

Bhatia v Winegarden
2020 NY Slip Op 34408(U)
December 31, 2020
Supreme Court, New York County
Docket Number: 805143/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 805143/15

AARTI BHATIA, as Executrix of the Estate of
RICHARD PEIRANO, deceased,

Plaintiff,

-against-

DR ROBERT WINEGARDEN, DR. TATYIANA BERMAN
SOL STOLZENBERG, D.M.D., P.C, d/b/a TOOTHSAYERS,
RAIMON PEREZ, JERRY H. LYNN, D.D.S. and
UNIVERSAL DENTAL,

Defendants,

----- X

Joan A. Madden, J.:

Defendants Sol Stolzenberg, D.M.D., P.C. d/b/a Toothsavrs (“Stolzenberg” or
“Toothsavrs” or “Stolzenberg/Toothsavrs”) and defendant Dr. Robert Winegarden
(collectively “defendants”) separately move to set aside the verdict pursuant to CPLR 4401 on
the grounds that plaintiff failed to make out a prima facie case against defendants; that the
verdict is against the weight of credible evidence; and for remitter, reducing the award of
\$175,000 for past pain and suffering and striking or reducing the award of \$20,000 for past
dental expenses. Solzenberg/Toothsavrs also moves to set aside the verdict on the grounds that
plaintiff failed to establish prima facie evidence that it was the owner of Toothsavrs at the time
of Mr. Peirano’s dental treatment, so as to be vicariously liable for any negligence in connection
with such treatment. Plaintiff, Aarti Bhatia, as Executrix of the Estate of Richard Peirano
opposes both motions and cross moves for additur to increase the award for past pain and
suffering to \$500,000.

In this dental malpractice action, plaintiff alleged that defendants were negligent in treating Richard Peirano (“Mr. Peirano”) with respect to work involving crowns and bridges between 2008 and 2013.¹

Plaintiff asserts issues at trial focused on the bridge at teeth numbers (nos.) 6 through 8, crowns at teeth nos. 4,5, 13, and 14.² Plaintiff’s expert Dr. Gilbert Beldengreen testified that the crowns did not fit properly, and that an improper fit of this nature allows bacteria to harbor and cause decay which, in turn, causes periodontal problems resulting in inflammation and bleeding gums (Trial Transcript (“T.T.”) at 475-76; 505-06). In addition, this causes bone loss, infection, pain and places stress on the patient’s immune system (T.T. at 509; 623). Dr. Beldengreen further testified that the ill-fitting crowns fabricated by Toothsavvers caused significant bone loss in Mr. Peirano’s upper left quadrant, requiring teeth to be extracted, the area sutured to heal over, and eventually resulted in the need for bone grafting and a left sinus lift to increase bone volume (T.T. at 480). Dr. Beldengreen opined, based on the nature, quality and periodontal and dental problems resulting from the ill-fitting bridge and crowns, that this work was a departure from accepted dental practice (T.T. at 503, 504). Moreover, Dr. Beldengreen testified that this type of dental work causes discomfort and an inability to eat on that side of the patient’s jaw.

Mr. Peirano, who was deceased at the time of the trial, testified at his deposition that throughout his five years of treatment at Toothsavvers, that is, from 2008 to November 25, 2013, his gums were continuously sore and bleeding. Mr. Peirano further testified that that on

¹ The evidence at trial indicated that Mr. Peirano first received dental care at Toothsavvers between April 2002 and 2003; however, the trial issues, as stated above, involved treatment between 2008 and 2013.

² Stolzenberg/Toothsavvers asserts that Mr. Peirano, while a patient at Toothsavvers, had three (3) versions of an upper center bridge on teeth nos. 6 through 8; an upper left bridge on teeth nos. 12 through 14, and two versions of individual crowns on teeth nos. 4,5,9, 10 and 11.

November 26, 2013, dissatisfied with the care at Toothsavvers, he went to Columbia Dental Clinic (Columbia Clinic), where he received treatment for his periodontal and dental problems, which treatment consisted of the extraction of various teeth, including teeth nos.12 and 14, and implants.

In this connection Dr. Beldengreen testified that with respect to teeth nos. 12 and 14, the extractions were necessary due to bone loss and granulated infected tissue, which condition subsequently required bone grafting and the sinus lift (T.T. at 480). Dr. Beldengreen opined that implants were then surgically placed, that the entire process causes pain and discomfort. The record establishes that at the Columbia Clinic, Mr. Peirano received treatment for periodontal problems, including additional extractions, grafting and implants, until his death on November 30, 2017.

With respect to defendants' argument that plaintiff failed to establish a prima facie case, defendants argue that plaintiff's claim of negligence regarding the "fit of the crowns and bridgework," is speculative and legally insufficient. Defendants contend that Dr. Beldengreen relied on x-rays taken by Columbia Dental Clinic on November 26, 2013, which was many months after the crowns and bridge were inserted. In support of this this argument, defendants point to Dr. Beldengreen's testimony that one cannot definitively determine the fit of a crown from two-dimensional x-rays, as a clinical exam and probing are needed, which Dr. Beldengreen did not do (T.T. at 541, 580).³

Defendants further argue that plaintiff did not establish causation as to the ill-fitting crowns, since the evidence showed that Mr. Peirano's "upper left teeth," were "hopeless" by the

³ Dr. Winegarden argues that poor dental hygiene caused Mr. Peirano's periodontal problems. However, as the jury considered this issue in interrogatories 5(a) and 5(b), and found that Mr. Peirano was negligent in caring for his teeth, that this was not a substantial factor in causing his injuries, the court need not revisit this issue..

time he became a patient of Tothsavers; Dr. Beldengreen did not link individual departures to specific injuries; and defendants' expert Dr. Rausch testified that Columbia Clinic was able to complete the restoration of the teeth in this area (T.T. at 895-96; 917).

For the following reasons, defendants' motions to set aside the verdict on the grounds that plaintiff failed to establish prima facie evidence of negligence and on the grounds that the verdict is against the weight of the evidence, are denied. CPLR 4404(a) provides to the extent relevant, that "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... where the verdict is contrary to the weight of the evidence" The standard for setting aside the verdict and entering judgment for the moving party as a matter of law is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a trial judge asked to direct a verdict." Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978). However, "in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus, a valid question of fact exists, the court may not conclude that the verdict is as a matter of law not supported by the evidence." Id (citation omitted). Moreover, "[i]n considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." See Szczerbiak v Pilak, 90 NY2d 553,556 (1997).

Applying the above standard, defendants' argument that plaintiff failed to establish a prima facie case of negligence is without merit. As to the contention that Mr. Peirano's teeth

were “hopeless” when he became a patient at Toothsavvers, defendants fail to support this contention with attribution to the record. Likewise, defendants fail to support the contention that plaintiff did not establish a link between the departures with specific injuries. As discussed above, Dr. Beldengreen testified that the crowns on teeth nos. 4, 5, 13 and 14 and the bridge on teeth nos. 6 – 8 were ill-fitting and caused inflammation, and bleeding gums, which led to bone loss, infection, and pain, and the need for extractions and implants. In connection with Mr. Peirano’s upper left quadrant, Dr. Beldengreen testified the ill-fitting crowns caused the infections and bone loss and led to the need for the teeth to be extracted, the area sutured, bone grafting, and a left sinus lift to increase bone volume. As to defendants’ argument that Dr. Beldengreen testified that x-rays are not sufficient and a clinical examination is needed to establish that crowns are ill-fitting, the significance of this testimony was for evaluation by the jury, and is not dispositive, in light of other evidence that the crowns were ill-fitting, including evidence of Mr. Peirano’s numerous office visits involved in refitting, readjusting or other corrective measures, and x-rays taken during that period. As to defendants’ argument regarding Dr. Rausch’s testimony that Columbia Clinic was able to complete the restoration of certain teeth, and therefore plaintiff did not suffer any permanent injuries, this argument is unavailing, based on Dr. Beldengreen’s testimony that the work at Toothsavvers was a departure from accepted dental practice and caused the need for the restoration work. Nor is a different conclusion warranted based on defendants’ contention that the implants inserted at the Columbia Clinic had been previously discussed with, and refused by, Mr. Peirano at Toothsavvers. Significantly, defendants fail to support this contention with evidence in the record that absent the departures, Mr. Peirano would not have needed the implants and other restoration work.

With respect to defendants' motion to set aside the verdict as against the weight of the evidence, the standard to be applied is whether the evidence so preponderated in favor of the moving party, that the verdict "could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., 86 NY2d 744, 746 (1995), quoting Moffatt v. Moffatt, 86 AD2d 864 (2d Dept 1982), aff'd 62 NY2d 875 (1985). Case law holds that the court's analysis "involves what is in large part a discretionary balancing of many factors." Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978)(internal citation omitted). To the extent defendants' arguments implicate the weight to be given to the conflicting opinions and testimony, of Dr. Beldengreen and Dr. Rausch, this evaluation is a matter for the jury. Rojas v. Palese, 94 AD3d 557, 558 (1st Dept 2004) (citations omitted). Moreover, "[i]t is for the jury to determine the credibility of witnesses and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses....Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert." Siddiqua v. Anarella, 120 AD3d 793,794 (2nd Dept 2014) (internal citations omitted). Under these well settled legal principles, and based on an analysis of the evidence as discussed above, it cannot be said the evidence so preponderated in favor of the defendants, that the verdict "could not have been reached on any fair interpretation of the evidence. Lolik v. Big V Supermarkets, Inc., supra.

The motion by defendant Stolzenberg/Toothsaver to set aside the verdict on the grounds that plaintiff failed to establish prima facie evidence or evidence of sufficient weight regarding Toothsavers' vicarious liability for the acts of Dr. Winegarden, is denied. In this connection, Stolzenberg/Toothsavers argues that as Dr. Winegarden performed the dental work at issue, in order for Stolberg/Toothsavers to be vicariously liable for any negligence, plaintiff must show that Dr. Stolzenberg was the owner of Toothsavers at the time of the treatment, and that Dr. Winegarden was an employee of Toothsavers. In support of this contention regarding

ownership, defendant contends that the proof at trial was insufficient, as it depended on the testimony of Mr. Jerry Lynn, the former owner of the practice, regarding the transfer of ownership of the practice, which testimony defendant alleges was not credible and that the transfer was a “sham.” Defendant points to the lack of documentary evidence regarding the transfer or sale, and asserts that Mr. Lynn’s testimony that he sold the practice for \$6 million to Sol Stolzenberg D.M.D., P.C. was not credible, as Mr. Lynn could not recall the amount of the down payment, the payment arrangements nor the outstanding balance. Defendant also argues that while plaintiff did not offer any documentary evidence regarding the sale, plaintiff’s counsel objected when Mr. Lynn’s attorney made such offer.

Stolzenberg/Toothsavers motion is denied as its argument is based on the theory that the sale of the practice to So Stolzenberg, P.C., D.M.D., in other words to “itself,” was a “sham” and requires a determination that the testimony of Mr. Lynn, and, to a certain extent, the testimony of Dr. Winegarden that he was an “employee” of Toothsavers, are incredible as a matter of law, a determination that defendant fails to support in the record. Significantly, as the allegation that the sale to Stolzenberg, D.M.D., P.C. was a “sham” is asserted by that same entity, the defendant that was in a position to substantiate its allegations with at a minimum, documentary evidence. Under these circumstances, it cannot be said that the verdict should be set aside on the grounds that plaintiff did not present prima facie evidence of ownership by Stolzenberg, D.M.D., P.C., or that the evidence so preponderated in favor of Stolzenberg, P.C., D.M.D.

Nor is Stolzenberg/Toothsavers’ argument persuasive that Dr. Winegarden’s testimony that he was an employee of Toothsavers during the time he treated Mr. Peirano, is insufficient to establish his employment status. In support of this contention, Stolzenberg/Toothsavers argue that the dispositive factor in determining whether a person is an employee or independent

contractor, is whether he or she is under the control or direction of the alleged employer, and point to Dr. Winegarden's testimony that he made his own treatment decisions and Dr. Stolzenberg did not tell him, nor direct or control his treatment. Stolzenberg/Toothsavers asserted in its answer that Dr. Winegarden was an independent contractor as an affirmative defense and has the burden of proof on this issue. See Hampton v. Universal Dental, 140 AD3d 462 (1st Dept 2016). As the alleged employer, Stolzenberg/Toothsavers was in a position to prove Dr. Winegarden's status. Moreover, Dr. Winegarden's testimony that he was an "employee" cannot be said to be incredible as a matter of law. Defendant's argument that Dr. Winegarden did not understand the legal distinction between an employee and an independent contractor likewise is not persuasive, particularly in light of other testimony that in 2013 he purchased the practice. Under these circumstances, it cannot be said that the verdict should be set aside as to Stolzenberg/Toothsavers on the grounds that plaintiff failed to show prima facie proof or that the evidence so preponderated in favor of movant, regarding Dr. Winegarden's employment status.

Defendants move to set aside the verdict and for a new trial with respect to damages, on the grounds that the jury's awards to plaintiffs were excessive, and plaintiff cross moves on the grounds that the award was inadequate. While the amount of damages to be awarded for personal injuries is primarily a question for the jury, and a jury's verdict should be given considerable deference, an award may be set aside "as excessive or inadequate if it deviates materially from what would be reasonable compensation." CPLR 5501(c); see Ortiz v. 975 LLC, 74 AD3d 485, 486 (1st Dept 2010). While "personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification," courts look to comparable cases in deciding if an award deviates

from fair and reasonable compensation. Reed v. City of New York, 304 AD2d 1, 6 (1st Dept), lv denied 100 NY2d 503 (2003). However, “[m]odification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible.” So v. Wing Tat Realty, Inc., 259 AD2d 373, 374 (1st Dept 1999).

In analyzing whether an award is reasonable compensation, as discussed above, courts look to awards in comparable cases; however, such awards are not binding, given the unique nature of pain and suffering in individual cases. Courts, in giving deference to jury awards, have considered that the jury had an opportunity to hear testimony first- hand and concluded that the award at issue was appropriate, See Ford v. A.O. Smith Water Products, 173 AD3d 602 (1st Dept 2019). Considering the forgoing factors, I conclude that the jury’s award of \$175,000 for pain and suffering is reasonable compensation.⁴As to reasonable compensation. I have considered, *inter alia*, that Mr. Peirano experienced pain during his five years of treatment at Toothsavvers, and during subsequent treatment at Columbia Clinic for approximately four years. While a patient at Toothsavvers, Mr. Peirano experienced inflammation, bleeding gums, infections and tooth decay. In addition, due to the ill-fitting crowns and ill-fitting bridge at teeth nos. 6-8, Mr. Peirano was required to make numerous visits to the office for refitting or repair work.

Defendants also move to set aside the verdict of \$20,000 for dental expenses on the grounds that plaintiff failed to present competent proof of expenses and relied upon “hearsay.” In this connection, plaintiff counsel’s contention that the Toothsavvers’ chart shows Mr. Peirano paid \$4,900 for dental work is unchallenged by defendants and thus, is sufficient proof as to this

⁴ While plaintiff and defendants cite various cases to support their respective arguments, the cases cited vary in factual details with respect to the nature and extent of injuries, and, as noted above, offer some guidance, but are not binding.

amount. Defendants' arguments fail with respect to Mr. Peirano's deposition testimony that he paid Columbia Clinic between \$10,000 and \$12,000 for the work performed at the clinic. CPLR 7117 permits the use of such deposition where the deponent is deceased, and accordingly, the lesser amount of \$10,000 is properly considered. Thus, the evidence supports \$14,900 in dental expenses, and defendants' motion to set aside the verdict is granted only to the extent of vacating the award of \$20,000 for dental expenses, and ordering a new trial on such damages unless plaintiff stipulates to reduce the award to \$14,900.

Accordingly, it is


ORDERED that defendants' motions are granted only to the extent of vacating the award of \$20,000 for dental expenses, and ordering a new trial on such damages unless within 45 days of service of a copy of this decision and order with notice of entry, plaintiff stipulates to reduce the award to \$14,900; and it is further

ORDERED that in all other respects defendants' motions are denied; and it is further

ORDERED that plaintiff's cross-motion is denied.

DATED: December 31, 2020

ENTER:



J.S.C.

HON. JOAN A. MADDEN
J.S.C.