

Buckham v 322 Equity LLC
2020 NY Slip Op 31350(U)
May 11, 2020
Supreme Court, Kings County
Docket Number: 505356/2016
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 505356/2016
Motion Date: 12/16/2019

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AUDREY BUCKHAM,

Plaintiff,

-against

DECISION/ORDER

322 EQUITY LLC,

Defendant.

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The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of aw.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, 322 EQUITY LLC, by notice of motion dated July 26, 2019, moves for an order 1) pursuant to CPLR §4404 setting aside the jury verdict on liability rendered on May 16, 2019 and entering judgment in favor of defendant, on the ground that plaintiff failed to establish a prima facie case as to her cause of action for negligence or, alternatively, setting aside the verdict as against the weight of the evidence and/or in the interest of justice and granting a new trial on liability; 2) pursuant to CPLR §4404 setting aside the jury verdict on damages rendered on June 13, 2019 and entering judgment in favor of defendant on the grounds that plaintiff failed to establish a prima facie case as to her alleged damages, or alternatively, setting aside the verdict as against the weight of the evidence and/or in the interest of justice and granting a new trial on the issue of damages; 3) pursuant to CPLR §4402, granting a mistrial based upon evidence and testimony elicited at trial

that plaintiff's counsel paid for plaintiff's medical treatment in violation of NY Rules of Professional Conduct 1.7 and 1.8; and 4) disqualifying plaintiff's counsel from representing plaintiff in this matter based upon a conflict of interest arising from violation of NY Rules of Professional Conduct 1.7 and 1.8; (5) directing that a collateral source hearing pursuant to CPLR 4545 be held; and, 6) for such other and further relief as the Court deems just and proper.

Background:

Plaintiff commenced this personal injury action alleging that she was injured on December 18, 2014, when the ceiling in her bathroom collapsed on her while she was in the shower. At the time of the accident, she was a tenant in defendant's building. During the trial, the defendant moved for a directed verdict on the grounds that the plaintiff failed to make out a prima case. The court reserved decision. On May 16, 2019, the jury returned a verdict on the issue of liability in favor of the plaintiff. The trial on the issue of damages commenced on June 6, 2019. On June 13, 2019, the jury returned a verdict in favor of plaintiff awarding her the following damages:

<u>Nature of Award</u>	<u>Amount of Award</u>	<u>Years Awarded</u>
Past Pain and Suffering	\$600,000	4 years, 6 months
Future Pain and Suffering	\$750,000	25 years
Past Medical Expenses	\$60,000	4 years, 6 months
Future Medical Expenses	\$50,000	25 years
Past Lost Earnings	\$180,000	4 years, 6 months
Future Lost Earnings	\$400,000	10 years

I. The Motion to Set Aside:

A. The Liability Verdict:

That branch of defendant's motion to set aside the verdict on liability on the ground that the plaintiff failed to make out a prima facie case, or in the alternative, on the ground that the verdict was against the weight of the evidence is denied. Pursuant to CPLR §4404:

After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a 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 may order a new trial of a cause of action or separable issue 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 as long as is deemed reasonable by the court.

CPLR §4404(a).

A motion for judgment as a matter of law pursuant to CPLR 4404(a) may be granted “only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and that there was no rational process by which the jury could have found in favor of the nonmoving party” (*Tapia v. Dattco, Inc.*, 32 A.D.3d 842, 844, 821 N.Y.S.2d 124; *see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145; *Gaspard v. Aronoff*, 153 A.D.3d 795, 796, 61 N.Y.S.3d 240). This is the same standard for granting a motion for a directed verdict for failure to make out a prima facie case.

Contrary to defendant's contention, there was a valid line of reasoning and permissible inferences that justify the jury's liability verdict. Ample evidence was presented supporting the jury's determination that the defendant was negligent and that its negligence was a substantial factor in causing plaintiff's accident. There is no merit to defendant's contention that the record is devoid of any proof that defendant had actual and/or constructive notice of the conditions that

caused the ceiling collapse or that the defendant created the condition. Accordingly, defendant's motion to set aside the verdict on the ground that the plaintiff failed to make out a prima facie case is denied.

A jury verdict may not be set aside as against the weight of the evidence “ ‘unless the evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence’ ” (*Killon v. Parrotta*, 28 N.Y.3d 101, 107, 42 N.Y.S.3d 70, 65 N.E.3d 41, quoting *Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163; see *Gaspard v. Aronoff*, 153 A.D.3d at 796, 61 N.Y.S.3d 240). “[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for 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” (*Nicastro v. Park*, 113 A.D.2d 129, 133, 495 N.Y.S.2d 184). Here, the evidence did not so preponderate in favor of the defendant so that it could be said that the liability verdict could not have been reached on any fair interpretation of the evidence.

B. The Damages Verdict:

During the damages phase, plaintiff called as expert witnesses Dr. Cohen and Dr. Baum who both have a specialty in orthopedics. Dr. Cohen testified that as a result of the accident, the plaintiff suffered a herniated disc at the L5/S1 level which required him to perform surgery consisting of a discectomy, a decompression and a fusion entailing the insertion of a cage to stabilize plaintiff's spine. He attributed both the injury and the necessity for surgery to the accident. Although he opined that there was a high risk that plaintiff would need future back surgery, which he estimated would cost between \$50,000 and \$100,000, he testified that there

was only a 50% possibility that the plaintiff would need the future surgery. He did not give any testimony that his bills for treatment were reasonable.

Dr. Baum testified that as a result of the accident, the plaintiff suffered injuries to her right knee and both shoulders, all of which required arthroscopic surgery. The injury to her right shoulder consisted of a high grade supraspinatus tendon tear, a tear of the interior inferior labrum, bursitis and impingement. The injury to her left shoulder consisted of a tear of the anterior inferior labrum with extension to the equator. The right knee injury involved a tear of the lateral meniscus resulting in grade two to three chondromalacia. Dr. Baum opined that the plaintiff will require a right knee replacement in the future that will cost approximately \$30,000. Although he estimated the plaintiff owed him approximately \$30,000 in outstanding medical bills, no testimony was elicited that this was a reasonable amount for the services rendered.

(1). **Excessiveness:**

“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 A.D.3d 761, 762, 51 N.Y.S.3d 160, quoting *Graves v. New York City Tr. Auth.*, 81 A.D.3d 589, 589, 916 N.Y.S.2d 793; see CPLR 5501[c]). “The reasonableness of compensation must be measured against relevant precedent of comparable cases” (*Peterson v. MTA*, 155 A.D.3d 795, 798, 64 N.Y.S.3d 266, quoting *Halsey v. New York City Tr. Auth.*, 114 A.D.3d 726, 727, 980 N.Y.S.2d 487).

“ ‘ 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’ ” (*Peterson v. MTA*, 155 A.D.3d at 798, 64 N.Y.S.3d 266, quoting *Vainer v. DiSalvo*, 107 A.D.3d 697, 698–699, 967 N.Y.S.2d 107).

Considering the nature and extent of the injuries sustained by the plaintiff, the jury award of \$600,000 for past pain and suffering for a period of 4 years and six months, and the award of \$750,000 for 25 years do not materially deviate from what would be reasonable compensation (*see* CPLR 5501[c]; *see Tarpley v. New York City Transit Auth.*, 177 A.D.3d 929, 932, 113 N.Y.S.3d 148, 152; *Halsey v. New York City Transit Auth.*, 114 A.D.3d 726, 727, 980 N.Y.S.2d 487).

(2) **Past and Future Medical Expenses:**

Defendant contends that the awards for past and future medical expenses must be stricken as there was no evidence at trial that these expenses were reasonable. Defendant contends that medical expenses requires proof that the amount of the expenses are reasonable and an award for future medical expenses cannot be speculative, but rather must be supported by the record to reasonable certainty (*Lopez v. Sunrise One, LLC*, 40 Misc. 3d 1238(A), 977 N.Y.S.2d 667 (Sup. Ct. Kings Cty 2013); *citing Guallpa v. Key Fat Corp.*, 98 A.D.3d 650, 650). Defendant maintains plaintiff offered no evidence that the past or future medical expenses were reasonable, and that plaintiff simply placed certain medical bills into evidence, outside the presence of the jury, and the jury never reviewed any of the bills.

With respect to the award for past medical expenses, defendant is correct. Since there was no evidence that the past medical expenses were reasonable, the award must be stricken. With respect to future medical expenses, the only admissible proof of future medical expenses was the testimony of plaintiff's expert orthopedist Dr. Howard Baum that plaintiff will require a

future knee replacement at a cost of \$30,000. Contrary to defendant's contention, there was sufficient testimony that this was a reasonable amount for the surgery. Accordingly, the award for future medical expenses must be reduced to \$30,000.

(3) **Loss of Earnings:**

The Court sees no reason to disturb the jury's determinations as to plaintiff's past and future loss of earnings. The medical testimony fully supports the jury's determination that plaintiff was rendered disabled as a result of her injuries and plaintiff submitted admissible proof, her W-2 for 2013, demonstrating that she earned \$39,000 that year.

II. Defendant's Motion for a Mistrial and to Disqualify Plaintiff's Counsel from Continuing to Represent the Plaintiff in this Action.

During the trial, it came to light that the attorney of record for the plaintiff paid the hospital and anesthesia fees for two of plaintiff's surgeries (with the surgeon's personal fees asserted as a lien against the proceeds of this action) from his attorney escrow account. The checks reflecting these payments were received into evidence. Defendant maintained that by paying for some of plaintiff's medical expenses, her attorney created a conflict of interest and defendant moved for a mistrial on this basis. The Court reserved decision and directed the parties to brief the issue.

Defendant contends that the Court should have granted the motion and order that plaintiff's counsel be disqualified from continuing to represent the plaintiff. Defendant contends that paying portions of plaintiff's medical expenses constituted an impermissible financial investment in the outcome of this litigation under the New York Rules of Professional Conduct. Defendant maintains that an attorney may not represent a client where there is a clear conflict of interest (see *Moray v. UFS Indus., Inc.*, 156 A.D.3d 781; see also, *Woodson v. Mendon Leasing*

Corp., 253 A.D.2d 669, 669) and that where a conflict of interest becomes apparent during litigation, disqualification is the appropriate remedy.

Defendant cites New York Rule of Professional Conduct 1.7, which provides that a lawyer cannot represent a client if: “(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.” Defendant also cites Rule 1.8, entitled "Current Clients: Specific Conflicts of Interest Rules", which states: “While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that: (a) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; (b) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and (c) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

Defendant points out that Comment 9(b) to Rule 1.8, expressly states that advancing medical expenses is prohibited. The Comment provides: “Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.” (NY Rule of Professional Conduct 1.8, Comment 18 Comment 9(b)). Comment 10 sets forth the rationale for this rule and states: “Lawyers may not subsidize lawsuits

or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee arrangements and help insure access to the courts.” Defendant points out that this issue was also addressed in NYS Bar Association Ethics Opinion 1044, which again reiterates that it is unethical for an attorney to pay medical expenses outside of those expressly identified in Rule 1.8.

In opposition, plaintiff’s attorney of record submitted an affidavit stating that he never paid for any other plaintiff’s medical treatment with his own funds. He maintains that the plaintiff took out a litigation loan from US Claims, OPCO, LLC (hereinafter US Claims) in order to finance surgical fees associated with her shoulder and her right knee surgery and averred that he never had any financial interest in US Claims. He annexed to his affidavit a copy of the contract between US Claims and the plaintiff, which is dated April 19, 2016, reflecting that she borrowed \$4,288.90 from this company, as well as a billing statement from Bay Ridge Orthopedic Associates PC stating that the hospital fee for her left shoulder surgery was \$3,288.90 payable to NY Community Hospital, and that the anesthesia fee was \$1,000 payable to United NYC Medical for a total amount of \$4,288.90, the exact amount of the checks received in evidence. He also annexed a check register record indicating that on April 25, 2016, he deposited a check in the amount of \$4,288.90 from US Claims into his escrow account on behalf of Audrey Buckham and used those funds to pay the hospital and anesthesia fees.

Considering plaintiff's counsel's explanation, the Court sees no reason to grant defendant's motion for a mistrial or disqualify plaintiff's attorney.

III. Collateral Source Hearing.

With respect to defendant's request for a collateral source hearing, CPLR 4545(a) provides, in relevant part, that "[a]ny collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict." Defendant contends that since there were awards for past medical expenses and for past lost earnings, and there was some indication that the plaintiff received compensation from collateral sources for these damages, a collateral source hearing should be held. In this regard, defendant maintains that during her deposition, plaintiff testified that she maintained health insurance on the date of the incident and that she also had disability insurance which paid lost earnings of approximately \$170 per week.

Here, the defendant established that a collateral source hearing is warranted by tendering "some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, by collateral sources" (*Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 36, 852 N.Y.S.2d 148; *Turuseta v. Wyassup-Laurel Glen Corp.*, 91 A.D.3d 635, 636, 937 N.Y.S.2d 76, 77; *see Nunez v. City of New York*, 85 A.D.3d 885, 887–888, 926 N.Y.S.2d 113). Accordingly, a collateral source hearing will be scheduled once the Court is back in session.

The Court has considered defendant's remaining arguments in support of the motion and find them to be unavailing.

Accordingly, it is hereby

ORDRED that defendant's motion is **GRANTED** to the extent that the award for past medical expenses is vacated, the award for future medical expenses is reduced to \$30,000 and a

collateral source hearing will be held prior to the entry of judgment once court is back in session.

The motion is in all other respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 11, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020