

Pagan v Goldfarb Props., Inc.
2020 NY Slip Op 34824(U)
October 28, 2020
Supreme Court, Bronx County
Docket Number: Index No. 302599/2016
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No.: 302599/2016
Motion Sequence No. 3
Motion Date: 9/30/2020

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JOSE PAGAN

Plaintiff(s),

-against-

GOLDFARB PROPERTIES, INC.,

Defendant(s).

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice of the Supreme Court

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support and Exhibits annexed thereto,.....	1
Affirmation in Opposition and Exhibits annexed thereto.....	2
Affirmation in Reply.....	3

Motion decided as follows: Upon deliberation of the application duly made by defendant GOLDFARB PROPERTIES INC., (hereinafter "Defendant") herein by **NOTICE OF MOTION**, and all the papers in connection therewith for an Order pursuant to CPLR § 4404, setting aside the Verdict and Order on the instant matter for a new trial for liability and damages is heretofore denied and for an Order pursuant to CPLR § 4545 granting a collateral source hearing is heretofore granted.

This action arises out of a workplace slip and fall in which plaintiff JOSE PAGAN (hereinafter "Plaintiff") was caused to sustain personal injuries. A jury trial on the matter was held on January 28th, 29th, 30th, February 4th, 6th and 7th. After several days of testimony, by Plaintiff, and experts for both Plaintiff and defendant the jury reached a verdict in favor of the Plaintiff on February 10, 2020. The jury awarded damages to Plaintiff's in the following amounts:

- One million dollars (\$1,000,000) for past pain and suffering,
- Two million dollars (\$2,000,000) for future pain and suffering,
- One hundred thousand dollars (\$100,000) for past medical expense and
- Two hundred thousand dollars (\$200,000) for past loss of earnings.

Defendant now moves to set aside the damages portion of this verdict and for a collateral source hearing. The Court heard oral argument on the matter on September 30, 2020. The Court notes that the defendant did not address, during oral argument or in his papers, the issue of liability but solely argued to set aside the money damages portion of the verdict.

In support of its motion, Defendant argues that (1) the jury's verdict of one million dollars(\$1,000,000) for past pain and suffering and of two million dollars(\$2,000,000) for future pain and suffering are excessive and against the weight of evidence, (2) that the jury's verdict of one hundred thousand dollars(\$100,000) for past medical expenses and of two hundred thousand dollars(\$200,000) for past loss of earnings are not supported by documentary evidence and (3) that the admission of the testimony of Plaintiff's expert Robert Fuchs regarding the geometry of the staircase involved in the incident was unwarranted and prejudicial.

CPLR 4404(a) states:

After a trial of a cause of action or issue triable as 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 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.

Past and Future Pain and Suffering

Defendant argues that cases from the first department clearly demonstrate that compensation similar to the instant matter resulting in verdicts of \$1,000,000 for past pain and suffering and \$2,000,000 for future pain and suffering were determined to be excessive and unreasonable. Defendant argues that a court may reduce a jury award which seems to deviate from what would be considered reasonable compensation based on the evidence.

In opposition, Plaintiff argues that there is no basis to set aside the verdict as being against the weight of the evidence, arguing that Defendant has not met its burden to prove that the evidence at trial could not have led rational people to reach the verdict that the jury did in this case, as they have not attached a transcript of the trial. Furthermore, Plaintiff argues that case law clearly demonstrates that the total damages awarded by the jury were not excessive in relation to the injuries sustained by Plaintiff. Regarding the \$2,000,000 verdict for future pain and suffering, Plaintiff argues that, without transcript of the trial to back its arguments, Defendant cannot simply argue that the verdict is excessive or unwarranted. Plaintiff also argues that Defendant's use of Lewis v. Port Author. of NY & N.J., 8 A.D.3d 205 (1st Dept., 2004) to prove that the verdict was excessive is entirely without merit as there is a dearth of information regarding the plaintiff in Lewis' age, occupation or usual activity. Plaintiff argues that, in the instant matter, plaintiff's age, occupation and usual activity were facts which weighed heavily on the jury's verdict. Regarding the \$1,000,000 verdict for past pain and suffering, Plaintiff argues that, without providing the transcript of the trial, Defendant's arguments against the verdict are without merit. Plaintiff also argues that the case defendant cites to, Tonaj v. ABC Carpet co., Inc., 43 A.D.3d 337 (1st Dept., 2007), does not involve injuries nearly as serious as the one's sustained by Plaintiff in the instant matter.

A court may set aside a jury's verdict only if the verdict could not have been reached by any fair interpretation of the evidence. Berry v. Metropolitan Transp. Authority, 256 A.D.2d.271 (1st Dep't. 1998). "A verdict should be set aside [as against the weight of the evidence] only where it seems palpably wrong and it can be plainly seen that the preponderance is so great that the jury could not have reached their conclusion upon any fair interpretation of the evidence." Cornier v. Spagna, 101 A.D.2d.141, 149 (1st Dep't 1984). In the instant matter, Defendant has not provided the record of the trial to substantiate its claims that the evidence presented could not have reasonably led a jury to reach the verdict which it did. Further, based upon the material evidence provided by both Plaintiff and Defendant at trial, the jury was free to determine the weight and credibility of the evidence and testimony of witnesses as to the injuries sustained by Plaintiff, the extent of the injuries, the extent of the disability to the Plaintiff and the damages awarded as the finders of fact. The Court will not disturb the fact finder's determination. When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view. Rivera v. 4064 Realty Co., 17 A.D. 3d 201, (1st Dept., 2005). The Trial Court is required to accord

great deference to the fact-finding function of the jury. Speciale v. Achari, 29 A.D 2d 674 (2nd Dept., 2006). 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. Gualpa v. Key Fat Corp., 98 A.D 3d 650 (2nd Dept., 2012). Due to the foregoing, Defendant's motion to set aside the jury verdict on the issue of the damages awarded for past and future pain and suffering is hereby denied.

Past Medical Expenses and Lost Earnings

Regarding the \$100,000 verdict for past medical expenses, Defendant argues that Plaintiff's claims for medical expenses were based purely on speculation and estimate by Plaintiff's surgeon, Dr. Katzman, and that the total sum is not supported by any documentary evidence. Regarding the \$200,000 verdict for past loss earnings, Defendant argues that Plaintiff only offered oral testimony stating his hourly wage and average hours worked per week and failed to provide documentary evidence in the form of pay stubs, W-2's or tax returns. For this reason, Defendant argues that Plaintiff has not met his burden of proof and the jury's verdict based upon this oral testimony is therefore unsupported. Furthermore, Defendant states that the lack of documentary evidence produced in support of Plaintiff's claims warrants a collateral source hearing. Defendant argues that the instant matter is a workplace accident in which Plaintiff's medical expenses and lost wages were covered by workers' compensation. Defendant alleges that, since Plaintiff has acknowledged receiving workers' compensation and failed to produce any documentary evidence regarding lost earnings, they are entitled to a collateral source hearing.

In opposition, Plaintiff argues that the total amount for past medical expenses was not reached by pure speculation and was instead the result of a combination of the testimony of Plaintiff's three (3) treating doctors. Regarding the \$200,000 verdict for past loss earnings, Plaintiff argues that Defendant's contention that the claims for lost wages were unsubstantiated due to a lack of material evidence is entirely without merit, as Defendant did not provide a record of the trial to substantiate its argument. Plaintiff also argues that the Court clearly found the documentation sufficient to substantiate Plaintiff's claims for lost wages during the trial. Regarding Defendant's request for a collateral source hearing, Plaintiff argues that Defendant has not met its burden to prove that a collateral source hearing is necessary or warranted. Plaintiff argues that Defendant, both prior to and during trial, was made aware of the exact amount of workers' compensation received by Plaintiff and that Plaintiff was not indemnified for these expenses. For this reason, Plaintiff urges the Court to deny defendant's request for a collateral source hearing.

CPLR § 4545 states:

Actions for personal injury, injury to property or wrongful death. In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the

projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.

In order to meet the burden of proof necessary to be entitled a collateral source hearing, defendant must prove that tender "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...from collateral sources" and must meet the reasonable certainty standard. Firmes v. Chase, 50 A.D. 3d 18 (2nd Dept., 2008); Williams v. Turner, 2 A.D. 3d 217 (1st Department, 2003). Here, Defendant has shown that Plaintiff has acknowledged receiving workers' compensation but that plaintiff has failed to provide documentary evidence, in the form of tax documents, regarding lost earnings. Defendant's motion for a collateral source hearing as to the lost earnings claim is hereby granted.

"Awards of damages for past and future medical expenses must be supported by competent evidence which establishes the need for, and the cost of, medical care." Pilgrim v. Wilson Flat, Inc. 110 A.D. 3d 973 (2nd Dept. 2013). Plaintiff has stated that the jury verdict regarding past medical expenses was reached after the testimony of three (3) of plaintiff's treating doctors. "Thus, the jury's awards for past medical expenses...was reasonable in light of testimony from the plaintiff's witnesses as to certain past and future medical expenses." Starkman v. City of Long Beach, 148 A.D.3d 1070 (2nd Dept. 2017). Due to the foregoing, defendant's motion to set aside the verdict for the past medical expenses and/or a collateral source hearing is hereby denied.

The Testimony of Robert Fuchs

Lastly, Defendant argues that the admission of the testimony of Plaintiff's expert Robert Fuchs regarding the geometry of the staircase involved in the incident was unwarranted and prejudicial. Defendant argues that his testimony should be limited to only the matters exchanged between Plaintiff and Defendant prior to the trial. Defendant alleges that the code violations contained within the supporting affidavit submitted by Robert Fuchs had not been previously pled or included in Plaintiff's original expert disclosure. For this reason, Defendant argues, the admission of Robert Fuchs' testimony prejudiced Defendant as they were not provided sufficient time to formulate a defense and provide their own expert witness.

Plaintiff, in opposition, argues that Defendant's contentions are entirely skewed and misleading. The affidavit which Defendant refers to had been submitted to the Court in opposition to the Defendant's motion *in limine* to preclude Robert Fuchs from testifying. Plaintiff argues that the information contained in the affidavit was for the purpose of establishing the scientific and engineering principles relied upon by Robert Fuchs when reaching his conclusions. Furthermore, Plaintiff argues that the testimony of Robert Fuchs speaks to the same conditions of the staircase upon which the incident occurred that had been the fundamental claims of the lawsuit for the entire length of the matter, rendering Defendant's argument that the testimony was prejudicial, completely without merit. For these reasons, Plaintiff urges the Court to deny Defendant's request to set aside the jury verdict.

The affidavit of Robert Fuchs was admitted into evidence, as opposition to Defendant's motion *in limine* to preclude the witness from testifying. The motion and the merits of Robert Fuchs' affidavit and testimony has previously been argued and the Court will not reverse its decision. Furthermore, Defendant fails to provide any valuable line of reasoning to show that the jury would not have reached the same verdict without the testimony of Robert Fuchs. Additionally, the affidavit and testimony of Robert Fuchs addressed the size and shape of the staircase involved in plaintiff's injury as well as the anti-slip tread on each step. This testimony is relevant only to the liability of Defendant and not to the monetary damages portion of the jury's verdict. Due to the foregoing, this Court will not disturb the admission of the affidavit or testimony of Robert Fuchs.

Accordingly, it is,

ORDERED and ADJUDGED that defendant GOLDFARB PROPERTIES, INC.,'s motion pursuant to CPLR § 4404 setting aside the verdict dated February 10, 2020 is hereby denied in its entirety. It is further,

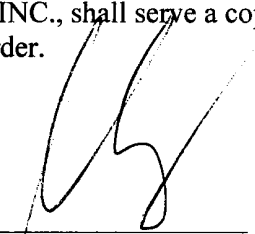
ORDERED and ADJUDGED that defendant GOLDFARB PROPERTIES, INC.,'s motion pursuant to CPLR § 4545 for a Collateral Source Hearing is hereby granted only as to the lost earnings and denied in all other respects. It is further,

ORDERED and ADJUDGED that the Collateral Source Hearing on the lost earnings shall be held on February 25, 2021 at 11:00a.m., virtually via Microsoft TEAMS. It is further,

ORDERED and ADJUDGED that defendant GOLDFARB PROPERTIES, INC., shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The foregoing constitutes the decision and order of this Court.

10/28/20
Dated



Hon. Wilma Guzman, J.S.C