

**Flores v New York City Tr. Auth.**

2015 NY Slip Op 32683(U)

July 29, 2015

Supreme Court, Bronx County

Docket Number: 15618/2007

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

\_\_\_\_\_  
ANDREW FLORES, X

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.  
\_\_\_\_\_ X

**DECISION/ORDER**

Index No.: 15618/2007

The following papers numbered 1 to 5 read on the below motions noticed on June 2, 2014 and duly submitted on the Part IA15 Motion calendar of **April 6, 2015**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def.'s Affirmation in Support of Motion, with Exhibits	1,2
Pl.'s Opposition, Exhibits	3,4
Def.'s Affirmation in Reply	5

Upon the foregoing papers, defendant New York City Transit Authority ("Defendant") moves for an Order pursuant to CPLR 4404(a) and 5501, setting aside the verdict rendered in favor of the plaintiff Andrew Flores ("Plaintiff") on March 27, 2014, and directing a judgment entered in favor of Defendant as a matter of law, in that the verdict was contrary to the weight of the evidence and legally insufficient and against the interests of justice; or, alternatively, reducing the amount of the verdict awarded as excessive and without evidentiary basis; or, alternatively, ordering a new trial in the action. Plaintiff opposes the motion.

I. Background

This matter arose out of an alleged trip-and-fall incident that occurred in a subway station on March 22, 2007. Plaintiff asserted that he tripped and fell over a broken portion of a cover board that had been placed at the platform edge, causing him to sustain personal injuries. After trial, the jury returned a verdict for the Plaintiff, awarding: \$266,000 for past pain and suffering

over a time period of seven years, \$375,000 for future pain and suffering over 15 years, and \$535,000 for future medical expenses with a life expectancy of 15 years.

Defendant now argues that it is entitled to the relief sought in its motion because (1) Plaintiff did not produce any evidence as to the actual or constructive notice of the allegedly defective condition, (2) the testimony of Plaintiff's expert witness, Peter Pomeranz, P.E., although stricken, was unduly prejudicial to the Defendant and influenced the jurors to render a verdict in favor of the Plaintiff, and (3) the verdict by the jury as to damages was both excessive and without basis in evidentiary fact.

Plaintiff testified at trial that he tripped on a "broken piece of wood" that was yellow in color. His right leg tripped, causing him to attempt to gain his balance by holding onto the train door. He testified "[w]hen I put my left leg down, I just went straight through - I went straight down" and his "knee went through the platform and in between the platform and the train so my knee was the one that stopped the rest of my body." Plaintiff described the "broken" area as "like 12 inches" wide. He identified photographs of the accident location, allegedly depicting the defect that caused his fall. Defendant asserts that Plaintiff testified that he never noticed the height difference between the subway platform and the "wood" that caused his fall at any time prior to the accident, and could not remember if he had ever been to the accident area before. Defendant's employees Randall Richardson and Vincent Moschello, testified at trial that they could not recall being at the scene of this alleged accident at any time prior to, or at the time of the accident. Pablo Oliveras, another employee of Defendant, could not describe the alleged defect and, in fact, testified that he did not observe any defect at the location of the accident shortly after this accident occurred. Erik Tarrants, another employee, did not describe any allegedly defective conditions at the premises and instead testified that he did not observe any defects or defective condition.

Defendant argues that Plaintiff's entire basis for his claims of actual or constructive notice of this condition was based on the aforementioned evidence. Although photographs of the condition were admitted into evidence, those photographs were insufficient to establish constructive notice as they are unsupported by testimony as to the duration of the condition so as

to establish the length of time that it existed. Further, Plaintiff never described the defect as being worn, dirty, eroded, or somehow created over a period of time as opposed to suddenly. Further, neither Plaintiff nor anyone else ever testified that the defect was discolored or contained any other indicia that it was in existence for a sufficient length of time so as to have been discovered and remedied.

Defendant also contends that the evidence at trial established that this alleged defect was trivial in nature and not actionable. The moving papers state: “based upon the plaintiff’s representations with his fingers at trial as well as a review of the photographs, the height differential of the cover board between the platform itself was approximately one-half inch.” Further, the cover board at issue was painted bright yellow to contrast it from the platform. Under these circumstances, the allegedly injurious condition was not dangerous.

Although the testimony of Peter Pomeranz, P.E., was stricken, Defendant argues that it was unduly prejudicial, and influenced the jurors to render a verdict in favor of Plaintiff. Mr. Pomeranz’ testimony was stricken because it was based on alleged violations of the Americans with Disabilities Act. Any alleged violations of the Act, however, could not serve as a predicate for a finding of negligence.

Despite the fact that this testimony was stricken, and a curative instruction was made, the Defendant states that Plaintiff’s counsel made inflammatory and prejudicial remarks during summation that were based on that stricken testimony. Plaintiff’s counsel made references to the happening of the accident which was only contained in Mr. Pomeranz’s testimony, that is, Plaintiff’s toe got trapped in the open area between the defect, the chip in the cover board, and that area that had been painted over, and that it had been in such a condition for a length of time. Counsel also made statements that the defect was “an inch” when there was no testimony to that effect. Defendant urges that counsel’s statements that the defect was “painted over” were especially prejudicial to the defense of this action “since the plaintiff’s sole basis for claiming liability is constructive notice.”

Finally, Defendant contends in the alternative that the verdict as to damages was excessive and without evidentiary basis. Dr. Jeffrey Cohen, the Plaintiff’s treating physician, testified that he never spoke to Dr. Gary Thomas, Plaintiff’s alleged pain management specialist.

Dr. Thomas testified, however (over objection of counsel as no 3101[d] was provided), that he consulted and worked with Dr. Cohen as a team while treating Plaintiff. Further, Defendant argues that although Dr. Cohen opined about the need for future treatment in Plaintiff's knee and a possible knee replacement, he conceded that he did not order an x-ray that would have provided further information about the arthritic changes in the knee. Dr. Thomas first examined the Plaintiff over three years after this accident. While he opined about future care and treatment, Dr. Thomas never ordered any diagnostic studies or objective tests to support his opinions. Defendant argues that, in light of the foregoing, Plaintiff failed to satisfy his burden of proving damages.

Moreover, Defendant argues that the awards for past and future pain and suffering materially deviate from reasonable compensation. The movant provides appellate case law reviewing allegedly similar injuries and circumstances in support of this argument. With respect to future medical expenses, Defendant notes that the evidence, including Dr. Thomas' testimony, only supported an award of \$215,250. There was no support for an award for future physical therapy, as Dr. Cohen testified that Plaintiff would not benefit from such treatment. Defendant urges that Plaintiff did not establish the need for a future total knee replacement, but even if he did, that would only raise the amount due for future medical expenses to \$315,250.

Plaintiff opposes the motion. He initially argues that the motion should be denied as procedurally defective, because it fails to include a complete copy of the trial transcript.

Plaintiff contends that the jury verdict that Defendant had notice of the allegedly defective condition was supported by the weight of the evidence. At trial, it was adduced that the subject defect existed for an extended period of time, whereby Defendant had constructive notice of it, and should have remedied it. Plaintiff notes that, contrary to Defendant's contentions, Plaintiff described the dimensions of the defect as "wide .. like 12 inches, probably." Plaintiff was also shown photographs of the location of his accident and indicated that he noticed "the crack where he tripped at." He described it as "yellow wood" and used his hands to show how thick it was. Plaintiff urges that this evidence established that the defect was painted over by an employee. He noted that "the front of [his] sneaker was all black from where ... it got stuck underneath that piece of wood." It was, therefore, "well within the province of the jury to infer from both

plaintiff's testimony and the photographs that Defendant had notice of the condition. Moreover, Defendant's own witnesses testified that a "cover board" such as the one at issue was a "temporary repair" and placed over "rubbing boards" located at the platforms until repairs could be made. Plaintiff contends that the above evidence also established that the defect at issue was not trivial, and considering all circumstances, it could have constituted a trap.

As for the expert testimony and later summation, Plaintiff argues *inter alia*, that such testimony was stricken, a curative instruction was issued, and counsel did not move for a mistrial. Accordingly, he cannot now argue that the testimony was overly prejudicial. Further, the statements of Plaintiff's counsel during summation did not refer to any testimony of Mr. Pomeranz, but was rather based on the Plaintiff's own testimony as to how the accident happened, and the dimensions of the defect. His statements that the defect was painted-over was based on the photographic evidence that was submitted to the jury.

Plaintiff also argues that the verdict was fair and reasonable, and submits additional Appellate case law concerning similar injuries. Further, Plaintiff asserts that both of his treating physicians offered diagnosis of the injuries based on their own treatment as well as the Plaintiff's complaints and medical records. The evidence at trial demonstrated that as a result of this accident, Plaintiff sustained a torn meniscus and other injuries to the left knee, resulting in restricted motion and muscle spasms, requiring arthroscopic surgery. Plaintiff's experts opined that the injuries were permanent in nature and that a future total knee replacement was possible. Dr. Thomas also found, *inter alia*, that Plaintiff was suffering from sever back pain and lumbar radiculopathy as a result of the accident. He administered lumbar epidural steroid injections due to the pain, and causally related all injuries to this accident. Plaintiff contends that, considering the evidence submitted, the jury verdict for past and future pain and suffering was reasonable. Further, the award for \$535,000 for future medical expenses was based on the evidence, and the jury acted within its discretion in making the award.

Defendant reiterates its arguments as to notice, allegedly prejudicial conduct during summation, and the reasonableness of the damages award in a reply affirmation.

II. Standard of Review

Under CPLR 4404(a),

The court may set aside a jury 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.

For a court to decide that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial (*see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 [1978]; *Nicastro v. Park*, 113 A.D.2d 129, 132 (2<sup>nd</sup> Dept. 1985)). Any defect in the plaintiff's case can be cured by the evidence presented on the defendant's case in chief (*Id.*). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Stated another way, a jury verdict should not be set aside unless the evidence so preponderates in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence (*see Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 746 [1995]).

III. Applicable Law and Analysis

First, Plaintiff argues that the motion should be denied because it fails to include a complete copy of the trial transcript. The record, however, is sufficiently complete, and in any event, Plaintiff provided the court's instructions and jury charge in his opposition papers (*compare Gorbea v. Decohen*, 118 A.D.3d 548 [1<sup>st</sup> Dept. 2014]). Defendant's motion will therefore be decided on the merits.

*Notice*

Defendant argues that the verdict must be set aside, and judgment be entered in its favor, because the Plaintiff produced no evidence as to actual or constructive notice of the alleged defective condition.

A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk (*see Broderick v. RY Management Co., Inc.*, 71 A.D.3d 144 [1<sup>st</sup> Dept. 2009]; citing *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). In order to recover damages for an alleged breach of this duty, the plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Armstrong v. Ogden Allied Facility Mgt. Corp.*, 281 A.D.2d 317, 318 [1<sup>st</sup> Dept. 2001]). Constructive notice exists where the dangerous condition is visible and apparent and has existed for a sufficient length of time before the accident as to permit discovery and remedy by the landowner (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]).

In this matter, the jury could rationally conclude that the Defendant had constructive notice of the allegedly hazardous condition. Plaintiff described the defect as a yellow, broken piece of wood that was approximately 12-inches wide. His fall occurred when the front of his right foot “got stuck underneath that piece of wood.”

Plaintiff identified the defect when presented with photographs of the accident location. “[P]hotographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident, and if there is testimony that the condition at the time of the accident was similar to the condition shown in the photographs” (*DeGiacomo v. Westchester County Healthcare Corp.*, 295 A.D.2d 395 [2<sup>nd</sup> Dept. 2002], *see also Taylor v. New York City Tr. Auth.*, 48 N.Y.2d 903 [1979]). Here, upon further scrutiny of photographs allegedly depicting the hazardous condition, as identified by the Plaintiff at trial, the jury could rationally conclude that the defect came into existence over a period of time and thus Defendant had constructive notice of it (*see Simmons v. New York City Transit*

*Authority*, 110 A.D.3d 625 [1<sup>st</sup> Dept. 2013]; *Gonzalez v. New York City Tr. Auth.*, 87 A.D.3d 675 [2<sup>nd</sup> Dept. 2011]).

### *Triviality of the Defect*

Defendant also argues that the verdict must be set aside, and judgment be entered in its favor, because the alleged defect at issue was trivial in nature and not actionable.

Generally, the issue of whether a dangerous condition exists depends upon the particular facts of each case, and is properly a question of fact for the jury (*see Trincere v. County of Suffolk*, 90 N.Y.2d 976 [1997]). Still, a landowner may not be liable for “trivial” defects that do not constitute a “trap” or “nuisance” over which a pedestrian might “merely stumble, stub his or her toes, or trip” (*see Turuseta v. Wyassup-Laurel Glen Corp.*, 91 A.D.3d 632 [2<sup>nd</sup> Dept. 2012]). When determining the nature of a defect, there is no “minimum dimension test” for the defect to be actionable (*see Herrera v. City of New York*, 262 A.D.2d 120 [1<sup>st</sup> Dept. 1999]). Instead, courts must examine all factors, including the “width, depth, elevation, irregularity, and appearance” of the defect, as well as the time, place, and circumstance of the injury (*Turuseta v. Wyassup-Laurel Glen Corp.*, citing *Trincere v. County of Suffolk*, 90 N.Y.2d at 978). For example, while a shallow or gradual depression may be “trivial,” “the presence of an edge which poses a tripping hazard” may render the defect nontrivial and therefore actionable (*see Argenio v. Metropolitan Transp. Auth.*, 277 A.D.2d 165 [1<sup>st</sup> Dept. 2000]). Further, the location of the defect, such as in a heavily traveled pedestrian walkway, may render observation of the defect less likely (*Id.*).

In this case, after review of the photographs and relevant testimony, it cannot be said that there was “no rational process” by which the jury could find that this defect was non-trivial (*see* CPLR 4404[a]; *Nakasato v. 331 W. 51<sup>st</sup> Corp.*, 124 A.D.3d 522 [1<sup>st</sup> Dept. 2015]), or that such a result could not be reached by “any fair interpretation of the evidence” (*Id.*). The photographs depict a chipped/broken edge in the “yellow board.” Contrary to Defendant’s contentions, Plaintiff adequately described the alleged injury-producing condition. Plaintiff testified that the defect was approximately 12-inches wide, and he used his fingers to show the jury how deep he estimated the defect to be. The defect was also located on a subway platform where pedestrians

would routinely enter and exit the trains. Further, Plaintiff testified that after the incident, he saw that the front of his sneaker was “all black from where ... it got stuck underneath that piece of wood.” Under these circumstances, as a whole, the defect may have had the characteristics of a “trap” or “snare,” and therefore the jury verdict finding a dangerous condition will not be disturbed.

#### *Claims of Prejudice during Summation*

Defendant now argues that the testimony of Mr. Pomeranz was “inflammatory and prejudicial” and influenced the jury in arriving at their verdict, despite the fact that his testimony was later stricken and a curative instruction was provided. Defendant further contends that this error was “highlighted” by comments that Plaintiff’s counsel made during summation.

First, Defendant cannot now argue that the testimony of the expert was overly prejudicial and inflammatory, as the testimony was stricken from the record, the jury was directed to disregard it, and counsel at that time did not see fit to move for a mistrial (*see Duran v. Ardee Assoc.*, 290 A.D.2d 366 [1<sup>st</sup> Dept. 2002][internal citations omitted]). Further, Defendant has not shown that these circumstances constituted an error that was “so fundamental as to constitute a gross injustice” so as to warrant the relief sought (*Id.*, see also *Boyd v. Manhattan and Bronx Surface Transit Operating Authority*, 79 A.D.3d 412 [1<sup>st</sup> Dept. 2010]).

Next, contrary to Defendant’s contentions, the statements made by Plaintiff’s counsel during summation were based on evidence that was properly before the jury. Counsel’s statements that Plaintiff’s foot “got caught” in the defect reflected the Plaintiff’s own testimony that his foot “got stuck underneath” the plywood and caused his fall. While there was no direct testimony about the depth of the crack being “one inch,” Plaintiff demonstrated to the jury with his fingers how deep he estimated the defect to be, and counsel’s remarks constituted a fair comment on this evidence. There was, moreover, admissible evidence from Defendant’s own witness that plywood cover boards like the one at issue served as a temporary repair until the “rubbing boards” could be fixed. Counsel’s statements that the broken piece of wood was “painted over” did not serve to deprive the Defendant of a fair trial where, as noted *supra*, there was sufficient other evidence to raise an issue of fact as to constructive notice (*see, e.g., Jean-*

*Louis v. City of New York*, 86 A.D.3d 628 [2<sup>nd</sup> Dept. 2011]). Moreover, Defendant did not move for a mistrial or seek a further curative instruction after the allegedly prejudicial comments (*Duran v. Ardee Assoc.*, *supra*).

### *Damages*

Defendant argues that the awards of \$266,000 for past pain and suffering over approximately 7 years, and \$375,000 for future pain and suffering over the course of 15 years, must be reduced as they were excessive, and not based on evidentiary fact. Defendant cites testimony indicating that Plaintiff's doctors contradicted one another and they "could not state what was actually wrong with the plaintiff" or "what was causing his continued complaints of pain and suffering." Defendant further argues that the future medical expenses award of \$535,000 was not supported by the evidence.

Pursuant to CPLR 5501(c),

In reviewing a money judgment in an action in which an itemized verdict is required by rule forty one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered into a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Compensation has been deemed reasonable when it falls within boundaries of other awards that have been previously approved on appellate review (*Donlon v. City of New York*, 284 A.D.2d 13, 18, [1st Dept. 2001]). In *Donlon*, the Court held that an "analysis of appealed verdicts using CPLR 5501(c) is not optional but a legislative mandate." 284 A.D.2d at 16, 727 N.Y.S.2d at 97. Moreover, "[c]ase comparison cannot be expected to depend upon perfect factual identity. More often, analogous cases will be useful as benchmarks" (*Id.*). Further still, "a jury's assessment of damages in a personal injury case is entitled to great deference" (*Lohk v. Big V Supermarkets*, 86 N.Y.2d 744 [1995]). It has also been recognized 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” (see *Reed v. City of New York*, 304 A.D.2d 1 [1<sup>st</sup> Dept. 2003]).

Despite the allegedly contradictory expert testimony, the evidence adduced at trial, as noted in Defendant’s moving papers, established that Plaintiff’s initial arthroscopy had revealed a torn meniscus, and a tear to the femoral condyle. Plaintiff’s treating physician testified that he had swelling to the ankle and limited strength and range of motion in the knee. He noted during arthroscopic surgery that Plaintiff had synovitis and inflammation of the lining of the knee joint, along with area of bleeding, consistent with trauma. He opined that these injuries were causally related to this accident. Plaintiff had painful ambulation nearly five years later at a post-operative visit to Dr. Cohen. The doctor further noted at this evaluation that Plaintiff’s quadricep muscle was wasting and he was suffering from atrophy. Dr. Cohen opined that these injuries were permanent in nature and Plaintiff was partially disabled.

Moreover, Plaintiff testified that he was unable to work for seven months after the accident. He treated with a pain management specialist in connection to injuries to both the knee and the back, and underwent Orthovisc injections to the knee as well as epidural steroid injections. Dr. Cohen further opined that, after a March 2014 examination, Plaintiff may require another arthroscopy of the knee to see why it remained symptomatic. He also opined that, if an x-ray is performed and showed significant arthritis, Plaintiff may have an option of having a left total knee replacement. Contrary to Defendant’s arguments, this testimony was competent to establish “what was causing [Plaintiff]’s continued complaints of pain and suffering.”

Dr. Thomas, further, testified that he performed a physical examination of the Plaintiff and found, among other things, permanent lumbosacral radiculopathy. While it was later revealed that Dr. Thomas did not order an MRI or X-ray of the lumbar spine, that failure only impacted the weight of his testimony -- which the jury was free to credit or discredit ( *Davis v. Avis Rent A Car Systems, Inc.*, 225 A.D.2d 390 [1<sup>st</sup> Dept. 1996]; see also *Williams v. Parke*, 1 A.D.3d 240 [1<sup>st</sup> Dept. 2003]). The jury did not deviate from any “valid line of reasoning or permissible inferences” by finding that Plaintiff had established that he sustained certain injuries that were causally-related to this accident ( *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 [1978]).

When compared to similar awards upheld by the Appellate Division, moreover, it cannot be stated that the award of \$266,000 over a period of seven years for past pain and suffering, and \$375,000 over a period of 15 years for future pain and suffering, materially deviated from what would be reasonable compensation.

In *Frascarelli v. Port Authority of New York and New Jersey*, the Second Department upheld a past pain and suffered award of \$225,000, and reduced a future pain and suffering award to \$150,000, where the plaintiff sustained non-permanent bruises and a torn medial meniscus that was removed during arthroscopic surgery. The plaintiff's doctors opined that he could develop arthritis in the future due to the loss of the meniscus (269 A.D.2d 422 [2<sup>nd</sup> Dept. 2000]). In *Garcia v. Queens Surface Corp.*, the 28-year-old Plaintiff suffered a torn meniscus and underwent two surgeries to correct the condition. The plaintiff was disabled for eight months and ultimately required re-assignment with reduced duties. The First Department upheld an award of \$150,000 for past pain and suffering over the course of five years, and future pain and suffering of \$450,000 for 20 years (271 A.D.2d 277 [1<sup>st</sup> Dept. 2000]). In *Alvarado v. City of New York*, the 31-year-old Plaintiff sustained a fractured right patella requiring two surgeries. The First Department decreased the award of past pain and suffering to \$250,000, and future pain and suffering to \$150,000 (287 A.D.2d 296 [1<sup>st</sup> Dept. 2001]). More recently, in *Luna v. New York City Transit Authority*, the First Department determined that a jury verdict of \$500,000 for past pain and suffering over 3 ½ years constituted reasonable compensation. The 47-year old plaintiff in *Luna* sustained a torn meniscus to her right knee, underwent arthroscopic surgery, and was unable to work for three months, and underwent 12 extremely painful sessions of physical therapy. The preceding cases, involving similar injuries, resulting in past pain and suffering awards ranging from \$150,000 - \$500,000. The jury's award of \$266,000 over a period of seven years does not substantially deviate from these figures.

The jury's award for future pain and suffering of \$375,000, over a period of 15 years, is likewise within reason and not excessive. In *Smith v. Manhattan & Bronx Surface Tr. Operating Auth.*, the First Department affirmed an award of \$800,000 of future pain and suffering to a plaintiff who suffered "severe damage to her left knee, including tears of the medial and lateral menisci, a torn ligament, torn cartilage in various places, and damage to the patella, with

permanent osteochondral defect” (58 A.D.3d 552 [1<sup>st</sup> Dept. 2009]). The plaintiff had chronic pain and would perhaps require a total knee replacement. In *Calzado v. New York City Tr. Auth.*, the First Department upheld an award of \$700,000 for future pain and suffering over a projected 32-year period, where the plaintiff suffered a torn anterior cruciate ligament and a torn medial meniscus (304 A.D.2d 385 [1<sup>st</sup> Dept. 2003]). Recently, in *Reyes v. New York City Transit Auth.*, 126 A.D.3d 612 [1<sup>st</sup> Dept. 2015]), the First Department upheld a future pain and suffering award in the principal amount of \$750,000, where the plaintiff suffered damage to her left knee, including a laceration requiring 15 staples, a tear of the medial meniscus, and three bulging discs, requiring physical therapy and later arthroscopic surgery. Plaintiff’s treating physician also opined that she would eventually need a total knee replacement. *Luna v. New York City Transit Authority, supra*, involved a plaintiff who sustained a torn meniscus to her right knee, underwent arthroscopic surgery, and was unable to work for three months, and underwent 12 extremely painful sessions of physical therapy. Evidence was adduced at trial that the plaintiff sustained a permanent, partial disability, and it was “highly probable” that she would need a future total knee replacement. The Appellate Division determined that a jury verdict of \$500,000 for future pain and suffering, over a period of 34 years, was reasonable under those circumstances. In *Harris v. City of New York Health & Hospitals Corp.*, the First Department found that an award of \$250,000 in future pain and suffering over a period of 10 years was reasonable for a 76-year-old plaintiff who sustained tears of the menisci of both knees and twice underwent arthroscopic surgery on her left knee. She thereafter walked with a cane and evidence showed that she may have required a knee replacement in the future (49 A.D.3d 321 [1<sup>st</sup> Dept. 2008]).

Here, the evidence at trial revealed that this 53-year-old Plaintiff remained symptomatic years after the accident, is permanently partially disabled, and the attempted arthroscopic surgery of his knee had failed. Dr. Cohen had a reasonable basis for his opinion that Plaintiff may require a total knee replacement in the future, even in the absence of an x-ray, MRI, or diagnostic imaging of that body part. Dr. Cohen performed a recent physical examination of the Plaintiff, and considered many factors in arriving at his diagnosis, including Plaintiff’s continued range of motion restrictions and “noise” and “pain” in the knee, signifying crepitus. Dr. Cohen testified that his prognosis of the left knee was “poor.” Dr. Thomas also based his opinion of the

Plaintiff's condition not only upon his treatment history, but also upon his own physical examination. After examining the totality of the evidence, and comparing the jury's verdict to similar Appellate precedent, this Court finds that the awards of \$266,000 for past pain and suffering, and \$375,000 for future pain and suffering did not materially deviate from reasonable compensation.

Finally, the award of \$535,000 for future medical expenses, however, must be reduced. The evidence adduced at trial – specifically the testimony of Dr. Thomas – established that Plaintiff's anticipated future medical expenses would be \$315,250. The award for future medical expenses is therefore vacated, and a new trial is ordered on the issue of such damages unless Plaintiff stipulates in writing to the reduction of the award for future medical expenses from \$535,000 to \$315,250.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branch of Defendant's motion seeking to reduce the amount of the verdict awarded to Plaintiff for future medical expenses is granted, the award for future medical expenses is vacated, and a new trial is ordered on the issue of such damages unless Plaintiff stipulates in writing to the reduction of the award for future medical expenses from \$535,000 to \$315,250, and it is further,

ORDERED, that said stipulation shall be filed with the Court within thirty (30) days after the date of service of the judgment to be settled herein, with notice upon Defendant's counsel. If Plaintiff elects not to stipulate to same, then in such event, Plaintiff's counsel shall serve a copy of this Order with Notice of Entry on the Clerk of this Court, and a new trial shall be scheduled on the issue of future medical expenses, and it is further,

ORDERED, that the remaining branches of Defendant's motion are denied.

This constitutes the Decision and Order of this Court.

Dated: 7/29, 2015



Hon. Mary Ann Brigantti, J.S.C.