

Pimenta v 1504 CIA LLC
2019 NY Slip Op 31611(U)
June 6, 2019
Supreme Court, Kings County
Docket Number: 502843/15
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

MIRSON PIMENTA,

Plaintiff,

-against-

1504 CIA LLC and JCWH CONEY ISLAND, LLC,

Defendants.

DECISION / ORDER

Index No. 502843/15

Motion Seq. No. 3

Date Submitted: 4/18/19

Cal No. 46

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to set aside the verdict.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>59-61</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>64-66</u>
Reply Affirmation.....	<u>69-70</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff was awarded summary judgment by a different Justice on the issue of liability on his Labor Law § 240(1) claim. A trial on the issue of damages was held from October 22, 2018 to November 1, 2018. Plaintiff testified that on August 1, 2014, he was working at a construction site and while he was bending over to pick up some materials that had fallen on the floor, a 14-to16 foot aluminum ladder fell on him. It struck plaintiff on his back and knocked him to the ground. He testified that the impact caused his neck to "bend backwards" and his arms and knees to hit the ground. Plaintiff claimed that he sustained injuries to his neck, back and knees as a result of the accident. He has had three surgeries: a lumbar laminectomy and partial discectomy, a

cervical fusion and a knee arthroscopy. On the date of the accident, plaintiff was forty years old.

The jury rendered a unanimous verdict awarding plaintiff \$2,000,000 for past pain and suffering, \$15,000,000 for future pain and suffering for 33.3 years, \$383,588 for past medical expenses, \$661,426 for future medical expenses for 33.3 years, \$109,119 for future physical therapy for 33.3 years, \$160,971.76 for future lab tests and prescriptions for 33.3 years, \$0 for future housekeeping services, \$222,206 for past lost earnings and \$1,804,535 for future lost earnings for 21 years.

Defendants contend the maximum sustainable award for past pain and suffering in this case is \$600,000 (rather than the \$2,000,000 awarded) and for future pain and suffering is \$1,000,000 (rather than the \$15,000,000 awarded). In addition, defendants contend that the lost earnings award for 21 years (to age 67) exceeds plaintiff's own expert economist's estimate of his future work life expectancy, as he projected that plaintiff would have worked for 19 years (to age 65), so that the future lost earnings should be reduced proportionally, from \$1,804,535 to \$1,632,674. Defendants do not take issue with the other damages awarded by the jury, nor do they argue that the jury was wrong in concluding that the plaintiff can no longer work.

Defendants contend that the plaintiff's case most resembles *Garcia v CPR 1 Realty, L.P.* (164 AD3d 656 [2d Dept 2018]), where the plaintiff, who was 46 years old, suffered an inguinal hernia that required surgery as well as herniated discs with radiculopathy. The lumbar fusion surgery apparently caused the plaintiff in that case to be incontinent. Defendants maintain that even with what they describe as more severe injuries, the Second Department directed a new trial unless the parties stipulated to

reduce the jury award for past pain and suffering from \$1,200,000 to \$750,000, and the award for future pain and suffering from \$3,000,000, over 23 years, to \$1,200,000. Defendants also rely on *Nayberg v Nassau County* (149 AD3d 761 [2d Dept 2017] [award of \$600,000 for past pain and suffering and \$1,000,000 for future pain and suffering to a plaintiff who suffered a herniated disc requiring surgery as well as extensive dental damage sustained]); *Turuseta v Wyassup-Laurel Glen Corp.* (91 AD3d 632 [2d Dept 2012] [new trial unless the award of \$476,867 for past pain and suffering reduced to \$400,000 and award of \$2,219,229 for future pain and suffering for 28.2 years reduced to \$750,000 for a plaintiff with a fractured coccyx, a herniated disc and depression]; *Cicola v County of Suffolk* (120 AD3d 1379 [2d Dept 2014] [new trial unless the award of \$325,000 for past pain and suffering and \$250,000 for future pain and suffering reduced to \$150,000 for past pain and suffering and \$100,000 for future pain and suffering, for injuries to the cervical spine requiring spinal fusion surgery, physical therapy and other related medical treatment]; *Kusulas v Saco*, 134 AD3d 772 [2d Dept 2015] [upholding an award of \$1,000,000 for future pain and suffering for a plaintiff who will require revision spine surgery with ongoing pain management and physical therapy for life]; and *Sanz v MTA-Long Is. Bus* (46 AD3 867, 868 [2d Dept 2007] [new trial unless award for past pain and suffering reduced from \$350,000 to \$200,000 for herniated discs with radiculopathy that required a discectomy and fusion surgery]).

Plaintiff contends that the trial demonstrated that plaintiff suffered catastrophic life-destroying injuries, for which the \$2,000,000 award for past pain and suffering is appropriate and should not be disturbed. Plaintiff's counsel acknowledges that the

award for future pain and suffering of \$15,000,000 is subject to reduction, but argues it should not be reduced to the extent the defendants request.

With respect to his lower back injury, plaintiff offered evidence that he sustained a disc herniation at L5-S1 with radiculopathy, for which he underwent a laminectomy and partial discectomy on February 24, 2016. However, plaintiff continued to experience severe back pain, so his doctor implanted a spinal cord stimulator on December 1, 2017. He claimed it did not stop his pain. The medical testimony indicated that plaintiff will require a future revision lumbar surgery in ten to fifteen years and additional intervention to replace the battery in the spinal cord stimulator and that he will continue to need pain medication and physical therapy a few times per month for the rest of his life.

With regard to plaintiff's neck, evidence was proffered that the accident caused a disc herniation at C5-C6, which also caused radiculopathy, for which he ultimately underwent spinal fusion surgery on January 11, 2017. His doctor testified that he will also need a revision cervical fusion surgery in the future. With respect to his right knee, plaintiff offered evidence that he sustained a partial ACL tear and a tear of the anterior horn of the lateral meniscus, along with a patellar tilt that evolved and worsened over time, through January 6, 2018, when plaintiff underwent arthroscopic surgery to his right knee. Plaintiff's doctor testified that plaintiff's knee cap still has "too much motion" and plaintiff may need a second knee surgery soon. Plaintiff testified that he still has pain in all of these areas of his body as well as restricted ranges of motion. He claimed that his usual daily activities and his recreational activities are significantly restricted and his enjoyment of life is greatly curtailed as a result of his injuries. Plaintiff claimed at the

trial that he is unable to return to work because of his injuries. Plaintiff's expert economist estimated his future lost earnings for 19 years, through age 65, to be \$1,728,084, assuming a 3½% growth rate, and \$1,914,281, assuming a 4½% growth rate.

Defendants' medical witnesses disputed that the plaintiff's disc hernations and knee injuries were caused by the subject accident, noting that plaintiff did not complain of pain in his neck or his knee until months after the subject accident. Defendants' expert testified that plaintiff merely sustained a lumbar strain from the impact. Defendants offered evidence that plaintiff was involved in an alleged fistfight on the job in December 2014 and an automobile accident on February 18, 2016, which defendants claimed caused and/or contributed to the plaintiff's neck, back and knee injuries. The jury apparently did not find this testimony convincing.

Discussion

As a preliminary matter, the court accepts plaintiff's opposition papers despite the fact that they were e-filed on Monday, April 8, 2019, rather than Friday, April 5, 2019, as required by the parties' stipulation adjourning the motion to April 18, 2019. There was no prejudice, as the movants had ample time to reply (*Bakare v Kakouras*, 110 AD3d 838, 839 [2d Dept 2013] ["Contrary to the defendants' contention, the Supreme Court providently exercised its discretion in accepting the plaintiff's untimely opposition papers, since the defendants were not prejudiced thereby"]; *Mughal v Rajput*, 106 AD3d 886, 887 [2d Dept 2013] ["Although the affidavit was not timely submitted, the plaintiffs had an opportunity to respond to it, and were not prejudiced thereby"]).

"The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation" (*Nayberg v Nassau County*, 149 AD3d 761, 762 [2d Dept 2017] [internal quotation marks omitted]; see also CPLR 5501 [c]; *Graves v New York City Tr. Auth.*, 81 AD3d 589, 589 [2d Dept 2011]; *Chery v Souffrant*, 71 AD3d 715, 716 [2d Dept 2010]), "The reasonableness of compensation must be measured against relevant precedent of comparable cases" (*Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014] [internal quotation marks omitted]; see also *Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Vainer v DiSalvo*, 107 AD3d 697, 698–699 [2d Dept 2013] [internal quotation marks omitted]).

Here, plaintiff provides several reported appellate decisions where the plaintiff sustained herniated discs requiring spinal fusion surgery, with expected continuing deterioration and the need for ongoing treatment, including the possibility of additional surgery. Plaintiff avers these decisions support his contention that the jury's award of \$2,000,000 for past pain and suffering should not be disturbed, and that an award of future pain and suffering damages in the \$5-6 million range is sustainable. Plaintiff relies primarily on *Lopez v New York City Dept. of Env'tl. Protection*, (123 AD3d 982, 983 [2d Dept 2014]), where the Second Department sustained an award of \$2,000,000

for past pain and suffering and \$3,000,000 for future pain and suffering.¹ Plaintiff also cites *Halsey v New York City Transit Auth.* (114 AD3d 726, 727 [2d Dept 2014]), where the Second Department sustained an award of future pain and suffering of \$3,000,000,² and *Cano v Mid-Valley Oil Co.* (151 AD3d 685, 691 [2d Dept 2017]), where the Second Department ordered a new trial unless the parties stipulated to increase the jury's awards for past and future pain and suffering to \$1,000,000 and \$2,500,000 respectively.³ While those cases provide some guidance, the plaintiff's injuries in those

¹In *Lopez*, "the plaintiff was injured when he fell backward and was impaled by an uncapped piece of a vertical rebar while working on the construction of an electrical building at the Newtown Creek Wastewater Treatment Plant. . . . The rebar that impaled the plaintiff's body caused extensive injuries, which necessitated multiple hospitalizations and several surgical procedures. The plaintiff also sustained a herniated disc and underwent spinal fusion surgery, physical therapy, and injections to alleviate pain. The plaintiff's experts opined, inter alia, that as a result of the accident, the plaintiff's physical condition would continue to deteriorate, that he was expected to need additional surgery, and that he would require ongoing treatment for the rest of his life."

²In *Halsey*, "plaintiff, 27 years old at the time of trial, suffered from severe lower back pain that radiated into her legs and restricted her range of motion. She suffered from disc protrusion, foraminal stenosis, and radiculopathy. After physical therapy, pain medications, and epidural injections failed to alleviate her pain, the plaintiff underwent a laminectomy and fusion surgery, in which a piece of the disc was removed and a bone graft was fused to replace the removed disc. Following the surgery, the pain in the plaintiff's lower back did not improve and she had significant restrictions in her range of motion. She continued physical therapy, pain medications, and epidural injections. The plaintiff's expert concluded that the injuries to her lower back were permanent. He continued to observe restrictions in her range of motion and lumbar atrophy. He concluded that the plaintiff's back pain will worsen, and that she will need to continue to take pain, anti-inflammatory, and muscle relaxer medications. Further, the injuries hindered the previously active plaintiff's ability to participate in athletic activities and activities with her children, and made daily tasks, such as cooking and cleaning, very difficult. As a result of the fusion, other parts of the plaintiff's spine were subject to degeneration."

³In *Cano*, "plaintiff (who was 35 at the time of the trial) underwent surgery to repair a comminuted fracture in his dominant wrist. He continues to suffer from limited range of motion in his wrist, and has lost almost all range of motion in his left pinky. Additionally, despite having two separate spinal fusion surgeries, the first of which

actions were more severe and involved more surgeries than in this case and/or those plaintiffs were considerably younger so the future pain and suffering awards were intended to cover a longer period of time.⁴

The court finds that the jury award here of \$2,000,000 for past pain and suffering and \$15,000,000 for future pain and suffering deviates materially from what would be reasonable compensation. Reasonable compensation for plaintiff's injuries, which have worsened over time and significantly restrict his daily activities, his recreational activities and his enjoyment of life, and likely will require three future revision surgeries, would be \$1,000,000 for past pain and suffering and \$2,250,000 for future pain and suffering (see *Garcia v CPS 1 Realty, LP*, 164 AD3d at 657-58 [new trial ordered unless damages for past pain and suffering of \$1,200,000 and for future pain and suffering of \$3,000,000 over 23 years reduced to 750,000 and \$1,250,000 respectively];⁵ *Starkman v City of Long Beach*, 148 AD3d 1070, 1073 [2d Dept 2017] [court ordered new trial

included a laminectomy and a foraminotomy, the plaintiff's lower back pain did not improve, and he also experienced significant restrictions in his range of motion. His medical expert opined that both his wrist and lower back injuries were permanent, that the plaintiff's pain will worsen, and that he will need to continue taking pain medication and will require additional wrist and spinal fusion surgeries in the future. Additionally, the plaintiff testified that, as a result of the accident, he was no longer able to play soccer, lift weights, or play with his young daughter."

⁴In *Lopez*, (2013 WL 10186038) the award for future pain and suffering was for 35 years.

⁵"[P]laintiff elicited testimony showing that as a result of the accident, he sustained an inguinal hernia that was surgically repaired, and several herniated discs in the lumbar region of his spine starting at L5/S1, which caused him excruciating pain, radiculopathy, drop foot, and "RSD" (Reflex Sympathetic Dystrophy Syndrome). Testimony at trial also showed that, despite undergoing conservative treatment followed by spinal fusion surgery, both of which failed and the latter bringing about urinary incontinence, his condition was permanent in nature, rendering him permanently disabled from working."

unless parties stipulated to increase award for past pain and suffering from \$500,000 to \$750,000 and future pain and suffering from \$750,000 to \$1,500,000];⁶ *Kusulas v Saco*, 134 AD3d at 773 [\$1,000,000 past pain and suffering and \$1,000,000 future pain and suffering sustained];⁷ *Kayes v Liberati*, 104 AD3d 739, 740 [2d Dept 2013] [\$500,000 for past pain and suffering and \$1,500,000 for future pain and suffering sustained]⁸).

Finally, while plaintiff's economics expert estimated that plaintiff would work until age 65, the jury was not required to accept that estimate, nor were they required to accept the work-life expectancy figure provided to the jury from the tables in the Pattern Jury Instructions. The jury could have reasonably concluded, based upon plaintiff's testimony that he loved his work, and that prior to the accident he enjoyed working hard and never thought about retiring or doing something else, that plaintiff would work to

⁶"The plaintiff, 47 years old at the time of trial, suffered three fractured ribs and transverse process fractures in the C6, C7, and T1 vertebrae as a result of the accident. The plaintiff also suffered disc herniations and underwent two cervical fusion surgeries. The plaintiff takes various pain medications to treat his chronic pain, suffers ongoing sexual dysfunction, and is unable to participate in athletic activities."

⁷"[A]s a result of the accident, the plaintiff sustained herniated discs at C4-5 and C5-6, requiring spinal fusion surgery. The plaintiff underwent a second surgery after the bone graft between C5-6 failed to properly fuse, causing the adjacent disc at C6-7 to herniate. The plaintiff testified that she suffers from chronic and severe neck pain, despite physical therapy, epidural injections, and pain medications, and that she is unable to engage in many athletic activities that she previously enjoyed. According to the plaintiff's treating physician and expert, the plaintiff will require future surgery and medical treatment, including physical therapy and pain management, for the rest of her life."

⁸"As a result of the accident, Mohammed Kayes sustained injuries, including a herniated disc. He also underwent surgery and, according to the plaintiffs' experts, 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, as a result of the accident, Mohammed Kayes was no longer able to work in any significant capacity and could no longer engage in activities which he had previously enjoyed."

age 67. This is not a situation where the jury disregarded the evidence and awarded lost income to age 75 (*cf. Khulaqi v Sea-Land Servs., Inc.*, 185 AD2d 973, 974 [2d Dept 1992] ["The evidence relating to the plaintiff's pre-accident physical condition, his intentions concerning eventual retirement, the employment prospects of persons in his profession in general, and the other evidence, was simply insufficient, as a matter of fact, to justify the jury's verdict with respect to the plaintiff's work expectancy"]).

Accordingly, it is

ORDERED that the motion is granted to the extent that a new trial on damages, solely with regard to past and future pain and suffering, is directed unless, within 30 days of service of a copy of this order with notice of entry, plaintiff stipulates to a reduction in the award for past pain and suffering to \$1,000,000 and a reduction in the award for future pain and suffering to \$2,250,000.

This constitutes the decision and order of the court.

Dated: June 6, 2019

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court