

Muniz v Chimienti Realty Assoc., Inc.

2019 NY Slip Op 33857(U)

December 10, 2019

Supreme Court, Bronx County

Docket Number: 21227/2011

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT----- COUNTY OF BRONX

PART IA - 5

JONATHAN MUNIZ,

INDEX NUMBER: 21227/2011

Plaintiff,

-against-

Present:
HON. ALISON Y. TUITT
Justice

CHIMIENI REALTY ASSOCIATES, INC. and 1755
JARVIS, LLC,

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion to Resettle

On Calendar of 10/16/19

Notice of Motion - Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion to resettle is granted. The prior order of this Court, dated February 13, 2019, is hereby resettled to read:

Upon the foregoing papers, defendants' motion to set aside the jury verdict in this matter is granted in part and denied in part for the reason set forth herein.

Jonathan Muniz, the 52 year old plaintiff, alleges that on December 19, 2010 he was caused to trip and fall on a raised area in the kitchen floor of his apartment which was owned and managed by defendants. Plaintiff claimed that they had complained to the defendants regarding the condition of the kitchen floor but defendants failed to correct it. At trial, plaintiff established that as a result of the accident, he sustained a fractured left tibia which required hospitalization and surgery. Plaintiff was discharged from the hospital to a rehabilitation facility. It is undisputed that plaintiff signed himself out of the rehabilitation facility against

medical advice. Within two weeks after his self-discharge, plaintiff re-fractured his leg and sustained an additional ankle fracture. Plaintiff had a host of medical conditions unrelated to the accident including end stage renal failure requiring dialysis three times per week, insulin dependent diabetes and he was blind in the left eye. Plaintiff's leg failed to properly heal and he is presently confined to a wheelchair.

The case came to trial before this Court on January 31, 2017 and ended on February 24, 2017. The jury returned a verdict in favor of plaintiff in the amount of \$8,000,000; \$3,000,000 for past pain and suffering and \$5,000,000 for future pain and suffering (15 years/\$333,333.33 per). Defendants now move this Court seeking to set aside the verdict arguing that the overwhelming and uncontroverted evidence showed that plaintiff was responsible for his most serious injuries because he disregarded medical advice and signed himself out of rehabilitation facility. Defendants seek to set aside the verdict as against the weight of the evidence and as excessive.

Pursuant to C.P.L.R. §4404(a), the Court may set aside a jury verdict and direct judgment entered in favor of a party entitled to judgment as a matter of law. However, a court may grant judgment notwithstanding the verdict only where there is simply no valid line, of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury. Cohen v. Hallmark Cards, 45 N.Y.2d 493 (1978). A verdict may be set aside as against the weight of the evidence only where "the jury could not have reached its verdict on any fair interpretation of the evidence." McDermott v. Coffee Beanery, Ltd., 777 N.Y.S.2d 103 (1st Dept. 2004); Cardoza v. City of New York, 29 N.Y.S.3d 330 (1st Dept. 2016). "In the absence of indications that substantial justice had not been done, a successful litigant is entitled to the benefit of a favorable jury verdict", and a court may not employ its discretion merely because it disagrees with a verdict (McDermott v. Coffee Beanery, 9 AD3d 195, 2006 (1st Dept. 2004)) as such practice would "unnecessarily interfere with the fact finding function of a jury to a degree that amounts to an usurpation of the jury's duty". Pena v. New York City Transit Authority, 185 AD2d 794-5 (1st Dept. 1992). This is especially true in personal injury cases, which turn on conflicting testimony of expert witnesses. Fontana v. Kurian, 625 N.Y.S.2d 677 (3d Dept. 1995). A jury may accept or reject testimony in whole or in part, Mejia v. JMM Autobahn, 767 N.Y.S.2d 427 (1st Dept. 2003).

Defendants' motion to set aside the verdict as against the weight of the evidence is denied. Contrary to defendants' contention, the evidence adduced at trial was sufficient to support the jury's verdict in plaintiff's favor. Specifically, defendants argued that the defect in the kitchen, the raised floor, was trivial in

certainly put forth evidence showing that plaintiff was responsible for his subsequent injuries.

Plaintiff's evidence, however, was to the contrary, Plaintiff's expert and treating physician, Dr. Suecof disputed the claim that plaintiff was responsible for his subsequent injuries and presented evidence that plaintiff's self-discharge was not significant because plaintiff was nearing discharge when he signed himself out. On January 4, 2011, under Medicare guidelines, plaintiff was getting close to discharge. Plaintiff checked himself out on January 5, 2011. Moreover, plaintiff's evidence showed that at the time of his self-discharge, plaintiff was weight bearing as tolerated, and was going up and down stairs as part of his physical therapy at the rehabilitation facility, notwithstanding that he was ambulating with the use of a rolling walker. There was no evidence in any of the medical records that plaintiff had been instructed not to walk after his discharge. Indeed, the jury was specifically asked on the Verdict Sheet: "Question eight, did the plaintiff fail to mitigate his damages by failing to follow medical advice?" and they responded "No". Here, the jury was presented with contradicting medical evidence and found in plaintiff's favor. There was sufficient evidence to support this finding.

Defendants' contention that a mistrial is warranted is without merit. Defendants argue that they are entitled to a mistrial because plaintiff's wife testified that her husband had been abused by a male staffer of the rehabilitation facility while the staffer was changing his diaper. There are no claims in this action regarding any abuse. Defendants' counsel promptly objected to the testimony and the objection was sustained, the testimony was stricken from the record and the jury was given a curative instruction, Specifically, the Court instructed:

Before we begin our next witness there was testimony that you heard while Mrs. Muniz was testifying. There is no claim in this case that Mr. Muniz has an alleged abuse. Mrs. Muniz has no personal knowledge of any such alleged issues, and she should not have... testified about such a matter. You are totally to disregard any allegation of any alleged abuse of Mr., Muniz for any issue including but not limited to Mr. Muniz's self discharge from the Bronx Center against medical advice. So, that testimony should be stricken from your minds, okay

The curative instruction was sufficient to address the improper testimony.

With respect to the amount of verdict, the applicable standard of review here is whether the awards deviate materially from what would be reasonable compensation for the injuries sustained by plaintiff. See, Donlon v. City of New York, 284 AD2d 13 (1st Dept. 2001). To determine whether an award deviates materially from what would be reasonable compensation, courts look to awards previously approved in similar

cases. Id. However, the exercise of the discretion of a trial court over damage awards should be exercised sparingly. Shurgan v. Tedesco, 578 N.Y.S.2d 658 (2d Dept. 1992) citing James v. Shanley, 423 N.Y.S.2d 312 (3rd Dept. 1979).

In the instant matter, the record supports a finding that plaintiff sustained a severe and permanent injury to his leg. However, the verdict is clearly excessive in light of the evidence at trial that plaintiff was permanently disabled as a result of kidney failure for years prior to the accident. He had also previously suffered the amputation of his right toe due to diabetes, had impaired vision, was blind in his left eye, suffered from hypertension, heart disease and was at end stage renal failure receiving dialysis three times a week. Based on this record, the jury's award of damages for past and future pain and suffering is not supportable. In cases involving potentially more serious injuries in some significantly younger plaintiffs, this Court was hard pressed to find a sustainable \$8 million verdict which was awarded here. The Court considered the following cases for guidance.

Nunez v. Jenkins, Supreme Court, Bronx County, a case with an \$8,700,000 verdict on April 26, 2006 (later settled for insurance policy limits: \$4,000,000) involved a plaintiff who sustained severe injuries as a result of 2,000 pounds of lumber falling on him, including a fractured tibia, fibula, pelvis and lumbar spine, as well as internal injuries including lacerated liver. After a trial lasting 19 days, the jury awarded the plaintiff \$8,700,000 which included only \$55,200 for past pain and suffering and \$457,000 for future pain and suffering.

In Lewis v. NYCTA, Supreme Court, New York County, March 3, 2011, 2011 WL 1250182, the jury returned a verdict of \$6.5 million for past and future pain and suffering, less than the \$8 million plaintiff here was awarded, for plaintiff, a 13 year old who sustained catastrophic injuries when his leg was run over by a bus, including a major degloving injury to his right lower leg, tearing off skin, muscle and tendons and exposing bones. He sustained a fracture of the right distal fibula, an avulsion of the right distal tibia and a fracture of the left calcaneus. He underwent eight operations with five for plastic surgery and three for hardware implanted in his ankle. The surgeries included the placement of pins and an external fixator to hold the fractured fibula in place, the placement of a permanent rod in the fibula to align the bone fragments, the placement of a syndesmotic screw to realign the spacing between the tibia and fibula, and a surgery to harvest skin from his thigh to graft over the transplanted muscle. The plastic surgeon harvested the rectus muscle from his abdomen to transplant onto his calf and the muscle grow back.

In Wells v. Hudson Valley Bus Co., Putnam County, New York, January 1, 2005, the jury returned a verdict for \$5,730,000, including \$1,800,000 for past pain and suffering and \$1,600,000 for future pain and suffering where plaintiff sustained multiple fractures, including a compression fracture at C-4,5, a fractured femur, a fractured tibia and fibula and a fracture of the non-dominant humerus and a fracture to the navicular bone in the foot. Plaintiff required multiple open reductions and internal fixations. Plaintiff attempted to return to her job but ultimately was unable to continue,

In Fortuna v. Roth, Supreme Court, Suffolk County, January 31, 2014, the jury returned a compensatory pain & suffering award of \$4,000,000 for 24 year old plaintiff who sustained severe injuries as a result of a motor vehicle accident. Plaintiff claimed permanent impairment due to multiple significant injuries including fractures of his right patella, tibia, fibula and femur; lumbar vertebrae fractures at levels L2, L4 and L5; a right pelvic fracture; multiple facial fractures including fractures of the right zygomatic arch, right medial and lateral pterygoid plates, right maxillary sinus and right temporal and sphenoid bones; a fractured right humerus requiring open reduction and internal fixation surgery; multiple rib fractures resulting in a lacerated spleen and left pneumothorax; right frontal lobe contusions and subdural hemorrhage with short-term memory loss, as well as loss of teeth and a fracture to the first digit distal phalanx.

In, Kovit v. Estate of Hallurns, 763 N.Y.S.2d 325 (2d Dept. 2003), *rev 'd 017 other grounds*, 4 N.Y.3d 499 (2005), the Appellate Division reduced a verdict for past pain and suffering from \$5,000,000 to \$2,000,000 and for future pain and suffering from \$10,000,000 to \$1,750,000 for plaintiff who suffered serious injuries which ultimately necessitated an above the knee amputation of his leg as the result of being pinned between two vehicles.

In, Hernandez v. Ten Ten Co., 959 N.Y.S.2d 128 (1st Dept. 2013), jury award of \$1,000,000 for past pain and suffering over 8 years, and \$2,166,666.67 for future pain and suffering over 25.8 years, did not deviate materially from what was considered reasonable compensation where plaintiff sustained fractures to his tibia and fibula, underwent leg surgery entailing installation of metal rod and screws in his leg, sustained back injuries, and suffered from reflex sympathetic dystrophy, complex regional pain syndrome, depression, sleep disorder, and sexual dysfunction.

In Orellano v. 29 East 37th Street Realty Corp., 772 N.Y.S.2d 659 (1st Dept. 2004), damages awarded by jury of \$2.5 million for past pain and suffering and \$3 million for future pain and suffering, was

excessive, and would be reduced to \$375,000 for each of past and future pain and suffering; plaintiff suffered comminuted fracture of the tibia and fibula that required several surgeries during a two-month hospital stay and resulted in partial permanent disability to the 47-year old plaintiff.

In Rodriguez v. New York City Housing Authority, 655 N.Y.S.2d 501 (1st Dept. 1997), jury award of \$1,192,502.25 was not excessive where plaintiff was missing a large portion of her kneecap, had an atrophied right leg and severe limitations of motion requiring use of a walking cane, suffered from degenerative arthritis, was in constant pain, could not fully perform her job duties and would require two more surgeries.

Based on the evidence presented herein and in comparison to cases cited herein, the Court finds that plaintiff's verdict is patently excessive and must be reduced. The verdict is reduced from \$3,000,000 to \$750,000 for past pain and suffering and from \$5,000,000 to \$1,250,000 for future pain and suffering. Accordingly, defendants' motion to set aside the verdict is granted to the extent of setting aside the verdict as excessive and directing a new trial solely on the issue of past and future pain and suffering damages, unless plaintiff, within twenty (20) days after service upon his attorney of a copy hereof, with notice of entry thereon, consents to the entry of a judgment decreasing the amount awarded to the plaintiff for past pain and suffering from \$3,000,000 to \$750,000 and decreasing the amount awarded to the plaintiff for future and suffering from \$5,000,000 to \$1,250,000, in which event the Clerk is directed to enter judgment with the verdict as is amended and decreased.

Regarding medical bills, during the trial defendants' counsel objected to plaintiff's introduction of medical bills from Jacobi Hospital and the Bronx Center for Rehabilitation. It was agreed that the issue of the medical bills would be resolved at a hearing after the trial to determine the amount of medical bills that would be added to the final verdict. The Hearing was held on April 24, 2017. The total billing from Jacobi Hospital was \$90,258.47 and the total from the Bronx Center for Rehabilitation was \$77,007.93. Thus, the total for both facilities is \$167,266.40, Plaintiff's Medicare Secondary Payer Recovery Portal Lien is in the amount of \$181,665.68, As no deduction was made for comparative negligence, the amount of \$167,266.40 should be added to the plaintiff's verdict.

The Court has considered defendants' remaining arguments and finds them unavailing. This constitutes the decision and Order of this Court,

Dated: 12/10/19



Hon. Alison Y. Tuitt