Kowalsky v County of Suffolk
2015 NY Slip Op 30460(U)
March 19, 2015
Supreme Court, Suffolk County
Docket Number: 41227/2009
Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX NO. 41227/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
Supreme Court Justice

JASON KOWALSKY,

Plaintiff,

-against-

THE COUNTY OF SUFFOLK, THE SUFFOLK COUNTY DEPARTMENT OF PARKS, RECREATION & CONSERVATION and RAYMOND M. RANCOURT,

Defendants.

ORIG. RETURN DATE: 10/10/14
FINAL SUBMISSION DATE:1/14/15
MTN. SEQ. # 004
MOTION: MOTNDECD

PLAINTIFF'S ATTORNEY:
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The Defendants-Petitioners move by way of motion for an order renewing/rearguing their motion for judgment pursuant to CPLR § 4401 and upon such renewal/reargument dismissing the Plaintiff's action; renewing/rearguing the Defendants' oral motion pursuant to CPLR § 4404 and upon such renewal/reargument dismissing the Plaintiff's action pursuant to CPLR § 4405; and setting aside the jury's verdict as being excessive and deviating materially from what would be reasonable compensation pursuant to CPLR § 5501(c). The Plaintiff opposes the application.

The Court has considered the following: Defendants' Notice of Motion, Supplemental Affirmation, Exhibits A through G, Plaintiff's Affirmation In Opposition, Plaintiff's Memorandum of Law In Opposition To Defendants' Post-Trial Motion For JNOV and Other Relief, and Defendants' Reply Affirmation.

In determining a motion pursuant to CPLR § 4404 to set aside a verdict as against the

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weight of evidence, the Court must decide whether the evidence so preponderates in favor of the movant that the verdict should not have been reached upon any fair interpretation of evidence (*see Lolik v. Big V Supermarkets*, 86 NY2d 744, 746; *Leonard v. New York City Transit Authority*, 90 AD3d 858, 859; *Metco Plumbing, Inc. v. Sparrow Construction Corp.*, 22 AD3d 647, 649). Resolution of the motion does not involve a question of law, but rather requires a discretionary balancing of many factors (*see Flynn v. Elrac, Inc.*, 98 AD3d 938, 939; *Vasquez v. County of Nassau*, 91 AD3d 855, 857). Moreover, "great deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to observe and hear, the witnesses," *(Hedaya Home Fashions, Inc., v. American Motorists, Inc. Co.*, 12 AD3d 639, 640. Thus, "where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view," *Tapia v. Dattco, Inc.*, 32 AD3d 842, 845).

The Court must accept as true all of the evidence offered by the party against whom the motion for judgment aims, and must even resolve in that party's favor all questions relating to the credibility of witnesses. See New York Practice, 5th edition, David Siegel, page 704, chapter 15.

In applying the standard of review that portion of the Defendants'–Petitioners' application to set aside the verdict and dismiss Plaintiff's complaint is ***DENIED.***

This action was commenced by the Plaintiff to recover damages for a personal injuries sustained on June 12, 2009 when, while working as a field technician for Verizon, he was struck by a truck operated by the Defendant Rancourt and owned by the Defendant County of Suffolk.

The Plaintiff, a 37-year-old male, at the time of the trial, adduced proof of causally related injuries: a torn annulus at L4-5 for which he under went spinal fusion surgery; a lumbar laminectomy at L5-S1; a torn meniscus of his right knee requiring arthroscopic intervention; a partially torn ACL of his right knee; and chronic pain syndrome. It was not contested that the Plaintiff was/is unable to return to the position he held with Verizon at the time of the accident.

By order dated January 26, 2010, this Court (Mr. Justice. Pastoressa) granted Plaintiff's petition for summary judgment on the issue of liability. Furthermore, by order of the undersigned, Defendants' petition to preclude Plaintiff from presenting at trial issues regarding lumbar surgery on the ground of collateral estoppel was denied. That determination is currently pending review before the Appellate Division, Second Department. At that pre-trail stage of these proceedings, the decision of the Court of Appeals in *Auqui v.*

Seven Thirty One Ltd. Partnership, 22 NY3d 246, 980 NYS2d 345 (2014) was considered and analyzed. The Court relying upon *Auqui,* acknowledging that "general notions of fairness involving a practical inquiry into the realities of the litigation and the procedures used in the administrative proceeding were not sufficient, both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested and that the issue was fully aired."

The matter proceeded to trial before this Court on July 30, July 31, August 1, August 4, August 5, August 7, August 8, August 11, August 12, August 13, August 14, and August 15, 2014.

Concerning injury and pecuniary loss, the Plaintiff presented testimony of Dr. Shafi Wani, Plaintiff's treating neurologist and pain management doctor; Dr. Nestor Blyznak, Plaintiff's treating orthopedist (right knee injury); Dr. Andrew Merola, Plaintiff's treating orthopedic surgeon who performed the lumbar fusion; Dr. Thomas Fitzgerald, an economist who testified as to economic impact; and Dr.Harold Bialsky, a certified life care planner and location rehabilitation specialist.

The Defendants' case relied upon the testimony of Dr. Noah Finkel, an orthopedist, and Dr. Howard Reiser, a neurologist, who conducted independent medical examinations. The defense also called Mr. Joseph Pessalan, who presented a vocational rehabilitation analysis.

Jason Kowalsky, the Plaintiff, testified at length as to daily pain he experiences that interferes with sleep, and all the physical aspects of his life. Plaintiff produced a witness, Mr. Bradley French, his supervisor while he was employed with Verizon. Mr. French indicated that the position held by the Plaintiff is a demanding physical job requiring climbing, carrying ladders, wiring, bending, squatting, pushing and pulling, as well as lifting heavy objects.

The Plaintiff testified that he unsuccessfully tried to return to work. It was his life plan to work for Verizon for a period of 20 to 25 years and then establish his own repair-construction business.

The Defendants, in part, seek an order disallowing all sums awarded for lost wages and accompanying benefits. Defendants note that Dr. Merola testified that Plaintiff could physically do light or sedentary work. Defendants cite precedent mandating the remedy they seek. However, Dr. Merola also testified that he agreed with the neurologist assessment that the medications prescribed render the Plaintiff unable to return to any work as side effects would preclude employment. As concerns the pecuniary loss, Plaintiff's expert, Dr. Thomas Fitzgerald testified as to past and future lost earnings, medical insurance benefits, savings

plan benefits, Verizon, pension benefits and Social Security based upon the actual data derived from Verizon.

On August 15, 2014, the jury reached a verdict finding that the June 12, 2009 accident was in fact a substantial factor in causing Plaintiff's injuries and that Plaintiff sustained an injury which resulted in a significant limitation of use of a body function or system. The jury awarded the plaintiff. The following damages in the total sum of Five Million Eighty Eight Thousand Dollars ($5,088,000.00) as follows:

(1) Past pain and suffering-$200,000
(2) Future pain and suffering-$850,000 (for 41 years)
(3) Past lost earnings-$375,000
(4) Future lost earnings-$2,250,000 (for 24 years)
(5) Future medical and health insurance benefits-$250,000 (for 41 years)
(6) Past lost savings plan benefits-$17,000
(7) Future lost savings plan benefits-$116,000 (for 24 years)
(8) Future lost pension benefits-$980,000 (for 24 years)
(9) Future lost social security benefits-$50,000 (for 24 years)

In reconsidering the Defendants' application, the Court has been directed to the decision and order of the Supreme Court of the State of New York, Appellate Division: Second Department, whereby that court heard the appeal of *Christopher Cicola v. County of Suffolk, et al.*, (12 AD3d 1379, 993 NYS2d 131) for the purposes of demonstrating reasonable compensation for injuries such as those sustained by the Plaintiff.

The Court cannot raise or lower the sum awarded in a personal injury matter involving unliquidated damages, because setting of damages is strictly a jury function. *See Kupitz v. Elliott*, 42 AD2d 898, 347 N.Y.S.2d 705 (1st Dept. 1973). The court however, will grant the Defendants'-Petitioners' Petition and order a new trial, unless the parties stipulate to settle all claims with the following modifications:

(1) Future pain and suffering-$200,000 (for 41 years)
(2) Future lost earnings-$250,000
(3) Future medical and health insurance benefits-$75,000
(4) Past lost savings plan benefits-$5,000
(5) Future lost savings plan benefits-$10,000
(6) Future lost pension benefits-$200,000
(7) Future lost social security benefits-$10,000

Any items of damages not specifically addressing, the remittur portion of this decision

are deemed sustained, as to amounts. The Court has considered and rejects the remaining contentions of the Petitioners-Defendants.

In the event there is no stipulation as to the modification/adjustments the parties are directed to appear before the Calendar Control Part on May 18, 2015 to commence jury selection restricted to the issue of damages.

The foregoing constitutes the decision and ***ORDER*** of this Court.

Dated: March 19, 2015

HON. JERRY GARGUILO, JSC