

Steinbok v City of New York

2019 NY Slip Op 30082(U)

January 7, 2019

Supreme Court, New York County

Docket Number: 153737/2013

Judge: Verna Saunders

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 5

Justice

-----X INDEX NO. 153737/2013

ELAINE D. STEINBOK, Plaintiff, MOTION SEQ. NO. 007

- v -

CITY OF NEW YORK, DAVID MELLADO, NEW YORK CITY PARKS & RECREATION, ALAR HACKING CORP., RAHIMI ZAFARI, RENATA HACKING CORP. and LILI ARUTYUNOV,

DECISION AND ORDER

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 007) 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 176, 177

were read on this motion to/for SET ASIDE VERDICT.

This action arose from a motor vehicle accident which occurred on August 15, 2012 when a taxi, in which plaintiff was a backseat passenger, while making a left turn collided with a New York City Parks & Recreation ("Parks") vehicle.

Plaintiff moves the court by post-trial motion pursuant to CPLR § 4404 seeking to set aside the jury verdict, which awarded plaintiff \$500.00, and set a new trial on the ground that the verdict is contrary to the weight of the evidence.

Defendants, The City of New York, David Mellado, and New York City Parks & Recreation ("City") partially oppose the motion on the ground that the jury reached the verdict based on a fair interpretation of the evidence and argues that if the court permits a new trial, said trial should be on damages only.

Defendants, Alar Hacking Corp. and Rahimi Zafari ("Taxi") oppose the motion and cross-move pursuant to CPLR § 4404(a) seeking to set aside the verdict awarding plaintiff \$500.00 for past medical expenses as it had no legal effect and did not impact upon an otherwise consistent verdict which found that plaintiff did not sustain a serious injury. Co-defendant City supports Taxi's cross-motion. Plaintiff opposes the cross-motion.

CPLR § 4404(a) permits a trial court to 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 can order a new trial 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 a reasonable time as determined

by the court. (CPLR § 4404[a]). However, a jury's verdict should not be lightly overturned, and the plaintiff has a heavy burden of demonstrating that the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the law. (*Pavlou v City of NY*, 21 AD3d 74 [1st Dept 2005] citing, *Lolik v Big V Supermarkets*, 86 NY2d 744 [1995].)

For a court to determine that as a matter of law a jury verdict is not supported by sufficient evidence, the court must find that based on the evidence presented at trial, "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978].) It requires the court to view the evidence in the light most favorable to the prevailing party, for the movant to assume the facts testified to by the prevailing party's witnesses to be true, and to grant all favorable inferences flowing from the evidence to the prevailing party. (See *S. Kornblum Metals Co. v Intsel Corp.*, 38 NY2d 376 [1976].) Judgment notwithstanding the verdict is not appropriate where issues of credibility are involved as matters of credibility and the weight to be accorded the testimony are within the province of the jury. (*Bodlovich v Carucci*, 38 AD2d 699, 700 [1st Dept 1972].)

When alleging that the court erred in its jury instructions, a movant's failure to object, take exception or propose contrary requests to charge fails to preserve the claimed error, requires the law as stated in that charge to become the law applicable to the determination of the rights of the parties in the case and establishes the legal standard by which the sufficiency of the evidence to support the verdict must be judged. (*Harris v Armstrong*, 64 NY2d 700, 702 [1984] [internal citation omitted].) However, in the absence of a timely objection, a court may review an issue in the interests of justice where the error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded. (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 563 [1st Dept 2009] [internal citations and quotations omitted]; *Horney v Tisyl Taxi Corp.*, 93 AD2d 291 [1st Dept 1983].)

Trial

A jury trial in this matter was conducted from April 23, 2018 to April 30, 2018, at the conclusion of which the jury found that defendant Taxi was negligent, but that plaintiff did not suffer a "serious injury" as defined by Insurance Law § 5102(d) yet, awarded plaintiff \$500.00 for medical expenses incurred. While none of plaintiff's treating physicians testified at trial, the plaintiff did call Dr. Kenneth McCulloch, an expert orthopedist. The following expert medical witnesses were called by defendant Taxi: Dr. Rikki Lane (emergency medicine expert); Dr. Audrey Eisenstadt (expert radiologist); and Dr. Edward A. Toriello (expert orthopedic surgeon). Additional witnesses included the plaintiff; David Mellado (defendant Park's driver called by plaintiff); Captain Nicholas Healey of

the NYC Taxi and Limousine Commission (Taxi's witness); and Police Officer Christopher Konecni (defendant City's witness).

Plaintiff testified in sum and substance that on August 15, 2012, while a rear seat passenger, the taxi she was riding in collided with a vehicle causing her left knee and left shoulder to hit the partition. She testified that her head and the left side of her jaw also hit the partition. Plaintiff was seated on the driver's side of the vehicle. After the accident, she was transported to St. Luke's Hospital where she was advised that she suffered a concussion. Plaintiff was discharged a few hours later and directed to follow-up with her doctor.

Plaintiff testified that she had trouble standing and walking which caused her to visit her primary care physician, Dr. Alicia Miller who advised her to see specialists for her injuries. Accordingly, plaintiff visited Dr. Goldenberg, a pain management specialist, who referred her to Dr. Roth, an orthopedist, who recommended shoulder surgery. Plaintiff sought a second opinion from, Dr. Answorth Allen who also recommended shoulder surgery. Dr. Allen performed the surgery on October 17, 2012 and then referred plaintiff for pain management and physical therapy. Plaintiff asserts that she wore a sling for four weeks after the surgery.

Thereafter, plaintiff was seen by Dr. Delman who prescribed physical therapy for her knee, back and neck and referred her to Dr. Hosny for pain management. Dr. Hosny administered nine trigger point injections in plaintiff's neck and back and referred her to Dr. Gupta. Dr. Gupta advised plaintiff to continue physical therapy, which plaintiff testified helped her regain mobility in her left arm. Plaintiff testified that she discontinued physical therapy in April 2013.

Plaintiff further testified that in August 2013 she saw a neuro-cognitive specialist, Dr. Brown who referred her to neurologist Dr. Hauseknecht due to her complaints of confusion, memory problem, headaches and tingling in her arms and legs. Dr. Hauseknecht prescribed plaintiff a muscle relaxant.

In 2018, plaintiff was examined by orthopedist, Dr. Kenneth McCulloch in preparation for trial. Plaintiff testified that overall, she missed approximately nine months of work and that she continues to feel some discomfort, tingling and pain, and experiences "cloudiness."

Plaintiff further testified that she met her husband in December 2012 and vacationed with him in Puerto Rico in 2013 where she participated in tours and hiking. In 2015, she and her husband honeymooned St. Lucia and vacationed in Jamaica and Israel during which plaintiff participated in activities such as scuba diving.

Dr. McCulloch testified that he examined plaintiff on February 7, 2018, reviewed a portion of plaintiff's medical records, and prepared a report. He opined that the accident caused a tear in plaintiff's posterior labrum, an injury to her superior labrum, and a partial rotator cuff tear. He further opined that plaintiff may have meniscal pathology of the knee which would require surgery. Dr. McCulloch also testified that a review of Dr. Allen's post-operative records indicated that plaintiff had full range of motion in her left shoulder and that she later hurt her shoulder "in bed" to which Dr. McCulloch testified that it would be difficult to determine whether her current limitations were related to the accident or a new injury. As to plaintiff's left knee, Dr. McCulloch testified that Dr. Allen's report indicated that plaintiff possessed full range of motion.

Dr. Rikki Lane, an emergency medical expert, testified in sum and substance that plaintiff's alleged injuries were not caused by the accident. Specifically, pursuant to the St. Luke's emergency rooms records, plaintiff arrived alert, oriented and complained of left body aches, mild headache, and left arm and jaw pain. Dr. Lane explained that plaintiff's pain level was not commensurate with someone who had suffered a superior labral tear as such patient would complain of pain, decreased mobility, swelling and bruising. Dr. Lane opined that based upon the report, there was no indication of such. Dr. Lane further testified that plaintiff was not provided with an ace bandage or crutches and was discharged with having a concussion, without loss of consciousness, and advised that she could return to work without restrictions.

Dr. Audrey Eisenstadt, who reviewed MRI scans of plaintiff's knee, brain, spine, and shoulder opined the following; plaintiff did not suffer a bone injury; that plaintiff's anterior and posterior cruciate ligaments were normal; that her medial and lateral collateral ligaments were intact; and that there was no evidence of soft tissue injury. Dr. Eisenstadt further opined that plaintiff's knee showed a degenerative condition called intra-substance meniscal degeneration and that this condition was not a result of trauma. As to plaintiff's shoulder, Dr. Eisenstadt testified that plaintiff has a condition, which is present from birth, where the acromion is low in relation to the clavicle and can cause an impingement on the muscles and tendons and that plaintiff's partial tear in her supraspinatus tendon was more likely caused from the impingement than from trauma. Dr. Eisenstadt also testified that plaintiff's spine had desiccation which takes months to develop and is indicative of arthritis and finally, that plaintiff had minimal bulging discs. Lastly, Dr. Eisenstadt opined that the MRI of plaintiff's brain was normal.

Dr. Edward A. Toriello, who reviewed plaintiff's medical records, testified in sum and substance that plaintiff was discharged from St. Luke's with a minor head injury and that she did not

sustain a posterior cruciate ligament tear from the accident. Specially, he opined that plaintiff suffered a minor tear in her knee treatable by physical therapy. His testimony was similar to that of Dr. Rikki Lane in that they both opined that plaintiff's complaints as reflected in the emergency rooms records were not consistent with a patient who had suffered a meniscal injury or complete posterior cruciate ligament tear. Contrary to the opinion of plaintiff's witness Dr. McCulloch, Dr. Toriello opined that plaintiff is not in need of knee surgery. As to plaintiff's arm, Dr. Toriello testified that plaintiff's shoulder surgery was to address pre-existing conditions not caused by the accident. His review of plaintiff's shoulder MRI scan showed a capsular laxity (unstable joint) but did not show any evidence of acute injury such as tearing, swelling, or bleeding. Instead, the MRI scan showed "fraying" which occurs over a period of time. Moreover, Dr. Allen's report indicated that plaintiff's shoulder was unstable, and he repaired the labrum which Dr. Toriello opines is indicative of pre-existing conditions, i.e., capsular laxity. Dr. Toriello also opined that plaintiff had degenerative shallow herniations in her spine and that the accident likely caused a strain or sprain that would resolve within four to six weeks post-accident.

Analysis and Conclusion

Plaintiff argues that the jury correctly found defendant Taxi negligent in causing the accident but erred in finding that plaintiff did not suffer a significant limitation of use of a body function, organ or system; did not suffer a permanent consequential limitation of use of a body function, organ, or system; and did not suffer a medically determined injury which prevented her from performing her usual and customary daily activities for 90 out of 180 days immediately following the injury. Plaintiff argues that the jury ignored the Court's instructions to stop after these questions were answered in the negative and instead awarded \$500.00 for past medical expenses but zero dollars for past or future pain and future medical expenses.

In opposition, defendant Taxi argues that plaintiff's contention that the jury's award of \$500.00 is a "material inconsistency" requiring a vacatur of the verdict and a new trial is incorrect as CPLR § 4111(c) permits the court to enter judgment in accordance with the answers when the answers are consistent with each other, but where one or more is inconsistent with the general verdict. Defendant Taxi avers that the jury's findings that plaintiff did not sustain a "serious injury" is in fact consistent with its findings that defendant was negligent and its award "was mere surplusage without any legal effect". (internal quotations omitted). Accordingly, Taxi submits that the court should vacate that portion of the award and enter a verdict in defendant's favor. Furthermore, Taxi contends that the jury's finding that plaintiff did not sustain a "serious injury" was

not against the weight of the evidence as plaintiff's testimony conflicted with the testimony of the medical experts and that it is the jury's duty to determine the credibility of the witness and resolve those conflicts. Taxi also contends that plaintiff errs in its argument that the parties stipulation that plaintiff did not return to work for nine months after the accident established the 90 out 180 day test of a "serious injury", as plaintiff's claim of inability to work is not dispositive because the 90 out of 180 day injury must be a medically determined one and the medical evidence in the record did not support plaintiff's absence from work for nine months.

The City supports Taxi's arguments and concurs that plaintiff failed to meet the Insurance Law § 5102(d) requirements necessary to prove that plaintiff suffered a "serious injury" resulting from the accident. The City further agrees that the jury's verdict is consistent with the evidence and its findings and that the award of \$500.00 for medical expenses has no legal effect.

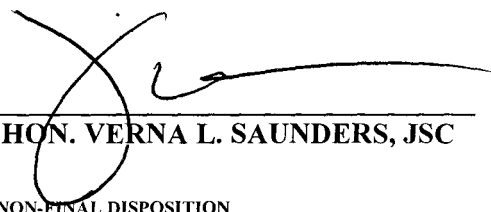
In *Mayer v Goldberg*, 241 AD2d 309 [1st Dept 1997] the court held that where a jury may have wanted to award damages on a theory of its own but clearly understood the fundamental questions before them, the verdict should not be disturbed. In the instant case, both the jury charge and the verdict sheet instructions failed to instruct the jurors to stop answering further questions if they determined that plaintiff was not seriously injured as a result of the accident.¹ Accordingly, the jury was not to answer the questions regarding damages if all of the serious injury threshold questions were answered in the negative. Notwithstanding same, the jury's award for medical expenses was not inconsistent with its ultimate findings. The jury found that plaintiff was not seriously injured and thus, correctly did not award for present or future pain and suffering or for future medical expenses. Further, the jury found that plaintiff did not suffer from a medically determined injury, resulting from this accident, which prevented her from performing her usual activities for 90 out of 180 days following the accident and thus, correctly did not award for lost wages despite plaintiff's testimony and the attorney's stipulation that plaintiff did not return to work for nine months after the accident. There is no dispute that plaintiff was a backseat passenger of defendant's taxi during the accident with the Parks vehicle and sought medical treatment after the accident; to which the jury awarded \$500.00 for out-of-pocket medical expenses. Thus, this court finds that the award itself is not inconsistent with the jury's ultimate findings as it clearly understood the fundamental questions before it.

¹ Plaintiff's argument that the court ignored the discrepancy of the verdict is incorrect as the attorneys were required to read and submit corrections to the verdict sheet, as well as, review and initial the final copy submitted to the jury. Furthermore, the jury was polled at the direction of the court at request of the parties. Moreover, neither side requested the jurors be re-charged or the verdict sheet amended, and no objections were preserved regarding same. (see *Harris*; supra.)

Additionally, plaintiff failed to demonstrate that the jury's verdict was against the weight of the evidence by showing that the evidence prevailed so greatly in the plaintiff's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence. Here, while the evidence supported the finding that Taxi was liable for the accident, there was ample evidence to support the jury's findings that plaintiff did not sustain a serious injury as a result of this accident. Plaintiff's treating physicians did not testify, and the defense expert witnesses in fact testified that a review of plaintiff's medical records revealed that plaintiff was not seriously injured as a result of the accident. Specifically, the emergency room records indicate that plaintiff's self-reported symptoms did not comport with someone who suffered the injuries she alleges. Plaintiff's testimony and the testimony of her medical expert were contradicted by three defense medical experts. Furthermore, plaintiff's expert conceded the possibility that plaintiff's asserted injuries could have been caused by a new injury and not the accident. Finally, the testimony revealed that plaintiff not only vacationed post-accident, but also participated in activities such as hiking, touring and scuba diving while doing so. After considering the credibility of the witnesses and the reasonable inferences drawn from the evidence, the jury found that plaintiff was not seriously injured as a result of the accident and found in favor of defendants; a finding that was not as against the weight of the evidence. As indicated above, issues of credibility and the weight to be given to testimony are within the power of the jury and cannot be a basis to set aside a verdict. Therefore, based on the foregoing, plaintiff failed to demonstrate that there is no reasonable basis and acceptable inferences which could lead rational jurors to conclude that plaintiff was not seriously injured.

Accordingly, the respective motions are denied, and the verdict will not be disturbed.

January 7, 2019



 HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE