Njinga v Alexiades
2020 NY Slip Op 32268(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 805196/2016
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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ELISABETH NJINGA and COLLINET NJINGA,

Plaintiffs,

-against-

MICHAEL ALEXIADES, M.D., MICHAEL ALEXIADES, M.D. P.C., and HOSPITAL FOR SPECIAL SURGERY

Defendants.

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DECISION AND ORDER

Index Number

805196/2016

FRANK P. NERVO, J.S.C.:

As an initial matter, the Court notes the parties filed a stipulation of discontinuance in this matter after the jury returned its verdict and was discharged (NYSCEF Doc. No. 141). A party may discontinue an action without court order before responsive pleadings have been served, or by filing with the clerk of the court before the matter has been submitted to the trier of fact (CRPL § 3217). Once the matter is presented to the trier of fact, a stipulation alone cannot discontinue the matter; a court order is required (*id.*; *see* § 3217 Practice Commentary C3217:11 Time for Stipulation, David D. Siegel). No application to discontinue the action has been presented to the Court in this post-verdict matter and, consequently, the purported stipulation of discontinuance is ineffectual. Thus, the Court will address defendants' motion, unopposed by plaintiffs.

I. Set Aside Verdict - Against the Weight of the Evidence

Defendants' motion seeking a directed verdict or, in the alternative, seeking to set aside the verdict and require a new trial, necessarily implicates two different standards of review. To the extent that defendants' motion seeks a directed verdict in their favor, the standard of review is whether, based on the evidence presented at trial, no valid line of reasoning and permissible inferences exist which could possibly lead a rational person to the conclusion reached by the jury (*Cohen v. Hallmark Cards*, 45 NY2d 493 [1978]). Where a jury's determination cannot be deemed "utterly irrational," and a question of fact exists, the Court cannot direct a verdict under a legal insufficiency inquiry (*id.* at 499).

To the extent that the defendants seek to set aside the verdict and a new trial, the standard of review is whether the jury's verdict was based on a fair interpretation of the evidence (CPLR § 4404[a]; *Delgado v. Board of Educ.*, 65 Ad2D 547 [2d Dept 1978] *aff'd* 48 NY2d 643 [1979]). The Court cannot usurp the jury's function and substitute its judgment for that of the jury's on an issue of fact resolved by the jury and based on a fair interpretation of the evidence (*Martin v. McLaughlin*, 162 AD2d 181 [1st Dept 1990]; *Niewieroski v. Nat'l Cleaning Contrs.*, 126 AD2d 424 [1st Dept 1987] *lv. denied* 70 NY2d 602 [1987]).

The jury heard conflicting descriptions of the circumstances surrounding: plaintiff's health, the hip replacement procedure, plaintiff's informed consent - or lack thereof, and the injuries plaintiffs alleged. Contrary to defendants' arguments on this motion, the jury was presented with evidence that defendant Dr. Alexiades failed to

elicit plaintiff's informed consent, the surgery performed was unnecessary, and the same proximately caused her injuries. It was the jury's duty to weigh the evidence and resolve any inconsistencies. Under these circumstances, the jury's verdict was based on a fair interpretation of the evidence. That defendants vehemently disagree with the evidence underlying the jury's verdict in favor of plaintiffs is of no moment. The Court will not set aside the verdict on these bases. Likewise, the conflicting evidence presented at trial precludes directing a verdict under a legal insufficiency inquiry.

II. Improper Comments by Counsel

Defendants next contend that plaintiff's counsel's remarks during trial, including his closing statement, were so egregious and prejudicial as to require a new trial. Defendants argue, inter alia, that counsel's statement urging the jury to send a message through their verdict, and suggesting the jury consider awarding damages on a per diem or unit of time formula was improper. These issues were raised at the time of trial and the Court instructed the jury, stating:

> During the course of plaintiff's counsel's summation he mentioned some conversations that he had with his client after some of the testimony. Any conversations that plaintiff's counsel may have had with his clients and that he referred to or relayed to you in his closing statement are not to be considered by you during your deliberations, as that is not evidence. But it bears repeating and this is a perfect example of the rule, that nothing an attorney says during their closing remarks is evidence.

(Trial tr. at 847).

> However, again, arguments remarks and summations of the attorneys are not evidence, nor is anything that I now say or may have said with regard to the facts evidence.
>
> [...]

> It is your recollection of the evidence and your decision on the issues of fact which will decide this case.

(Trial tr. at 849).

Defendant argues that plaintiff's counsel's closing remarks ran afoul of the measure of time request for damages, by suggesting the jury award recompense for every moment she is alive. Measurement of pain and suffering, and the appropriate damages to compensate a plaintiff, is, by its nature, a case specific inquiry that cannot be properly determined by a unit-of-time mathematical formula (*Paley v. Brust*, 21 AD2d 758 [1st Dept 1964]). Thus, a plaintiff's counsel may not suggest a per diem award (*De Cicco v. Methodist Hosp. of Brooklyn*, 74 AD2d 593 [2d Dept 1980]; *see also* New York Practice, § 9:503).

However, this argument is duplicative of their objection at trial and was overruled on the record:

> After review of the record the Court finds that the comment by Mr. Merson to the effect that he is making an argument that she be compensated for every day or every minute that she is here on Earth is not violative of the measure of time or unit of time request for damages that are sometimes made along the lines of, my client should be compensated one dollar for every minute or even one penny for every second would equal X number. So we have your objection. It is overruled.

(Trial tr. at 839-40).

Furthermore, the Court instructed the jury that any comment by counsel related to the appropriate measure of damages was argument and not evidence:

> Now, during his closing remarks, counsel for the plaintiff suggested specific dollar amounts he believes to be appropriate compensation for specific elements of the plaintiffs' damages. An attorney is permitted to make such suggestions as to the amount that should be awarded. Those suggestions are argument only, not

> evidence, and not considered by you as evidence of plaintiff's damages. The determination of damages is solely for you, the jury, to decide.

(Trial tr. at 864).

Plaintiff's counsel's remarks did not violate the prohibition on suggesting the jury utilize a unit-of-time mathematical formula to calculate plaintiff's damages and the jury was instructed that any counsels' suggestion as to damages was not evidence, but argument only. Plaintiff's counsel's remarks amount to a statement that the jury should consider plaintiff's pain and life expectancy in its own sound discretion in determining a suitable award, an appropriate consideration. Consequently, the verdict will not be set aside on this basis.

Likewise, defendants' argument that plaintiff's counsel's closing remarks improperly bolstered his clients' credibility, attempted to limit the credibility of defendants, and urged the jury to send a message vis-à-vis its verdict is duplicative of their objection at trial. The Court overruled defendants' objection to these comments, finding:

> While plaintiff's counsel may have remarked during his summation that he believes his client, he did include in his further remarks reference to the testimony and exhibits [sic] the basis for his belief in his client. Further, we can be confident it comes as no surprise to any juror that an attorney has belief in his own client or any other witness he may call for that matter. Perhaps the better practice would have been for counsel to remark "This is why my client is credible or believable," and then proceed to point to the evidence that suggests his client's credibility. The Court finds any form of curative instruction on this issue would not be useful, and any prejudice to the defense under the facts of this case is, at best, minimal.
>
> Now, with respect to plaintiff's counsel's remarks that Ms. Njinga's brining this case helps to make the world a better place or words to that effect, as we know, it is improper to transmute any negligence action into one that is brought for the

> benefit of society or for any reason other than the seeking of damages for injuries alleged to have been sustained resulting from another party's negligence. Therefore, the Court will charge this jury at the appropriate point in the charge that they are to consider ... appropriate compensation to the plaintiffs and not to consider damages for any other purpose including any potential benefit to the greater society, the greater good or to send any kind of message to anyone, as that is not the purpose of this trial.

(Trial tr. at 842-43)

The Court, thereafter, charged the jury:

> You may not consider or speculate on matters not in evidence or matters outside of this case. In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or indeed any consideration outside the case as it has been presented to you in this courtroom.

(Trial tr. at 850).

> [y]ou are not to consider damages for any other purpose including any potential benefit to the greater society, greater good, or send any kind of message to anyone as that is not the purpose of this trial. All right. All damages to be awarded here, should you find damages, are warranted – are to appropriately compensate the plaintiffs, and the plaintiffs only.

(Trial tr. at 863).

As noted by the Court at the time of trial, plaintiff's counsel's comments were not, perhaps, best practice, but defendants' contention that this Court's determination, finding an instruction to the jury would alleviate any prejudice, amounts to reversible error is misplaced. The cases cited by defendants for the proposition that a new trial is warranted where counsel makes inappropriate comments are inapposite, involving repeated irrelevant comments serving only to incite passion and sympathy (*see e.g. Minicheillo v. Supper Club*, 296 AD2d 350 [1st Dept 2002] implying German national who spoke with an apparent accent was a Nazi, eliciting unrelated testimony related to an alleged attack of an employee with AIDS, and eliciting extensive prejudicial

testimony of consumption of alcohol which had "little or no probative value"). This is not the case at bar. Consequently, a new trial will not be granted on this basis.

III. Excessive Award

Next, defendants contend the jury's award of $1 million for past pain and suffering, $5 million for future pain and suffering, and a total award of $250,000 for plaintiff-husband's loss of services claim is excessive and should be set aside. However, the cases cited by defendants in support of their motion to set aside the jury's verdict as excessive are entirely distinguishable from the instant matter.[1]

Here, the jury found Dr. Alexiades failed to secure plaintiff's informed consent, performed an unnecessary hip replacement surgery, and these actions were a substantial factor in causing injury to plaintiff, as well as forming the basis for her husband's consortium claim. The cases in this department of the Appellate Division cited by defendants involve, inter alia, labor law claims for hip fractures, falls after amputation surgery, hip fracture due to closing subway doors, and torn tendons and fractures due to a fall (*Caldas v. City of NY* 284 AD2d 192 [1st Dept 2001]; *Raniola v. Montefiore Med. Ctr.*, 85 AD3d 641 [1st Dept 2011]; Victor v. NYCTA, 112 AD3d 523 [1st Dept 2013]; *Clotter v. NYCTA*, 68 AD3d 518 [1st Dept 2009], respectively). These personal injury matters do not establish the award in this medical malpractice matter is excessive. Defendants fail to cite any appellate authority where a similarly situated plaintiff was awarded damages due to an unnecessary hip replacement surgery or where

[1] The Court takes judicial notice of the effects of inflation on awards in those matters cited by defendants and the Federal Bureau of Labor Statistics (*Ram v. Blum*, 77 AD2d 278 [1st Dept 1980]).

a plaintiff was awarded damages due to a defendant doctor's failure to provide appropriate information to obtain the plaintiff patient's proper informed consent (*see e.g. Lukas v. Trump*, 281 AD2d 400 [2d Dept 2001] personal injury action from trip and fall of 60 year old with polio; *Turuseta v. Wyassup-Laurel*, 91 AD3d 632 [2d Dept 2012] personal injury action from trip and fall; *Kahvejian v. Pardo*, 125 AD3d 936 [2d Dept 2015] motor vehicle accident causing avascular necrosis). Put another way, the cases defendants rely on as comparable to this matter are wholly inapposite.[2]

Furthermore, evidence was presented at trial, to a reasonable degree of medical certainty, that due to plaintiff's age, expected lifespan, and the expected durability of the hip replacement equipment, plaintiff may require a second hip replacement in the future, with the rehabilitation, pain, and risks associated with additional surgery at a more advanced age. This circumstance is absent in the cases cited by defendants. Thus, a comparison of awards in this matter with those cited by defendants is inappropriate.

The jury's award of $250,000 for plaintiff-husband's loss of services claim is imminently reasonably. At trial, he testified to significant loss of services of his wife, including, among others, her inability, since the surgery, to engage in intimate marital conduct, or travel, as they had extensively done previously.

[2] To the extent the cases cited by defendants lend themselves to comparison with the instant award, considering inflation, the Court does not find the instant award materially deviates from fair and just compensation.

IV. Adequate Proof

Defendants contend no evidence was presented, beyond plaintiff's testimony, of her pain, and that as such the award must be set aside. Defendants argue that *Thompson v. Port Authority* requires this Court to set aside the verdict in favor of plaintiff for want of corroborating evidence supporting plaintiff's claims of pain (284 AD2d 232 [1st Dept 2001] finding fair interpretation of evidence supported finding no future injury and no loss of consortium due to credibility concerns, lack of continuous treatment, and lack of corroborating medical expert testimony). Defendants reliance on *Thompson* is misplaced, as plaintiffs presented, inter alia, x-rays and imaging, expert testimony, and medical records indicating her hip joint did not require surgery and the surgery was causally related to the pain she suffered and continues to suffer indefinitely. Dr. Sicherman, plaintiffs' expert, testified that plaintiff experienced various pain associated with the surgery, including the emotional trauma of being subjected to an unnecessary surgery. He further testified that he believed the pain plaintiff suffered prior to surgery was potentially spinal in nature and would not be relieved by hip replacement surgery, contraindicating performing the surgery. Finally, Dr. Sicherman testified that he believed plaintiff's injuries were permanent and would continue "forever" (Trial tr. at 184). Such corroborating evidence was lacking in *Thompson*, and the credibility concerns in *Thompson* are absent in this matter (*id.*).

Plaintiffs, therefore, submitted sufficient proof of her injuries, plaintiff-husband's derivative claim, and their causal connection to Dr. Alexiades' surgery. It is beyond cavil that total hip replacement surgery, performed unnecessarily and without proper informed consent, as well as the likelihood of a second hip replacement surgery amounts

to an injury "more than minimal," despite defendants' contention otherwise (*Laurie Marie M. v. Jeffrey T.M.*, 159 AD2d 52 [2d Dept 1990]). Again, that defendants point to evidence they submitted to the contrary is of no moment, as it was the jury's function to weigh the evidence and resolve any inconsistencies therein. Plaintiffs submitted sufficient evidence to establish her pain as a matter of law. The Court will not set aside the jury's verdict for insufficient showing of plaintiff's pain and suffering.

V. Evidence

Finally, defendants contend admitting the unredacted medical records of Dr. Seckin into evidence was reversible error, as neither Dr. Seckin not Dr. Levy, the declarant, were called at trial, and thus the statement "Dr. Levy agrees the hip replacement surgery was done in error" is inadmissible hearsay.

Business records made in the ordinary course of business that contain statements within the scope of the entrant's duty to record the statement are admissible as an exception to hearsay (CRLR § 4518[a]; *Johnson v. Lutz*, 253 NY 124 [1930]). It is well established that each participant in the chain producing the business record must be under a duty to record the event/statement. "Not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well;" "if any of the participants in the chain is acting outside the scope of a business duty" the exception fails (*Matter of Leon RR*, 48 NY2d 117 [1979]).

Defendants stipulated to the entry of redacted medical records, including Dr. Seckin's, but objected to the statement, "Dr. Levy agrees the hip replacement surgery was done in error" (Trial tr. at 156, 719). The Court overruled the objection, finding the medical record a valid business record (Trial tr. at 719). Contrary to defendants' argument, and as noted by the Court at trial, this annotation in the record was relevant and related to the questions before the jury. Plaintiff suffered from pain prior to the surgery that continued afterwards, and the statement contained in Dr. Seckin's records regarding the hip replacement surgery is pertinent to plaintiff's treatment by Dr. Seckin, as Dr. Seckin sought to identify the source of plaintiff's pain. The statement was of a type made in the ordinary course of business by plaintiff's treating physicians and by physicians with duties to report and record the statement. Thus, the record was properly admitted as an ordinary business record of plaintiff's doctor.

Accordingly, it is

ORDERED that the motion is denied in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 26, 2020

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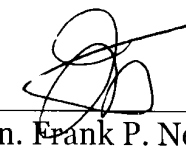

Hon. Frank P. Nervo, J.S.C.