Brant v Prime Wines Corp.
2016 NY Slip Op 32794(U)
February 9, 2016
Supreme Court, Erie County
Docket Number: 2013/2767
Judge: Patrick H. NeMoyer

[* 1]

At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 8th day of FEBRUARY, 2016

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

BRENAN BRANT and
ANDREA BRANT,

Plaintiffs,

v.

PRIME WINES CORP.,

Defendant.

DECISION and ORDER

INDEX NO. 2013/2767

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ERIE COUNTY CLERK

APPEARANCES: RENE JUAREZ, ESQ., for Plaintiffs
MELISSA A. FOTI, ESQ., for Defendant

PAPERS CONSIDERED: the NOTICE OF MOTION of Plaintiffs and the supporting affirmation of Rene Juarez, Esq., with annexed exhibits;

the opposing ATTORNEY AFFIRMATION of Melissa A. Foti, Esq., with annexed exhibits; and

REPLY [Affirmation of Rene Juarez, Esq.] TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION, with annexed exhibits.

Plaintiffs commenced this action to recover damages for personal injuries sustained by Brenan Brant (hereinafter plaintiff, in the singular; the claim of Andrea Brant, otherwise referred to as plaintiff's wife, is derivative). The injuries were sustained as a result of an accident that occurred on May 16, 2012 at a building construction site. At the time of the accident, plaintiff was engaged with some co-workers in removing a large rooftop air conditioning unit from a flatbed delivery truck by use of forklift. During the maneuver, the weight of the unit caused the forklift to tip forward, in turn causing the unit to start to slide off the forks towards plaintiff. As plaintiff strained to hold the unit in place, or perhaps as he moved backwards to avoid being crushed by the unit as it slid towards him, plaintiff ruptured his right Achilles tendon. In addition to that injury, plaintiff also has claimed injuries to his right calf and his left ankle and knee, all

allegedly suffered as a result of the achilles tendon injury. Throughout the time of trial, plaintiff further claimed a consequential injury to his lower back but, judging by the content of his moving and reply papers, that claim of injury apparently has been abandoned by plaintiff.

The issue of plaintiff's damages was tried before a jury over six days in November 2015, following the Court's grant of partial summary judgment on liability to plaintiff under Labor Law § 240 (1) in January 2015. After hearing the testimony of fact witnesses and some sharply contested expert proof, the jury returned a verdict awarding the following: $60,000 for plaintiff's past lost wages; $5,000 for plaintiff's past medical expenses; $25,000 for plaintiff's past pain and suffering (all for the approximately 3½-year period from the date of the accident until the date of the jury verdict); $0 for plaintiff's future lost wages; $5,000 for plaintiff's future medical expenses (over a period of two years) and $25,000 for plaintiff's future pain and suffering (over his remaining life expectancy of 41 years). Further, the jury awarded plaintiff $20,000 to compensate him for the reasonable expenditures (for vocational retraining) made by him to mitigate or reduce his future lost wages. Finally, the jury denied plaintiff's wife any recovery on her derivative claim.

Now before the Court is a motion by plaintiff to set aside the verdict in its entirety an grant a new trial in the interest of justice, on account of defense counsel's allegedly improper and prejudicial implications that plaintiff's future medical costs would be paid by private health insurance. Alternatively, plaintiff seeks an order setting aside the jury's various monetary awards or non-awards as against the weight of the credible evidence and as other than fair and reasonable compensation. The motion is opposed in its entirety by defendant. On the basis of the parties' respective submissions, this Court renders the following determinations:

Pursuant to CPLR 4404 (a), the trial court may set aside a verdict as unsupported by the evidence or contrary to the weight of the evidence and may either direct that judgment be

entered in favor of a party entitled to judgment as a matter of law or grant a new trial of one or more issues. It is appropriate for the court to grant such relief, however, only where there is "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Nicastro v Park*, 113 AD2d 129, 132 [2d Dept 1985]), or where "the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*McLoughlin v Hamburg Cent. School Dist.*, 227 AD2d 951 [4th Dept 1996], *lv denied* 88 NY2d 813 [1996]; *see Wilson v Mary Imogene Bassett Hosp.*, 307 AD2d 748 [4th Dept 2003]; *Kuncio v Millard Fillmore Hosp.*, 117 AD2d 975, 976 [4th Dept 1986], *lv denied* 68 NY2d 608 [1986]; *see also Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). A "court should be guided by the rule that if the verdict is one which reasonable men could have rendered after receiving conflicting evidence, the court should not substitute its judgment in place of the verdict" (*Kuncio*, 117 AD2d at 976 [citations and internal quote marks omitted]; *see Petrovski v Fornes*, 125 AD2d 972 [4th Dept 1986], *lv denied* 69 NY2d 608 [1987]). In other words, the court must be careful not "to overstep its bounds and 'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to a usurpation of the jury's duty' " (*Nicastro,* 113 AD2d at 133 [citations omitted]).

A trial court further may set aside a monetary verdict on the ground that it is inadequate or excessive in amount to compensate the plaintiff for his or her injuries – in other words, on the ground that it deviates materially from what would be reasonable compensation (*see* CPLR 5501 [a] [5], [c]; *see also Inya v Ide Hyundai, Inc.,* 209 AD2d 1015 [4th Dept 1994]; *Prunty v YMCA of Lockport,* 206 AD2d 911, 912 [4th Dept 1994]). "With respect to pain and suffering, [t]he amount of damages to be awarded is primarily a question of fact for the jury [,] whose

determination is afforded considerable deference . . . [, and b]ecause personal injury awards, especially those for pain and suffering, are not subject to precise quantification . . . , [the courts] look at comparable cases to determine at what point an award deviates materially from what is considered reasonable compensation" (*Huff v Rodriguez*, 45 AD3d 1430, 1433 [4th Dept 2007] [internal quote marks omitted; some bracketed material in original, some supplied]).

Moreover, under CPLR 4404 (a), the court has the discretion to set aside the verdict and order a new trial in the interest of justice. However, the exercise of such discretion is warranted only where there occurred at trial some preserved legal error, such as one in an evidentiary or instructional ruling, that deprived a litigant of substantial justice in a manner that likely affected the verdict (*see Micallef v Miehle Co., Div. of Miehle-Goss Dexter,* 39 NY2d 376, 381 [1976]; *see also Rodriguez v City of New York,* 67 AD3d 884, 885 [2d Dept 2009]; *Stevens v Atwal,* 30 AD3d 993, 994 [4th Dept 2006]; *Butler v County of Chautauqua,* 277 AD2d 964, 964 [4th Dept 2000]). Alternatively, the Court may set aside the jury verdict in the case of a non-preserved matter that was "so fundamental that it preclude[d] consideration of the central issue upon which the action is founded" (*Breitung v Canzano,* 238 AD2d 901, 902 [4th Dept 1997]; *see Pawelek v Gleason,* 16 AD3d 1108 [4th Dept 2005]). However, "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" (*Pickering v New York City Tr. Auth.,* 299 AD2d 402, 403 [2d Dept 2002], quoting *Nicastro,* 113 AD2d at 133 [internal quotation marks omitted]). Applying the foregoing precepts, the Court proceeds to address the following issues raised by plaintiff:

PROPRIETY OF DEFENSE COUNSEL'S REFERENCE TO MEDICAL INSURANCE:

The Court agrees with defendant that plaintiff failed to preserve this issue as a matter of law inasmuch as he withdrew his evidentiary objection to defense counsel's questioning of Dr. Reiber, plaintiff's economist, concerning whether plaintiff's purchase of health insurance might

eliminate or reduce his out-of-pocket future medical costs. In any event, the test for setting aside the verdict based upon even a preserved legal error is whether the error was so fundamental as to deprive the litigant of substantial justice or a fair trial. Here, the Court cannot conclude that plaintiff was deprived of substantial justice by the references to health insurance.[1] The collateral source rule, CPLR 4545 (a), establishes the legal materiality of such evidence, at least for consideration by the Court, although the statute clearly contemplates a hearing on and a judicial resolution of the collateral source facts and legalities between the time of verdict and judgment. Plaintiff has not cited any case law declaring any and all references to health insurance to be prejudicial and hence inadmissible at trial. The Court notes that among the issues in the Fourth Department case of *Wooten v State of New York* (an appeal from a judgment rendered following a bench trial) was not whether such evidence was forbidden to be adduced at trial, but whether it was required to be (lest the collateral source issue be deemed waived by the defendant) (*see* 302 AD2d 70, 73 [2002]). The Court notes that the cases cited by plaintiff have to do only with the impropriety of introducing the existence of liability insurance into the case (*see Siegfried v Siegfried*, 123 AD2d 621, 622 [2nd Dept 1986]; *O'Connell v Consolo*, 32 AD2d 820 [2nd Dept 1969]).

THE ADEQUACY OF THE JURY'S AWARDS FOR:

Past lost wages:

Plaintiff contends that the Court should set aside the verdict and grant a new trial on this

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[1]The Court rejects plaintiff's attempts, especially via references to the unrecorded statements of jurors, to impeach the verdict (*see Phelinger v Krawczyk*, 37 AD3d 1153, 1153-1154 [4th Dept 2007]; *Pawlaczyk v Jones*, 26 AD3d 822, 823 [4th Dept 2006], *lv denied* 7 NY3d 701 [2006]; *Lopez v Kenmore-Tonawanda School Dist.*, 275 AD2d 894, 897 [4th Dept 2000]), which is not shown to have been the product of juror misconduct or improper outside influence (*see Alford v Sventek*, 53 NY2d 743, 744-745 [1981]; *Hutchinson v Clare Rose of Nassau, Inc.*, 40 AD3d 702, 704 [2d Dept 2007]; *Phelinger*, 37 AD3d at 1153-1154; *Edbauer v Board of Educ. of N. Tonawanda City School Dist.* [Appeal No. 3], 286 AD2d 999, 1000 [4th Dept 2001]; *Lopez*, 275 AD2d at 897).

element of damages unless defendant stipulates to an award of at least $121,543. The Court concludes that the jury's award was not against the weight of the evidence. The Court notes the proof in the trial record that plaintiff had been cleared by Dr. Mason, the orthopedic surgeon who treated plaintiff for his right achilles and left knee injuries, to return to work as of December 6, 2012, within seven months after the accident. Although there is proof in the record that plaintiff did not work for the remainder of 2012 and all of 2013, and worked somewhat less in 2014 and 2015 than he had been accustomed to working in some (but by no means all) years before the accident, there is ample proof in the record that such lack of work has been attributable to economic factors and not to plaintiff's accident and any ongoing injuries caused thereby. The Court notes that the sum awarded by the jury, $60,000, appears to have substantially exceeded the undisputed amount of plaintiff's lost income and benefits between May 16 and December 6, 2012.

Past medical expenses:

Plaintiff contends that the jury's award of $5,000 for past medical expenses should be set aside unless defendants stipulates to an award of $10,391. The Court agrees with the defense that the only dollars-and-cents proof concerning past medical expenses had to do with the cost of a certain customized prescription pain cream at $2,022 per fill. The Court further agrees with defendant that the evidence is susceptible of an interpretation that plaintiff filled the prescription only twice. The Court agrees with defendant that, inasmuch as the jury's award actually exceeds the cost of those prescriptions, the award is not against the weight of the evidence.

Past pain and suffering:

The Court notes that plaintiff cites no case law definitively holding that $25,000 for 3½ years of pre-verdict pain and suffering is inadequate as a matter of law to compensate the 37-

year-old plaintiff for a non-surgical tear of his achilles tendon and its sequelae. The Court notes the ample proof that the injuries to plaintiff's left knee were largely attributable to a 20-year-old ACL tear and surgery. The Court further notes the proof showing that plaintiff was reporting no residual pain from his achilles tear within about one month of the accident. Although the Court has no wish to minimize plaintiff's pain and disability in the weeks following the accident, the Court sees no legal or evidentiary basis for an upward adjustment of the jury's award for past pain and suffering, certainly not to the $200,000-450,000 level advocated by plaintiff.

Future medical expenses:

The Court likewise rejects plaintiff's contention that the jury's award for plaintiff's future medical expenses ($5,000) is inadequate to the extent that it does not equal or exceed $54,198.00. Clearly, in awarding future medical expenses and future pain and suffering, the jury found, in accordance with the defense medical evidence, that plaintiff had a slight residual debility as a consequence of his right achilles tear and the resultant atrophy of his right leg. Just as clearly, the jury credited the economist's testimony that plaintiff would incur certain costs of future medical treatment, including orthopedic visits, x-rays, and physical therapy. Nevertheless, the jury probably had an experiential basis for rejecting the notion that plaintiff actually would see an orthopedist every three years for the rest of his life and would, on such occasions, actually undergo 13 separate x-rays of his heel. Moreover, the jury had an evidentiary basis -- namely the expert opinion that the knee injury was mostly the result of a pre-existing condition and surgery and to that extent not related to the accident -- for rejecting plaintiff's claims with regard to the cost of future medical treatment of his left knee.

Future pain and suffering:

In challenging the jury's award of $25,000 for future pain and suffering, plaintiff points out that the award amounts to $609.76 in compensation for each year of plaintiff's remaining life

expectancy. That may be, but the Court nevertheless sees no basis for concluding that the award is against the weight of the evidence. The Court notes the defense medical opinion to the effect that plaintiff was free of pain in his ankle within a few months of the achilles tear, and that the tear healed itself non-surgically, with but a slight residual atrophy of the muscle in plaintiff's right calf. Moreover, according to the defense medical expert, plaintiff had but mild tenderness but no ongoing limitation in his right ankle and was in need of no further medical treatment for his right achilles injury apart from some calf strengthening exercises that he could do on his own. The Court further notes the medical opinion adduced by the defense, including on cross examination of plaintiff's orthopedist, to the effect that the left knee pain may have represented an aggravation of a pre-existing injury to his left knee, but that it and any permanency was largely attributable to that pre-existing injury and surgery, and to degenerative processes, and not to the subject accident. The defense medical expert opined that plaintiff evinced no limitation in the movement, stability, and strength in his left knee when examined before trial. The Court sees no basis for plaintiff's assertion that the award for future pain and suffering is inadequate to the extent that it does not amount to $125,000-$200,000.

Plaintiff's costs of mitigation:

At trial, plaintiff sought, as an element of damages, the expenses borne by him in an effort to mitigate his lost wages, especially his future lost wages. The expense in question consisted of plaintiff's tuition cost at ITT Technical Institute, which he attended in an effort to obtain training and certification in the repair of medical equipment, believing at the time he could pursue that as a career in lieu of his current occupation as a carpenter, which he feared he might be prevented from engaging in at some future time on account of his claimed injuries. It is to be noted that plaintiff was still working in construction at the time of trial. It is further to be noted that his economist's projections of his future lost income assumed that plaintiff would

continue to work as a carpenter for the remainder of his work life, although the economist assumed, just as plaintiff had, that he might be somewhat curtailed in doing so as he got older. It is still further to be noted that the jury awarded plaintiff nothing for future lost wages, an aspect of the verdict that remains unchallenged on this motion.

Plaintiff nevertheless contends that the jury verdict was contrary to the weight of the evidence insofar as it warded him $20,000 for the cost of such mitigation, not the $41,000 testified to by plaintiff or the $23,500 now sought by him. The Court agrees with defendant, however, that the testimony is susceptible of the view that plaintiff's out-of-pocket tuition expense was $18,735.38. Therefore, the Court concludes, the jury's award of $20,000 cannot be set aside as contrary to the weight of the credible evidence.

The derivative claim:

If there ever was a time when the law of the Fourth Department was that the jury's denial of any recovery to the injured plaintiff's spouse had to be set aside as against the weight of the evidence whenever the jury had granted a recovery to the injured plaintiff (*see e.g. O'Rourke v Berner*, 249 AD2d 975 [4th 1998]), that is clearly not now the law (*see Wolf v Persaud*, 130 AD3d 1523, 1526 [4th Dept 2015]; *Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1188 [4th Dept 2008]). The Court notes here that the testimony regarding the wife's alleged loss of plaintiff's society, companionship, and services was contested here, as was the credibility of plaintiff and his wife. After hearing the pertinent testimony, the Court cannot conclude that the jury failed to give it the weight that it should be accorded and that the failure to award for damages for the wife's loss of consortium was against the weight of the evidence (see *Lahren*, 49 AD3d at 1188).

Accordingly, the motion of plaintiffs to set aside the verdict is DENIED.

SO ORDERED:
GRANTED

FEB 09 2016

BY
KEVIN J. O'CONNOR
COURT CLERK

HON. PATRICK H. NeMOYER, J.S.C.