Suarez v Kalman
2023 NY Slip Op 31910(U)
May 31, 2023
Supreme Court, Kings County
Docket Number: Index No. 504286/2018
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
--X
JULIO AURELIO SUAREZ and MARIA ROSARIO HURTADO,

Plaintiffs,

-against-

PINCUS KALMAN and WEST NYACK REALTY CORP.

Defendants.
--X

Index No.: 504286/2018
Motion Date: April 17, 2023
Mot. Seq. No.: 3, 4

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DECISION/ORDER

The following papers, filed on NYSCEF as documents numbered 81 to 101 were read on this motion and cross-motion:

In this action to recover damages for personal injuries, the plaintiffs, Julio Aurelio Suarez and Maria Rosario Hurtado, move for a directed verdict on the issues of whether plaintiff Suarez suffered a serious injury under the "significant limitation of use of a body function of system" and the "permanent consequential limitation of use of a body organ or member" categories of Insurance Law § 5102(d); an order pursuant to CPLR 4404(a) setting aside the jury's verdict as contrary to the weight of the evidence and for a new trial, or in the alternative, pursuant to CPLR 4404(a) for an additur to the damages awards for future pain and suffering and future medical expenses. The defendants cross-move for an order pursuant to CPLR Section 4404(a) setting aside the verdict for basic economic loss as excessive and against the weight of the credible evidence. The two motions are consolidated for disposition.

Background:

The plaintiff, Julio Aurelio Suarez, commenced this action alleging that on January 30, 2018, he was riding a bicycle when it was involved in a collision with a motor vehicle owned by the defendant, West Nyack Realty Corp., and operated by the defendant Pincus Kalman. As a result of the accident, plaintiff alleged that he suffered a traumatic injury. By order dated July 30, 2020, Justice Ingrid Joseph awarded the plaintiffs partial summary judgment on the issue of liability and struck defendants' affirmative defenses of comparative negligence and

assumption of the risk. The matter proceeded to trial on the issue of whether the plaintiff suffered a serious injury within the meaning of Insurance Law 5102(d), and if so, on the issue of damages. At the close of evidence, the plaintiff moved for a directed verdict on the issue of whether plaintiff Suarez suffered a serious injury. The court reserved its decision and the issue was put to the jury.

The jury was asked three questions on the issue of serious injury, whether plaintiff Suarez suffered a serious injury under the 90/180-day category of Insurance Law 5102(d); whether he suffered a serious injury under the significant limitation of use of a body function or system category; and whether he sustained a serious injury under the permanent consequential limitation of use of a body organ or member category. On November 2, 2022, the jury returned a verdict finding that the plaintiff suffered a serious injury only under the 90/180-day category of Insurance Law 5102(d). The jury awarded the plaintiff $20,000.00 for past pain and suffering, $0 for future pain and suffering and $6500.00 for future medical expenses.

Discussion:

Plaintiff's motion for a directed verdict on the issue of whether plaintiff Suarez had suffered a serious injury under the "significant limitation of use of a body function or system" and the " permanent consequential limitation of use of a body organ or member" categories of Insurance Law 5102(d) is DENIED. "'A motion for judgment as a matter of law pursuant to CPLR 4401 may be granted where the trial court determines that, upon the evidence presented, there is no rational process by which the [trier of fact] could base a finding in favor of the nonmoving party'" (*PAS Tech. Servs. v. Middle Vil. Healthcare Mgt., LLC,* 92 A.D.3d 742, 744, 939 N.Y.S.2d 85, quoting *C.K. Rehner, Inc. v. Arnell Constr. Corp.,* 303 A.D.2d 439, 440, 756 N.Y.S.2d 608). "In considering such a motion, '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 light most favorable to the nonmovant' " (*PAS Tech. Servs., Inc. v. Middle Vil. Healthcare Mgt., LLC,* 92 A.D.3d at 744, 939 N.Y.S.2d 85, quoting *Robinson v. 211–11 N.,*

LLC, 46 A.D.3d 657, 658, 847 N.Y.S.2d 599). The trial court "must not engage in a weighing of the evidence, nor may it direct a verdict where the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question" (*Hernandez v. Pappco Holding Co., Ltd.,* 136 A.D.3d 981, 983, 26 N.Y.S.3d 312 [internal quotation marks omitted]; *see Matter of David WW. v. Laureen QQ.*, 42 A.D.3d 685, 686, 839 N.Y.S.2d 839).

Here, there was a rational process by which the jury could have found that the plaintiff did not suffer a serious injury under the "significant limitation of use of a body function or system" and/or "permanent consequential limitation of use of a body organ or member" categories of Insurance Law 5102(d). Indeed, Dr. Waxman, an expert called by the plaintiffs, testified that even if plaintiff Suarez suffered a traumatic brain injury, it was "mild to moderate" and "not severe' (Tr 361 lines 11-17; 20). Notably, Dr. Waxman's reviewed the MRI films of plaintiff Suarez's brain and opined that they did not reveal any atrophy (Tr. 284-285). The only anomaly Dr. Waxman saw was on the brain scan taken on the date of the accident, which showed a 2 mm subdural hematoma and a second "subtle" one; so subtle, in fact, Dr. Waxman opined that some doctors might have missed it. (Tr. 285-286). In his report regarding this scan, Dr. Waxman noted that the blood spot was "really small" and "ill-defined", and "improving" (Tr. 289, 7-19; 290). The blood spot was "really small" and "ill-defined", and "improving" and explained that if seeking to diagnose injury from trauma, films taken soon after the event are more reliable than ones taken years or even months after (Tr. 289 line 2). The Court also notes that defendants' expert neuroradiologist, Dr Katzman, agreed that films taken closer to the time of the accident better depict any casually-related injury (Tr. 488). Accordingly, that branch of plaintiffs' motion for a directed verdict is DENIED.

That branch of plaintiffs' motion pursuant to CPLR 4404(a) for an order setting aside the jury's verdict that the plaintiff did not suffer a serious injury under the "significant limitation of use of a body function or system" and/or "permanent consequential limitation of use of a body organ or member" categories of Insurance Law 5102(d) as contrary to the weight of the evidence is also DENIED. For the same reasons as stated above, the evidence did not so preponderate in favor of the plaintiff that the verdict could not have been reached on any fair interpretation of the evidence (see *Yac v. County of Suffolk,* 205 A.D.3d at 765–766, 169 N.Y.S.3d 86, quoting *Reilly v. Ninia,* 81 A.D.3d 913, 915, 917 N.Y.S.2d 652 [internal quotation marks omitted]).

That branch of plaintiffs' motion for an additur to the awards of damages for future pain and suffering and future medical expenses is also DENIED. The amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference (*see Chung v. Shaw,* 175 A.D.3d 1237, 1239, 108 N.Y.S.3d 47; *Vainer v. DiSalvo,* 107 A.D.3d 697, 698, 967 N.Y.S.2d 107). A jury award may be set aside if it deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Martinez v. Coca–Cola Refreshments USA, Inc.,* 187 A.D.3d 1170, 1171, 133 N.Y.S.3d 296; *Smith v. City of New York,* 179 A.D.3d 967, 968, 114 N.Y.S.3d 236). "[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution" (*Larkin v. Wagner,* 170 A.D.3d 1145, 1147, 96 N.Y.S.3d 664 [internal quotation marks omitted]; *see Ballas v. Occupational & Sports Medicine of Brookhaven, P.C.,* 46 A.D.3d 498, 846 N.Y.S.2d 664). Given the conflicting evidence, it cannot be said that the damages award deviated materially from what would be reasonable compensation (see *Pecoraro v. Tribuzio*, 212 A.D.3d 646, 647, 182 N.Y.S.3d 175, 178).

Turning to the cross-motion, the award of $6500 for future medical expenses must be reduced to zero. It is a matter of statutory law that because the first $50,000 in basic economic loss, which includes medical expenses, is not recoverable *(see,* Insurance Law § 5102 [a] [1], [2]; *Ellis v. Johnson Motor Lines, Inc.*, 198 A.D.2d 258, 259; *Shalom v Sahani,* 137 A.D.2d 454). Thus, where, as here, a plaintiff does not prove, through admissible evidence, that $50,000 afforded by insurance was exhausted, a jury's verdict for basic economic loss must be reduced to zero (see *Ellis v Johnson Motor Lines. Inc.,* 198 A.D.2d 258, 603 N.Y.S.2d 523; *Miller v Santoro*, 227 A.D.2d 534, 643 N.Y.S.2d 168). The cross-motion is therefore GRANTED.

Accordingly, it is hereby

ORDRED that plaintiffs' motion is **DENIED** in all respects; and it is further

ORDERED that defendants' cross-motion is granted and the award for $6500 for future medical expenses will be reduced to zero

This constitutes the decision and order of the Court.

Dated: May 31, 2023

PPS

PETER P. SWEENEY, J.S.C.

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

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