an infection and a two millimeter dehiscence¹ on the roof of her mouth. This resulted in the exposure of the bone graft and the threads of the implant. Defendant prescribed antibiotics and oral rinse. On August 5, 2005, plaintiff's dehiscence was not infected anymore. On November 4, 2005, defendant grafted some gum tissue to the dehiscence. On December 8, 2005, plaintiff presented to defendant with granulation tissue at the site of the #6 bone graft, which defendant removed the next day. However, because the graft was exposed the bone graft failed and had to be removed as well. Defendant sent a sample of the tissue he removed to a lab for testing.²

¹Wound dehiscence is a surgical complication in which a wound ruptures along the surgical suture line.

²The test results indicated that the specimen was taken from an abdominal wound. The dental experts who testified, including defendant, all agreed that the enterobacter cloacae and enterococcus faecalis identified in the lab report were usually found in the lower intestinal tract.

In late December (the 21st and the 28th), plaintiff experienced similar problems with #7 and the issues with #6 were not fully resolved. The implant needed to be stabilized so the bone graft was replaced to cover the exposed threads of the implant.

Plaintiff continued to treat with defendant until after February 17, 2007 even though another dehiscence developed near #7. During the period plaintiff treated with defendant and seemed to improve even though complications ensued from the original procedures. After plaintiff stopped seeing defendant for treatment she consulted and was treated by four other dentists.

Plaintiff's dental problems continued for some time after the original procedures were performed, including, *inter alia*, many additional surgeries, scar tissue formation which required additional anesthetic during treatment sessions (many injections of novocain, administration of nitrous oxide, valium for anxiety and vicodin for pain).

Dr. Paul Fletcher, D.D.S. was plaintiff's expert witness. Dr. Fletcher stated that the one stage procedure was cause of all plaintiff's dental problems. He opined that defendant's willingness to proceed with the one step procedure departed/deviated from good and acceptable dental practice and that defendant did not obtain plaintiff's informed consent.

The Verdict

Plaintiff seeks an upward modification of the award for past

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pain and suffering and for future pain and suffering and loss of enjoyment of life (\$10,000.00). Specifically, plaintiff argues that the award was inadequate, but does not specify what amount would be appropriate. Further the amount the jury awarded was not supported by the evidence, e.g., that plaintiff had to endure over one hundred dental procedures because of defendant's malpractice.

DISCUSSION

The discretion of a trial court to set aside the jury verdict pursuant to CPLR Section 4404(a) is a broad one intended to ensure that justice is done. CPLR §4404(a) states in pertinent part that:

"[a]fter a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon 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 of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

The power to set aside a jury verdict and order a new trial is an inherent one (*McCarthy v Port of N.Y. Auth.*, 21 AD2d 125, 127, [1st Dept 1964]), which is codified in New York in CPLR 4404(a). The power is a broad one intended to ensure that justice is done (see, Siegel, *New York Prac.* §406), but the proper standard for setting aside a jury verdict is elusive and has long defied precise

definition (see, *Mann v Hunt*, 283 AD 140 [3d Dept 1953]). Nevertheless, a close examination of the precedents reveals several principles that tend to outline the parameters of this Court's function on such a motion.

Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence (*Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]; *Yalkut v City of New York*, 162 AD2d 185 [1st Dept 1990]). The criteria for setting aside a jury verdict as against the weight of the evidence are less stringent, for such a determination results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury (*Cohen, supra*, at 498).

The fact that determination of a motion to set aside a verdict involves judicial discretion does not imply, however, that this Court can freely interfere with any verdict that is unsatisfactory or with which it disagrees. A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. "Fact-finding is the province of the jury, not the trial court, and

a court must act cautiously or it could engage in an overzealous enforcement of its duty to oversee the proper administration of justice. A court cannot overstep its bounds and unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (citations omitted). *Nicastro v Park*, 113 AD2d 129 [2d Dept 1985]).

The basic rule is that a doctor (or dentist) using his or her best judgment to choose between medically acceptable alternatives does not incur liability solely for mere errors in judgment. *Nestorowich v Ricotta*, 97 NY2d 393 (2002). Where alternative procedures are available to a physician [or dentist], any one of which is medically acceptable and proper under the circumstances, there is no negligence in choosing one option rather than another. See, e.g., *Henry v Bronx Lebanon Med. Ctr.*, 53 AD2d 476 (1st Dept 1976). The "error in judgment" charge implies the exercise of some professional judgment in electing among medically acceptable alternatives. *Spadaccini v Dolan*, 63 AD2d 110, 116 (1st Dept 1978); see, also, *Martin v Lattimore Road Surgicenter*, 281 AD2d 866 (4th Dept 2001).

"Particular deference has traditionally been accorded to jury verdicts in favor of defendants in tort cases" (*Nicastro*, 113 AD2d at 134; accord *McDermott*, 9 AD3d at 206), "especially if resolution of the case turns on evaluation of conflicting expert testimony" (*Fontana v. Kurian*, 214 AD2d 832, 833 [1995], lv. denied 86 NY2d

707 [1995]). Which was the case here. In exercising its discretionary authority, this court is guided by the principle that a verdict should not be set aside unless "the jury could not have reached the verdict on any fair interpretation of the evidence" *White v New York City Transit Authority*, 40 AD3d 297 (1st Dept 2007). "For a court to conclude that a jury verdict is unsupported 'by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' (citations omitted)." *Kaplan v Miranda*, 37 AD3d 762 (2nd Dept 2007); see, *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265 (2007); *Soto v New York City Transit Authority*, 6 NY3d 487 (2006); *Abenante v Star Gas Corp.*, 13 AD3d 405 (2nd Dept 2004). "If there is a question of fact and 'it would not be utterly irrational for a jury to reach the result it has determined upon ... the court may not conclude that the verdict is as a matter of law not supported by the evidence.'" *Soto v New York City Transit Authority*, 6 NY3d 487, 492 (2006).

The jury in this case made a determination that yes, plaintiff was not properly informed as to the risks and/or disadvantages between the single step procedure versus a two step procedure. However, the jury's decision to award \$10,000.00 was based upon the credibility of the witnesses and the weight of the evidence. The jury did not accept that there was a departure from good and

acceptable [dental] practice. *Roques v Nobel*, 73 AD3d 204, 206 (1st Dept 2010).

"Generally, the amount of damages to be awarded for personal injury is primarily a question for the jury, the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony" *Ortiz v 975 LLC*, 74 AD3d 485, 486 (1st Dept 2010) (citation omitted). A verdict may be set aside as "excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501(c); see *Ortiz*, supra. Although CPLR 5501(c) directs the Appellate Division to overturn a verdict when it materially deviates from what is considered to be reasonable compensation, this standard has been held applicable to trial courts as well. See *Shurgan v Tedesco*, 179 AD2d 805, 806 (2nd Dep't 1992).

In determining whether an award deviates from what is reasonable compensation, the courts look to similar cases, "bearing in mind that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification." *Reed v City of New York*, 304 AD2d 1, 7 (1st Dep't 2003) (citations omitted). In determining an award for pain and suffering, the court must determine not only the type of injury and degree of pain but also the period during which the alleged suffering occurred. See *Garcia v Queens Surface Corp.*, 271 AD2d 277, 278 (1st Dep't

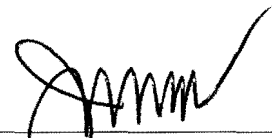
2000). "Modification of damages, which is a speculative endeavor, cannot be based upon precedent alone, because comparison of injuries in different cases is virtually impossible. *So v Wing Tat Realty, Inc.*, 259 AD2d 373, 374 (1st Dep't 1999).

Accordingly, it is

ORDERED that plaintiff's motion is denied.

Dated: July 18, 2014

E N T E R:



Hon. Joan M. Kenney
J.S.C.

FILED

JUL 31 2014

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