Wittorf v City of New York
2015 NY Slip Op 30719(U)
April 27, 2015
Supreme Court, New York County
Docket Number: 103233/2006
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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RHONDA WITTORF,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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Index No. 103233/2006

Mot. seq. no. 006

BARBARA JAFFE, JSC:

For plaintiff:
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A jury trial was held in this matter and a verdict rendered finding defendant liable for plaintiff's injuries. The jury found, in pertinent part, that defendant's employee Bowles was negligent in permitting plaintiff to enter the 65th Street Central Park Transverse; Bowles's negligence was a substantial factor in causing plaintiff's injuries; plaintiff was negligent; plaintiff's negligence was a substantial factor in causing her own injuries; defendant was 60 percent at fault; and plaintiff was 40 percent at fault. Plaintiff was awarded $1.5 million for pain and suffering from the time of the occurrence up to the date of the verdict, $243,000 for past medical expenses, $1 million for future pain and suffering, and $608,000 for future medical expenses. The jury also found that plaintiff had a 40-year life expectancy. (NYSCEF 53).

The justice previously presiding in this part granted defendant's motion for an order

setting aside the verdict, and dismissed the complaint on the ground that defendant was performing a governmental function when one of its employees closed the Central Park 65th Street Transverse to vehicular traffic. (33 Misc 3d 368 [Sup Ct, New York County 2011]). The Appellate Division affirmed. (104 AD3d 584 [1st Dept 2013]). By order dated June 5, 2014, the Court of Appeals reversed the Appellate Division, and remitted this matter for further proceedings "to consider the weight of the evidence issues." (23 NY3d 473 [2014]).

Plaintiff now seeks reinstatement of the verdict insofar as defendant was held liable, and moves pursuant to CPLR 4404(a) for orders: (1) setting aside the jury's finding that she was comparatively negligent or setting the matter down for a new trial on comparative fault; (2) setting aside the jury's award, as contrary to the weight of the evidence, for past and future pain and suffering, and ordering additur, or ordering a new trial on those issues; and (3) setting aside the jury's award for future medical expenses as excessive. (Affirmation of Paul Dansker, Esq., dated July 3, 2014 [Dansker Aff.]).

Defendant opposes plaintiff's motion to the extent that she seeks to set aside the comparative fault findings, or a new trial on that issue, or to set aside the award for past and future pain and suffering, or additur or a new trial on damages for past and future pain and suffering. It also asks that the accumulation of interest be suspended pending decision on this motion and any ensuing appeals. (NYSCEF 74).

I. COMPARATIVE FAULT

A. Trial evidence

A review of the evidence at trial is not necessary beyond reciting the salient, undisputed evidence, as set forth by the Court of Appeals and by the parties.

Plaintiff and her boyfriend Brian Hoberman, each experienced in biking in New York City and aware of the need to avoid potholes and other defective conditions, were riding their bicycles on the morning of November 5, 2005. At the 65th Street entrance to Central Park, they saw defendant's workers who appeared to be closing off the 65th Street Transverse. A worker, who was there to repair a series of deep depressions in the westbound lane of the Transverse, expressly permitted the two to ride into the park on the Transverse. Both plaintiff and Hoberman thus believed that the road presented no dangers; they proceeded at a moderate pace.

Plaintiff and Hoberman rode through the first of the Transverse's four overpasses without incident. As they approached the second overpass, where the depressions were located, the sun was in their eyes, as it was rising in front of them. According to Hoberman, the tunnel under the second overpass was unlit and dark, and there was sunlight on the other end of it, "which would have made it difficult to see as well." He rode through the tunnel in the center of the right lane. Plaintiff rode 20 to 30 feet behind him, but in the center of the road.

According to plaintiff, immediately before her accident, she pulled her sunglasses down on her nose, and looked over the top of the lenses. She conceded that "[t]he sun was shining, [she] couldn't see in the overpass." She nevertheless entered the tunnel and managed to avoid a large hole in the pavement. However, in doing so, she encountered another large hole and fell into it, which resulted in her injuries.

B. Contentions

Plaintiff argues that there was no evidence presented that she was at fault here. Rather, as defendant's employee waved her on notwithstanding his knowledge of the large holes under the overpass, she maintains that defendant should be faulted entirely. And because she "could not

possibly have seen the roadway defects that lurked in a dark unlit tunnel as she approached on a bright, sunny morning with the sun in her eyes," plaintiff asserts that she cannot be held almost as culpable as defendant. (Dansker Aff.).

C. Analysis

> After 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 . . . 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 . . .

(CPLR 4404[a]). The determination of whether a verdict is against the weight of the evidence requires a discretionary balancing of facts. (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 498-499 [1978]; *Nicastro v Park*, 113 AD2d 129, 132 [2d Dept 1985]).

Where there is no indication that substantial justice has not been done, "a successful litigant is entitled to the benefits of a favorable jury verdict," and the court may not "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (*Nicastro*, 113 AD2d at 132).

It is not only "well settled that instruction on the question of comparative negligence should be given to the jury where there is any valid line of reasoning or permissible inferences which could possibly lead rational individuals to the conclusion of negligence on the basis of the evidence presented at trial," but a plaintiff's comparative negligence "is almost invariably a question of fact and is for the jury to determine in all but the clearest cases." (*Shea v New York City Tr. Auth.*, 289 AD2d 558, 559 [2d Dept 2001]; *see also Johnson v NYCTA*, 88 AD3d 321, 324 [1st Dept 2011]). What is required is a comparison of "conduct which, for whatever reason, the law deems blameworthy, in order to fix the relationship of each party's conduct to the injury

sustained and the damages to be paid by the one and received by the other as recompense for that injury." (*Arbegast v Bd. of Educ. of S. New Berlin Cent. School,* 65 NY2d 161, 168 [1985]).

Here, plaintiff's conduct in riding her bicycle into the dark, unlit tunnel at a moderate rate of speed, notwithstanding her inability to see inside well enough to perceive the defects in time to avoid them, constitutes a sufficient basis for the jury's finding that she was partly negligent for her accident. That defendant's employee permitted her to ride on the Transverse, without more, did not constitute a warranty that the entire Transverse was defect-free, and did not relieve plaintiff of a duty on her part to take appropriate precautions under the circumstances.

For these reasons, and to the extent that the verdict in this regard is in defendant's favor, I decline to order a new trial as to liability and/or apportionment.

II. DAMAGES

Absent any sharp dispute about plaintiff's damages, I rely on the parties' contentions.

A. Contentions

Although conceding that the evidence at trial established that her future medical/surgical/psychological treatment will total $386,000, and not the $608,000 awarded, plaintiff asks only that further consideration be given to future expenses for xrays, CT scans, MRIs, medication, testing, follow-up, or inflation. She also argues that the awards for past and future pain and suffering are against the weight of the evidence. (Dansker Aff.).

Defendant maintains that the jury's awards should not be disturbed, distinguishes the cases on which plaintiff relies, and cites other cases that are more analogous. (NYSCEF 74).

C. Analysis

The assessment of damages is a function of the jury. (Siegel, NY Prac § 407 [4th ed]).

The standard against which an allegedly inadequate verdict is measured is whether the sum awarded "deviates materially from what would be reasonable compensation." (*Id.*; *see* CPLR 5501[c]). "To determine whether an award 'deviates materially from what would be reasonable compensation,' New York state courts look to awards approved in similar cases." (*Gasperini v Center for Humanities*, 518 US 415, 425 [1996]).

As the cases on which plaintiff relies are significantly distinguishable, there is an insufficient basis for setting aside the awards, except to the extent that plaintiff concedes that the award for future medical expenses be decreased to $386,000.

III. CONCLUSION

Absent a cross motion for the relief requested, defendant's request that the accumulation of interest be suspended is denied.

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiff Rhonda Wittorf's motion for an order setting aside the jury's finding that she was comparatively negligent or setting the matter down for a new trial on comparative fault is denied; it is further

ORDERED, that plaintiff Rhonda Wittorf's motion for an order setting aside the jury's award, as contrary to the weight of the evidence, for past and future pain and suffering, and ordering additur, or ordering a new trial on those issues is denied; it is further

ORDERED, that plaintiff Rhonda Wittorf's motion for an order setting aside the jury's award for future medical expenses as excessive is granted solely to the extent that the award is reduced to $386,000; and it is further

ORDERED, that the verdict is reinstated except with respect to the award for future

medical expenses which is reduced to $386,000.

ENTER:

Barbara Jaffe, JSC

DATED: April 27, 2015
New York, New York