Dacaj v New York City Tr. Auth.
2017 NY Slip Op 30650(U)
April 6, 2017
Supreme Court, New York County
Docket Number: 151523/12
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ, *Justice* **PART 13**

LUSH DACAJ,
Plaintiff,

- Against -

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY,
Defendants.

INDEX NO 151523 /12

MOTION DATE 03-31-2017

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to set aside the verdict.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5-6

Cross-Motion: Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers it is ordered that this motion by defendant for an order pursuant to CPLR § 4404 (a) setting aside the jury's verdict and pursuant to CPLR § 4545(a) for a collateral source hearing is granted solely to the extent of granting a collateral source hearing, the remainder of the motion is denied.

After a jury trial in which a verdict was returned in favor of plaintiff and against the defendant, the Defendant moves to set aside the verdict and for a new trial. The Defendant alleges that the verdict was against the weight of the evidence and excessive. Defendant also alleges that the court erred in admitting the video taken by plaintiff's expert William Marletta, of the stairs where the accident took place ; in charging the jury on actual and /or constructive notice, and in giving a missing witness charge without explaining to the jury the reason for the witnesses not appearing at the trial. These errors, they argue, compel setting aside the verdict and granting a new trial.

The Defendant alleges that the verdict was excessive requiring that the verdict on damages be set aside and a new trial granted. The defendant requests that in the event its motion is denied the court set the matter down for a collateral source hearing, because there is evidence that the plaintiff collected Social Security and disability insurance payments, and that his expenses were paid by Medicare and a private insurer.

Plaintiff opposes the motion and argues that the verdict is not against the weight of the evidence nor excessive because the court did not err in its evidentiary rulings or in its charge to the jury. Plaintiff further argues that the amounts of damages awarded by the jury for past and future pain and suffering, past and future lost earnings, and

past and future medical expenses was adequate and supported by the evidence. Finally, plaintiff argues that defendant failed to tender any competent evidence that his economic losses were, or will be, replaced or indemnified from collateral sources, and that Medicare is not a collateral source.

At trial plaintiff testified that on the date of the accident he was a 69 year old cleaner employed at SL Greene for 15 years. He alleges that as he was coming to work on November 11, 2011 he was caused to trip and fall on the third step from the top, while descending the stairs leading to the subway station at 47th Street and 6th Avenue. During his fall he struck various parts of his body- including his back, neck and the back of his head- and lost consciousness. When he regained consciousness he was at the bottom of the stairs and was experiencing pain to his back, neck, and the back of his right shoulder. He was taken by EMS to the hospital where a CT- Scan of his body was done. His neck was placed in a brace, he was given medication for the pain and sent home.

After his treatment at the Hospital's emergency he treated with Dr. Lattuga who ordered X-rays and MRI's of the affected areas. These studies revealed that plaintiff had cervical laminal fractures, bulges and Herniations, requiring surgery. Two surgeries were performed on his neck (open reduction internal fixation) on December 13 and 14, 2011. Plaintiff was hospitalized for these surgeries approximately 12 days (from December 12-24, 2011), spent 3 days in the Intensive Care Unit (ICU), was intubated and experienced a lot of pain, requiring the administration of Morphine to relieve the pain. After his discharge from the hospital he was required to take medication for the pain and to attend physical therapy sessions.

Plaintiff testified that at the time of trial he was still in great pain and had physical limitations due to the pain and the hardware in his neck. He stated that he intended to work to age 79 in order to receive a pension of 25 years on the job, but had to retire early due to the pain. He stated how much he earned per hour and per year from 2008 through 2010.

Plaintiff presented Dr. Sebastian Lattuga, his treating doctor and surgeon who stated that plaintiff sustained facet jumps and two laminal fractures to his cervical spine, which were recent, evidencing that they were caused by the accident. Dr. Lattuga stated that he performed anterior and posterior fusion of the cervical spine by placing 12 screws which are still in place in Plaintiff's spine. He stated that as a result of the accident of November 11, 2011 plaintiff sustained a C5/C6 fractured lamina and C4/C5 disc herniation. In his opinion plaintiff will get worse over time, may require additional surgery and will require visits to the orthopedist, MRI's, EMG's, pain medication, Epidural Injections, and physical therapy. Dr. Lattuga stated that plaintiff had an outstanding medical bill with his office of $155,000 dollars, for which he had a lien on any future recovery. This bill was not inclusive of any hospital charges plaintiff may have incurred.

Plaintiff presented Dr. Debra Dwyer, an economist, who calculated the future cost of plaintiff's medical care, and Dr. William Marletta, a safety consultant, who opined that the stair was defective and that, more specifically, the pitch or slope of the 3rd step was dangerous, hazardous, had an effect on plaintiff's ability to negotiate the step properly and contributed to plaintiff slipping and falling. He opined that the accident was caused by the non-uniformity of the steps, risers, treads, excessive slope

and the dangerous condition of the metal plate.

Finally plaintiff presented Elir Dacaj, plaintiff's grandson, who spoke of plaintiff's physical activities and mood before the accident and his inability to do the same physical activities after the accident.

The defendant cross-examined the witnesses presented by the plaintiff and presented its own witnesses. Dr. Jean Robert Desrouleaux, M.D., a Board Certified Neurologist, after laying the foundation for his opinion, opined that plaintiff's condition is degenerative and pre-existed the accident of November 11, 2011. Defendant also presented Mr. Vincent Moschello, its employee who testified about the good condition of the stairs and repairs made to it in order to keep it in good condition. Dr. Norman Marcus, P.E., discussed his inspection of the stairs, the records of repair, the photos and video taken by Dr. Marletta and opined that the stair, steps and handrails were not defective, and that the movement on the stair's plate as depicted in Dr. Marletta's video would have no effect on a person stepping properly on it.

Defendant did not produce an Orthopedic expert, nor a Radiologist after giving notice that they would be presenting these witnesses. Plaintiff notified defendant that he would be requesting a missing witness charge. At the end of the defendant's case plaintiff made a motion for a missing witness charge on these two doctors. Defendant opposed the motion on the ground that their testimony would be cumulative and that the witnesses were not under its control. To avoid the charge defendant had the burden to demonstrate their lack of control over these expert witnesses or that their testimony would be cumulative (see People v. Macana, 84 N.Y.2d 173, 615 N.Y.S.2d 656, 639 N.E.2d 13 [1994]; People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796, 502 N.E.2d 583 [1986]; Easley v. New York, 189 A.D.2d 599, 592 N.Y.S.2dd 690 [1st. Dept. 1993]; Trainor v. Oasis Roller World, Inc., 151 A.D.2d 323, 543 N.Y.S.2d 61 [1st. Dept. 1989]). Defendant failed to meet their burden to prevent the giving of this charge and the court properly gave a missing witness charge (see Grun v. Sportsman, Inc., 58 A.D.2d 802, 396 N.Y.S.2d 250 [2nd. Dept. 1977]).

The jury returned a verdict finding the defendant to be 86% at fault and plaintiff 14% at fault for the accident, and awarded plaintiff $3,295,582 as follows:
$350,000 Past Medical Expenses;
$240,000 Past Lost Earnings;
$1,200,000 Past pain and suffering;
$255,582 Future Medical expenses over 10 years;
$250,000 future loss earnings over 5.5 years;
$1,000,000 Future pain and suffering over 10 years.

Defendant now moves to set this verdict aside and for a collateral source hearing. Plaintiff opposes the motion and argues that the verdict should remain in tact because it is not against the weight of the evidence and defendant have not demonstrated an entitlement to a collateral source hearing.

CPLR §4404(a) provides that after a jury trial, the court may, upon the motion of a party or on its own initiative, set aside the verdict and "direct that judgment be entered in favor of a party entitled to judgment as a matter of law or ... order a new

trial of a cause of action.... where the verdict is against the weight of the evidence."

A jury verdict will be vacated only if the court finds the verdict could not be reached on any fair interpretation of the evidence. For a court to conclude 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 conclusions reached by the jury on the basis of evidence presented at trial (see Nicastro v. Park, 113 A.D. 2d 129, 495 N.Y.S. 2d 194; Cohen v. Hallmark Cards, 45 N.Y. 2d 493, 410 N.Y.S. 2d 282, 382 N.E. 2d 1145); Adamy v. Ziriakus, 92 N.Y. 2d 396 [1998]; Lolik v. Big v. Supermarkets, 86 N.Y.2d 744 [1995]). The jury's decision in finding for the plaintiff, on the basis of its fair interpretation of the evidence presented, is not irrational.

POINTS I AND II PAST AND FUTURE PAIN AND SUFFERING

"The amount of damages awarded 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 A.D. 3d 485,901 N.Y.S. 2d 839 [1st. Dept. 2010]). In setting aside a jury award of damages as inadequate or excessive the court must find that such award deviates materially from what would be reasonable compensation (Harvey v. Mazal American Partners, 79 N.Y. 2d 218, 581 N.Y.S. 2d 639 [1992]; CPLR § 5501[C]). Prior damages awards in cases involving similar injuries are not binding upon the courts but serve to guide and enlighten them in determining whether a verdict constitutes reasonable compensation (Kusulas v. Saco, 134 A.D.3d 772, 21 N.Y.S.3d 325 [2nd. Dept. 2015]; Taveras v. Vega, 119 A.D.3d 853, 989 N.Y.S.2d 362 [2nd. Dept. 2014]).

Courts have found as adequate and not a material deviation from reasonable compensation an award of $1,000,000 for future pain and suffering to a pedestrian who sustained multiple injuries including a fractured spine, cervical sprain, tear of his rotator cuff and nerve damage (see Stanisich v. New York City Transit, 73 A.D.3d 737, 900 N.Y.S.2d 422 [2nd. Dept. 2010]). An award of $1,200,000 for past pain and suffering to a worker who sustained injury to his spine requiring discectomy and fusion surgery (Williams v. City of New York, 105 A.D.3d 667, 964 N.Y.S.2d 134 [1st. Dept. 2013]). An award of $4,700,000 for past and future pain and suffering to a plaintiff who sustained contusion of cervical spine and compression fracture of thoracic spine (see Stewart v. New York City Transit Authority, 82 A.D.3d 438, 918 N.Y.S.2d 81 [1st. Dept. 2011]). An award of $1,000,000 for past pain and suffering and $1,452,000 for future pain and suffering to worker who had spinal fusion, suffered significant limitations of mobility, continual pain and may require additional surgery (Sanango v. 200 East 16th street housing Corp., 15 A.D.3d 36, 788 N.Y.S.2d 314 [1st. Dept. 2004]). An award of $1,000,000 for past pain and suffering and $1,000,000 for future pain and suffering to a plaintiff who suffered herniated disc requiring spinal fusion surgery and may require future surgery and medical treatment, including physical therapy for the rest of her life (Kusulas v. Saco, 134 A.D.3d 772, 21 N.Y.S.3d 325 [2nd. Dept. 2015]). An aggregate award of

$2,000,000 for past and future pain and suffering to plaintiff who sustained a herniated disc requiring surgery, will continue to experience significant pain and require future surgery and medical treatment, including pain management and physical therapy, for the rest of his life.. Moreover, is no longer able to work in any significant capacity and could no longer engage in activities which he had previously enjoyed (Kayes v. Liberati, 104 A.D.3d 739, 960 N.Y.S.2d 499 [2nd. Dept. 2013]).

Plaintiff sustained two Cervical Laminal fractures and disc herniation. He had two surgeries to fuse his spine, has plates and screws holding his spine in place, was admitted to the hospital for twelve (12) days, has experienced and is still experiencing great pain requiring strong pain medication, will require future surgery and will continue to experience pain, will require injections, physical therapy and diagnostic studies in the future. The amounts awarded by the jury given plaintiff's physical condition and limitations is supported by the testimony, was not excessive or against the weight of the evidence.

POINT III FUTURE MEDICAL COSTS

The jury award $255,582 for future medical costs. This award is supported by the testimony of Dr. Lattuga and Dr. Dwyer and the chart in evidence as plaintiff's 28. The chart projected that plaintiff will have future medical expenses, inclusive of an additional Cervical fusion, in the sum of $365,068 dollars. The jury reduced that amount by the amount it would cost to have the additional fusion surgery ($109,486) and awarded $255,582. This is the amount the jury believed plaintiff would incur for future medical visits, X-rays, MRI's, EMG's, injections, pain medications and Physical Therapy. The jury could properly reach this verdict on a fair interpretation of the evidence submitted to it.

POINTS IV AND V PAST AND FUTURE LOSS EARNINGS

The jury award of $240,000 for past lost earnings and $250,000 for Future Lost earnings was rational based on plaintiff's testimony regarding his earnings, the number of hours he worked per week and the amount he earned per hour. The finding that he lost $240,000 in earnings from the date of the accident to the date of the verdict and the jury's finding that if it had not been for the accident he would have worked for an additional 5.5 years from the date of the verdict, according to his testimony, render those figures rational and supported by the evidence presented at trial. The jury properly awarded these amounts on a fair interpretation of the evidence presented to it.

POINT VI ACTUAL/CONSTRUCTIVE NOTICE

The charge as given was proper as the plaintiff's Verified Bill of Particulars paragraph number 6 where it states..." which time defendants had said actual and constructive notice of the aforesaid condition and failed to provide proper means for fixing and/or removal of the condition...." placed defendant on notice that

plaintiff would claim Notice as a theory . Actual and Constructive Notice were pled in plaintiff's Verified Bill of Particulars. Defendant cannot say that "Notice" was a new theory raised by plaintiff at the time of trial, as it was pled in plaintiff's Verified Bill of Particulars.

POINT VII MISSING WITNESS

The court properly gave a missing witness charge and there was no valid explanation that could have been given to the jury as none was proffered. A missing witness charge is appropriate where a party has the physical ability to locate and produce a witness and where there is a legal or factual relationship between the party and the witness which makes it natural to expect the party to have called the witness to testify in his favor. The defendant had the burden to prove their lack of control over their witnesses Dr. Nasen and Dr. Katzman (Orthopedist and Neurologist) and that their testimony was cumulative, to avoid a missing witness charge (see Dukes v. Rotem, 191 A.D.2d 35, 599, N.Y.S.2d 915 [1st. Dept. 1993]). These doctors were in a position to give substantial, non-cumulative testimony with respect to plaintiff's injuries and prognosis. Defendant was on notice that a missing witness charge would be given if these witnesses were not presented. It failed to present the witnesses and the charge was properly given.

POINT VIII ADMISSION OF DR. MARLETTA'S VIDEO

The court properly admitted the videotape made by Dr. Marletta when he inspected the stair. This video was made not long after plaintiff's accident, was timely disclosed to the defendant, was not unduly prejudicial, and illustrated Dr. Marletta's testimony regarding the condition of the stairs at the time of the accident. Plaintiff laid the proper foundation for the admission of the video (People v. Orlando, 61 A.D.3d 1001, 878 N.Y.S.2d 185 [2nd. Dept. 2009]; people v. Junior, 119 A.D.3d 1228, 990 N.Y.S.2d 689 [3rd. Dept. 2014]), and defendant's expert witness commented extensively on the video at the trial. Furthermore, defendant failed to show that it was prejudiced by any delay in plaintiff's production of the video (People v. Haggerty, 48 A.D.3d 480, 851 N.Y.S.2d 626 [2nd. Dept. 2008]).

POINT IX COLLATERAL SOURCE HEARING

A motion for a collateral source hearing is timely if served before judgment is entered (See Firmes v. Chase Manhattan Automotive Finance Corp., 50 A.D.3d 18, 852 N.Y.S.2d 148 [2nd. Dept. 2008]). Judgment has not been entered, The Defendant has asserted a collateral source affirmative defense in its answer and the defendant has tendered some competent evidence that plaintiff has been or might be indemnified by a collateral source (Turuseta v. Wyasupp-Lauren Glen Corp. 91 A.D.3d 635, 937 N.Y.S.2d 76 [2nd. Dept. 2012]; Nunez v. City of New York, 85 A.D.3d 885, 926 N.Y.S.2d 113 [2nd. Dept. 2011]). As such defendant is entitled to a collateral source hearing on his medical expenses.

The Jury verdict is supported by legally sufficient and at times uncontroverted evidence and could have been reached on a fair interpretation of all the evidence submitted to the jury. The jury's award on damages is in accord with the medical and economic evidence presented by Plaintiff's experts. The Economic loss evidence was unrefuted by the Defendant who did not present testimony from an economist.

The jury weighed the evidence presented to determine liability and damages. There is no basis on this record for disturbing the jury's determination regarding the weight to be accorded the evidence presented to it, more specifically the unrefuted expert evidence. The jury's verdict could have been reached on a fair interpretation of the evidence presented and its award for past and future pain and suffering and for economic losses does not materially deviate form what would be considered adequate compensation.

Accordingly, for the foregoing stated reasons Defendant's motion, except the motion for a collateral source, is denied.

Accordingly, it is ORDERED that the motion by the Defendant to set aside the verdict as against the weight of the evidence and excessive is denied, and it is further

ORDERED that the motion for a collateral source hearing is granted, and it is further

ORDERED that the parties are to appear at 71 Thomas Street, Room 210, on April 25, 2017 at 9:30 A.M. for a conference to select a date for collateral source hearing.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: April 6, 2017

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE