SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 26

NELSON ARROYO

Index No.:24910/2017E

Plaintiff,

DECISION/ORDER

-against-

A ROYAL FLUSH OF NY II, INC., and ANTONIO DESOUZA

Present:
HON. Paul L. Alpert

Defendant

Paul L. Alpert, J.S.C.

Defendants A Royal Flush of NY II, Inc. and Antonio Desouza ("Defendants")move for an order pursuant to CPLR§§ 4404(a) and 5501 to set aside the jury verdict and/or reduce the award for past and future pain and suffering, past and future lost earnings and future medical expenses on the grounds that they are excessive and/or against the weight of the evidence. The motion is opposed by the plaintiff.

This is an action for personal injuries which occurred after the plaintiff was struck by a vehicle while it was backing up. The truck is owned by A Royal Flush of NY II, Inc. and was driven by its employee Antonio Desouza. As a result of the accident the plaintiff sustained injuries to his knee. After trial a verdict was returned in favor of the plaintiff in which the jury awarded the plaintiff $2,000,000 for past pain and suffering, $2,000,000 for future pain and suffering, $1,029,000 for past loss earnings, $1,029,000 for loss of earnings in the future and

$1,500,000 for future medical expenses. The jury awarded future pain and suffering and medical expenses over a period of 26 years and loss of earnings over 11 years. The defendant moves to set aside the verdict on the grounds that the amounts awarded deviate materially from what would be considered reasonable compensation. In the alternative the defendants seek to reduce the amount awarded on the grounds that portions of the award are not supported by any of the credible evidence offered at trial.

The defendants argue that the jury award for lost earnings must be set aside as the amounts deviate materially from what was presented at trial. At trial the plaintiff relied upon the testimony of economist Dr. Ronald Reiber to establish both past and future lost earnings. According to his testimony the plaintiff's lost wages from the date of his injury to the date of trial totaled $369,483 (Def Ex. C at page 70). Dr. Reiber testified that the plaintiff's future lost earnings if he worked until the age of 67 was $729,000 (Def Ex. C at page 80). Defendants argue that there is simply no basis for the jury to have awarded over 1 million dollars for past lost wages and over 1 million dollars for future.

Similarly the defendants argue that the award of $1,500.000 dollars for future medical expenses is not supported by the record. The testimony for future medical records was established by both Dr. Reiber and the plaintiff's life care specialist Harold Bialsky. According to the defendants the testimony elicited from these experts did not establish that the plaintiff would sustain $1,500,000 dollars in future medical costs. The testimony from Dr. Reiber established that the plaintiff would incur approximately $228,566 over twenty seven years for medical expenses that would be reoccurring such as X-Rays, MRI's, doctor visits and physical therapy. For future surgery Dr. Reiber opined that a future surgery on plaintiff's knee ten years in the

future would cost $155,936. The total sum for future medical expenses according to the testimony was $384,502.

With respect to the award for past and future pain and suffering the defendants claim that the sum awarded deviates materially from what would be considered reasonable compensation. In support of the motion the defendants rely upon numerous cases both recent and distant to establish that the amount awarded is excessive.

In opposition the plaintiff argues that the jury verdict should not be disturbed as the award adequately compensates him for his injuries. With respect to the claim for future medical expenses the plaintiff contends that the testimony elicited from Dr. Touliopoulos reflects that the plaintiff would need two more knee replacement surgeries in the future and that the jury considered this testimony in reaching the award for future medical expenses. Plaintiff maintains that the jury considered this fact and awarded damages based upon the plaintiff's medical need assuming that there were two surgeries necessary. The plaintiff also argues that the award for both past and future lost earnings is supported by the record. The fact that the award of wages was higher than that testified at trial is not a basis to disturb the award as there were numerous other factors that the jury could have considered in awarding the amount it did.

The plaintiff also argues that the amount awarded for both past and future pain and suffering should not be disturbed. In this regard the plaintiff urges the Court to reject the cases relied upon by the defendants to support the contention that the award should be reduced. First the plaintiff contends that the cases cited by the defendants are from outside the First Department and are too distant in time to be considered by the Court. Second, none of the cases specifically deal with a situation in which the plaintiff underwent knee replacement surgery three years prior

to trial and will need two revision surgeries in the future.

The 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 (Romero v. Metropolitan Suburban Bus Authority 25 A.D.3d 683 quoting Nicastro v. Park 113 A.D.2d 129). A jury verdict should not be set aside unless the jury could not have reached it on any fair interpretation of the evidence (Id). While great deference must be given to the amount of damages awarded it may be set aside if the award deviates from what would be reasonable compensation (Vainer v. DiSalvo 107 A.D.3d 697). The reasonableness of compensation must be measured against relevant comparable cases and although not binding upon the Courts they guide and enlighten the court with respect to determining whether a verdict in any given case constitutes reasonable compensation (Tarpley v. New York City Transit Authority 177 A.D.3d 929). A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty by means of tax returns or other documentation (Id. quoting Deans v. Jamaica Hospital Med. Ctr. 64 A.D.3d 742). Awards of damages for past and future medical expense must be supported by competent evidence which establishes the need for and the cost of medical care (Pilgrim v. Wilson Fiat, Inc. 110 A.D. 3d 973).

The award for past and future lost wages must be set aside as the competent evidence adduced at trial does not support the award rendered by the jury. There is simply nothing in the record which substantiates an award for past earnings in the amount of $1,029,000 or for an award for future lost earnings in the same amount. The award is utterly irrational. The only testimony to support past lost wages came from Dr. Reiber, plaintiff's expert, who testified that

lost earnings to date of trial amounted to $369,483. There is no justification for an award of over one million dollars. The verdict is therefore reduced to reflect loss of earnings to the date of trial in the amount of $369,483. Similarly, there is no justification for the jury's award of $1,029,000 for future lost wages. The testimony from Dr. Reiber calculated plaintiff's future loss earnings as $729,638 if the plaintiff worked to the age of 67. This was the age that the jury intended to award damages for as the jury specifically stated that the award for lost wages was a period of 11 years. The verdict is reduced to reflect an award of future lost wages in the amount of $729,638.

The jury awarded $1,500,000 for future medical expenses. This sum, like the award for lost wages is not supported by the record. Awards for future medical expenses which is speculative and not supported by the record should be reduced (see, Williams v. City of New York 105 A.D.3d 667; Mohammed v. New York City Transit Authority 80 A.D.3d 677). Here, the award of $1,500,000 is purely speculative. The total cost for future medical expenses according to the plaintiff's expert was $384,502. While plaintiff contends that the amount awarded by the jury takes into consideration the fact that the plaintiff would need a second surgery, the sum awarded still far exceeds the amount that would be necessary. Although Dr.Touliopoulos did testify to the possibility that a second surgery was possible, plaintiff's expert did not offer any detailed analysis of the cost associated with this surgery and simply said that the amount needed for surgery should be doubled. This testimony leads to pure speculation by the jury as to the amount associated with a second surgery and the post operative care needed (see, Figueroa v HLM Electric Ltd. 121 A.D.3d 1038). The verdict for future medical expenses is reduced to $384,502.

Turning to the issue of the award for past and future pain and suffering, the defendants

argue that the sum of $2,000,000 for past and $2,000,000 for future exceeds what is fair compensation for the injuries sustained. In deciding what constitutes fair compensation the Court can look to cases involving similar injuries to use as a "guide" to determine whether a verdict in a case constitutes reasonable compensation (Tarpley supra). In deciding a case under CPLR §5501(c) courts are required to determine what awards have been previously approved on Appellate review and decide whether the instant award falls within those boundaries (Donlon v. City of New York 284 A.D.2d 13). Consideration should also be given to other factors such as the nature and extent of the injuries (Arcos v. Bar-Zvi 185 A.D.3d 882).

The court has reviewed the cases offered by the defendants in support of their contention that the jury award should be set aside or reduced. Many of these cases date back more than fifteen years or involve actions outside the First Department. While the court does not believe that cases decided from departments other than the First should be summarily rejected, in reviewing the sufficiency of an award greater respect should be given to cases decided in this Department. The amount of damages awarded is primarily a question for the jury, the judgment of which is entitled great deference based upon its evaluation of the evidence (Ortiz v. 975 LLC 74 A.D.3d 485). Plaintiff's counsel is correct in his assertion that no cases were cited and none could be found by either the parties or the court which dealt with both an ACL reconstruction and a knee replacement performed prior to trial. Many of the cases involving knee injuries refer to the possibility of a plaintiff's need for knee replacement in the future. There are several cases, which although not directly on point do illustrate the appropriate measure of damages for knee injuries.

In Sermoneta v. New York City Transit Authority (151 A.D.3d 565), the plaintiff injured her knee as a result of a slip and fall. The Appellate Division affirmed the jury award of $700,000

for past pain and suffering and reduced to one million from two million the award for future pain and suffering over a period of 15 years. The plaintiff was expected to undergo a total knee replacement at some point in the future. In Luna v. New York City Transit Authority (116 A.D.3d 438) the Appellate court reversed the trial Court's reduction of an award of $500,00 for past pain and suffering and $500,000 for future pain and suffering. The one million dollar verdict did not materially deviate from what could be considered reasonable compensation given the plaintiff's continuing disability and high probability of a knee replacement in the future. In Diaz v. City of New York (80 A.D.3d 425) the Court affirmed that portion of the jury verdict which awarded the plaintiff $800,000 for six years of pain and suffering and increased the verdict for future pain and suffering from $150,000 to $600,00. In Diaz, the plaintiff underwent four separate arthroscopic surgeries on his knee and would likely require knee replacement during his lifetime which would also require revision surgery during his lifetime.

Here the plaintiff has undergone three separate knee surgeries prior to the trial of the matter. The last surgery involved a total knee replacement. He has not worked as a plumber since the incident. He currently walks with a limp, has limitations on the use off his knee and has developed arthritis as a result of the accident. The award for past pain and suffering in the sum of $2,000,000 does not materially deviate from what can be considered reasonable compensation. The Appellate Court held in Diaz (supra), which was decided approximately 12 years ago, that an award of $800,000 for a period of six years past pain and suffering was appropriate. In Diaz, the plaintiff underwent 4 arthroscopic surgeries. However none of those surgeries involved a total knee replacement which is a much more comprehensive and painful procedure. Thus, the jury award to the plaintiff in the amount of two million dollars, some 12 years after the Diaz case,

involving a more extensive surgery and a longer period of pain and suffering cannot be said to deviate materially from what would be considered reasonable compensation.

The Court finds however that the award for future pain and suffering does deviate from what would be considered reasonable compensation. An award of $2,000,000 for pain and suffering in the Sermoneta (supra) case for a period of fifteen years was deemed excessive and reduced to one million. Here, the award for future pain and suffering in the amount of two million dollars spans twenty six years. There is a likelihood of one and possibly two corrective surgeries for his knee. In Luna, an award of $500,000 for future pain and suffering representing 34.5 years was appropriate. The Diaz Court held that an award of $600,000 over a period of 31 years was satisfactory. In each of the above cases there was a high likelihood of future knee replacement surgeries. Guided by the above the Court reduces the amount awarded for future pain and suffering to $1,250,000 dollars.

Accordingly the defendant's motion for an order pursuant to CPLR§§ 4404 (a) and 5501(c) is granted to the extent of setting aside the jury verdict and directing a new trial as to damages only unless within 30 days after service of this order with notice of entry the plaintiff stipulates to modify the verdict to decrease the amount awarded for lost wages to the date of trial from $1,029,000 to $369,483; to reduce the amount of future lost wages from $1,029,000 to $729,638; to reduce the amount for future medical expenses from $1,500,000 to $384,502; and to reduce the amount for future pain and suffering from $2,000,000 to $1,250,000. If plaintiff stipulates to the reduced sum the parties are to file a stipulation with the Clerk of the Court.

This shall constitute the decision and order of the Court.

Dated: Dec. 14, 2023

Paul L. Alpert, J.S.C.