

Smith v Lenox Terrace Apts.
2021 NY Slip Op 30809(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 153410/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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INDEX NO. 153410/2016

GUILLERMO SMITH,

MOTION DATE 01/17/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

LENOX TERRACE APARTMENTS, HAMPTON
MANAGEMENT COMPANY, L.L.C.

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 78, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96

were read on this motion to/for For new trial on jury damages

In this personal injury action plaintiff Guillermo Smith claims that he tripped and fell over carpet in his Manhattan apartment building's elevator on July 28, 2015 resulting in a traumatic brain injury (TBI) and a left knee injury. Plaintiff asserts, as his basis for recovery, that the accident exacerbated his pre-existing mental and physical health conditions. A jury trial was held from September 27 through October 16, 2019 where the jury's unanimous verdict determined that defendants Lenox Terrace Apartments and Hampton Management Company LLC were negligent and that such negligence was a substantial factor in causing the accident. However, the jury determined that plaintiff suffered no damages for either past or future pain and suffering. Plaintiff now moves, pursuant to CPLR § 4404 [a], for an order to set aside the jury's award for damages and to direct a new trial on damages as (1) the damages were inadequate and deviated materially from reasonable compensation; (2) the damages were against the weight of the evidence; (3) interest of justice requires setting aside the jury's verdict; and (4) for such other relief the Court may deem just and proper. In opposition, defendants maintain the jury verdict

rendered was based upon a fair interpretation of the evidence; it was not inadequate or against the weight of the evidence; and it was not against the interests of justice.

As an initial matter, the Court notes that a jury verdict “is entitled to great deference based on its evaluation of the evidence, including conflicting expert testimony” (*Vukovich v 1345 Fee LLC*, 72 AD3d 496 [1st Dept 2010]; see e.g. *Nicastro v Park*, 113 AD2d 123, 133 [2d Dept 1985] [“[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.” “Fact-finding is the province of the jury” and the trial court should not “unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury’s duty” [internal quotations omitted]). Further, on a motion to set aside a jury’s award that deviates materially from what would be reasonable compensation, “modification 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]).

Further, when setting aside a jury’s verdict for being against the weight of the evidence, this “invokes the court’s discretion, [including the] professional judgment gleaned from the Judge’s background and experience as a student, practitioner and judge” (*Nicastro* at 134-35; see *Id* at 133 [setting aside a jury verdict that is “contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors”]; see also *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004] [“it is a settled rule that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence”]; *Bottalico v City of*

New York, 281 AD 339, 341 [1st Dept 1953] [when evaluating the jury’s verdict against the weight of the evidence, “we are not required to give credence to a story so inherently improbable that we are morally certain it is not true”]).

Finally, in the interest of justice, a trial court may set aside a jury’s verdict and order a new trial when the trial court erred in ruling on admissibility of evidence; newly discovered evidence; misconduct on part of the attorneys or jurors; and mistakes in the jury charge (*see Allen v Uh*, 82 Ad3d 1025 [2d Dept 2011]; *see also Rodriguez v City of New York*, 67 AD3d 884, 885 [2d Dept 2009]. The “power conferred upon a court to order a new trial is discretionary in nature” (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381 [1976] [The Trial Judge who “is in the best position to evaluate errors” [...] must decide whether substantial justice has been done, whether it is likely that the verdict has been affected [...] and must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision”] [internal quotation and citations omitted]).

The Court has considered the parties’ submissions and concludes the award made by the jury did not deviate materially from reasonable compensation and was supported by the weight of the evidence. Set forth in the record, the jury was presented testimony from plaintiff along with his witnesses Dr. Kim Busichio, Dr. Jason Brown, Dr. Azim Etemadi, and plaintiff’s mother Carolina Barrow, that he sustained a TBI, a left knee injury and a loss of consciousness. In opposition, defendants presented the jury with testimony from their expert Dr. William Head¹ and the Emergency Room (ER) physician from July 28th’s accident, Dr. Edgardo Sosa,² that

¹ NYSCEF Doc. No. 71, pp. 720, 731, 750, 766, 778, 863-74

² Independent witness under subpoena. NYSCEF Doc. No. 73, pp. 1138, 1147, 1150, 1152, 1154-55, 1159

plaintiff did not lose consciousness and no TBI or external damage occurred to the head, nor was there any damage to the knee.³ Dr. Sosa even testified that the basis for his opinion comes from how the accident was described and it did not “suggest that it was significant enough to cause significant head injury and [plaintiff’s] symptoms didn’t support [a significant head injury] either” (NYSCEF Doc. No. 72, p. 1159). Moreover, defendants’ doorman, Jamel Bjorntzen, who appeared as a witness for plaintiff, testified to conversing with plaintiff and viewing him as conscious prior to the arrival of emergency responders. Furthermore, the jury heard conflicting testimony from doctors and experts from all parties as to the significance of plaintiff’s Glasgow Coma Scale/Score (GSC Score) being 15, including Dr. Sosa’s testimony that plaintiff’s two GSC Scores of 15 conducted in the ambulance and at the ER, concludes the plaintiff “never had any alterations in his level of consciousness” (NYSCEF Doc. 73, p. 1133: 3-11).

Plaintiff presented the jury with testimony that prior to July 28, 2015 plaintiff was functioning, active, independent and a good student; however, the accident caused him to decompose mentally and physically and exacerbated his prior conditions (e.g. two hospitalizations due to schizophrenia/psychosis episodes, anxiety, depression, paranoia, weight gain, diabetes, hypercholesterolemia, fatty liver and high blood pressure becoming unmanageable), such that his mental conditions are now permanent. In opposition, defendants presented testimony and documentary evidence that plaintiff had been decompensating for many months and years prior to July 28, 2015, with multiple diagnoses including schizophrenia, paranoia, psychosis, post-traumatic stress disorder, anxiety, depression, obesity, and other physical ailments.

³ The Jury was also made aware of NYFD’s fire and ambulatory records, Harlem Hospital’s records, and well after July 28, many subsequent MRIs depicting no neurological or physical damage.

Plaintiff's witness Dr. Busichio testified that because plaintiff has pre-existing mental health conditions, he was more likely to suffer a TBI and have subsequent symptoms and a worse recovery than someone who did not possess similar pre-existing conditions;⁴ and that plaintiff's mental condition is now permanent due to the July 28, 2015 fall.⁵ However, defendants introduced testimony from Dr. Head that: (1) he believed no further treatment can be effective for plaintiff since prior to the July 28 accident, plaintiff has been decompensating;⁶ and (2) a diagnosis for schizophrenia has the tendency to wax and wane over a patient's lifetime (i.e. fluctuate).⁷ In addition, Dr. Head testified that he was of the opinion that the July 28, 2015 fall did not exacerbate plaintiff's pre-existing conditions, stating that there was "no brain injury" sustained (NYSCEF Doc. No. 71, p. 778), and that some of plaintiff's physical ailments are also inherited.⁸ Likewise, the jury heard from plaintiff's mother that he was a good student; however, plaintiff's own witness Dr. Busichio testified he was a C student in school.⁹ Further evidence was introduced that plaintiff withdrew from Berkley College in November 2014 due to his psychosis and schizophrenia (eight months prior to the July 28 fall).

Experts and treating doctors from all parties testified that the medication prescribed to plaintiff has a tendency to cause diabetes, weight gain and a risk of falling.¹⁰ Evidence was also

⁴ NYSCEF Doc. No. 69, pp. 471

⁵ *Id.*, pp. 473-4

⁶ Dr. Head references plaintiff's psychologist's Dr. DeeAnne Kind's November 23, 2014 letter to the New York State Office of Temporary and Permanent Disability where Dr. Kind reflected that her treatment for plaintiff of five years (2009-2014) was having little or no progress and that plaintiff's psychiatrist (as of 2013) Dr. Bebsy Estefan diagnosed plaintiff with schizophrenia (*see* NYSCEF Doc. No. 71, pp. 773-4)

⁷ *Id.*, pp. 731-2

⁸ NYSCEF Doc No. 71, pp 763-4

⁹ NYSCEF Doc. No.68, p. 277; NYSCEF Doc. No. 69, p 466

¹⁰ NYSCEF Doc No. 70, pp. 620, 644, 661; NYSCEF Doc. No. 71, pp. 736, 760-1

introduced that plaintiff had a prior history of repeatedly blacking out and falling due to his anti-psychotic/schizophrenia medications.¹¹

The jury heard plaintiff's witnesses being cross-examined as to whether they reviewed the medical records of Dr. Kind and Dr. Estefan; whether Dr. Brown can make his conclusions on incomplete information; and whether such records would have been material in establishing plaintiff's witnesses' medical conclusions.¹² Alternatively, Dr. Head relied heavily on Dr. Kind's and Dr. Estefan's records in making his determination that plaintiff had decomposed well before July 28.¹³ In addition, the jury was also presented with Dr. Etemadi's testimony on cross-examination that he never conducted a full neurological exam of plaintiff before making his conclusions.¹⁴ Moreover, the jury was able to evaluate Dr. Head's testimony as to his opinion that plaintiff was faking his ailments and that plaintiff has symptom magnification syndrome.¹⁵ Members of the jury also heard that plaintiff had an abnormal EEG; however, Dr. Head testified that 15% of the population is known to have an abnormal EEG.¹⁶ Thus, based on the multitude of varying testimony and evidence, it was reasonable for the jury to conclude that an award for past or future pain and suffering was unwarranted for plaintiff's head.

As for the alleged injury to the plaintiff's left knee, plaintiff's counsel told the jury that the case was not about a knee injury. Nor was any testimony elicited from any experts about a knee injury. It was not presented to the jury as a basis for damages. The jury heard testimony that plaintiff was discharged from the ER with a contusion of the left knee, unremarkable

¹¹ NYSCEF Doc. No. 67, pp. 192, 235, 237-240

¹² NYSCEF Doc. No. 69, pp. 483-4; NYSCEF Doc. No. 72, pp. 978-81, 990-3

¹³ NYSCEF Doc. No. 71, pp. 731-34, 773-775, 882, 900-2

¹⁴ NYSCEF Doc. No. 70, p. 599

¹⁵ NYSCEF Doc. No. 71, pp. 752-60


¹⁶ NYSCEF Doc. No. 71, pp. 708

findings in his x-rays, no swelling or redness (i.e. effusion) and the ability to return to work August 1, 2015.¹⁷ Plaintiff returned to work on August 9, 2015, 12 days after the July 28, 2015 elevator accident, and worked six days until August 15, 2015 where he slipped on concrete at the pool where he lifeguarded.¹⁸ During those six days, the jury heard a read-in of the deposition transcript for plaintiff's lifeguarding supervisor Marty Kravitz who reported no complaints or diminished work performance from the plaintiff.¹⁹ The subsequent ER visit on August 15 for the pool slip accident had unremarkable X-rays; however, plaintiff was directed to seek physical therapy and was not able to ride his bike or exercise.²⁰ Plaintiff's mother admitted that the August 15, 2015 slip and fall had nothing to do with his July 28, 2015 accident.²¹ Therefore, it was reasonable for the jury to conclude that an award of past or future pain and suffering was unwarranted for plaintiff's left knee.

Finally, the Court finds plaintiff's arguments on requiring a new trial in the interests of justice unavailing.

Accordingly, after careful consideration of the evidence and cases involving similar injuries, the Court denies plaintiff's motion.

This constitutes the decision and order of the Court.

<u>03/09/2021</u> DATE	 ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION		
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	

¹⁷ e.g. NYSCEF Doc. No. 71, p. 723; NYSCEF Doc. No. 72, pp. 1146, 1149-50, 1154

¹⁸ NYSCEF Doc. No. 67, pp. 230-4

¹⁹ NYSCEF Doc. No. 70, pp. 690-1, 695

²⁰ NYSCEF Doc. No. 68, p. 357-9

²¹ NYSCEF Doc. No. 68, p. 359:12-14