

Nardone v Tow Rific Auto Serv., LLC
2024 NY Slip Op 35342(U)
June 11, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2021-54312
Judge: Edward T. McLoughlin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

EUGENE NARDONE and his wife LINDSAY
NARDONE,

Plaintiffs,

- against -

TOW RIFIC AUTO SERVICE, LLC,

Defendant.

DECISION & ORDER

Index No.: 2021-54312

Motion Sequence No. 3

McLOUGHLIN, J., Acting Supreme Court Justice

The Court read and considered the following documents in determining plaintiffs' motion pursuant to CPLR 4404[a] and 5501[c] to set aside the jury's verdict as to damages:

NYSCEF Docket Numbers 57 - 69

On December 14, 2020, plaintiff Eugene Nardone fell on a staircase on premises leased and controlled by defendant Tow Rific Auto Service, LLC ("defendant") and suffered pain and injury to his right shoulder. On October 20, 2021, plaintiffs commenced this action with the filing of a summons and complaint in which they asserted causes of action for negligence and a derivative cause of action on behalf of plaintiff Lindsay Nardone (*see* NYSCEF Docket No. 1).

A trial on the issues of liability and damages commenced with jury selection on November 14, 2023. On November 16, 2023, the jury rendered its verdict. After finding negligence on the part of defendant and plaintiff Eugene Nardone, and apportioning 50% of fault to each, the jury rendered the following verdict as to damages: \$40,000 to plaintiff Eugene Nardone for past bodily injury, pain and suffering, and loss of enjoyment of life; \$9,961.75 to

plaintiff Eugene Nardone for past medical expenses¹; \$5,000 to plaintiff Lindsay Nardone for past lost services; and no future damages for either plaintiff (*see* Verdict Sheet, NYSCEF Docket No. 46). After the jury was discharged, plaintiff's counsel objected to the jury's damage award and indicated his intention to move to set aside the verdict.

Plaintiffs now move, by notice of motion dated February 2, 2024, for an order setting aside the jury's verdict on damages and ordering a new trial. In support of their motion, plaintiffs contend that the jury's verdict on damages is utterly irrational, as it is not supported by legally sufficient evidence or, alternatively, that the verdict is contrary to the weight of the trial evidence (*see* DeGasperis Aff, NYSCEF Docket No. 58, ¶133). More specifically, plaintiffs argue that there is no rational process by which the jury could have found that plaintiff Eugene Nardone did not suffer permanent loss of motion of his right shoulder and/or right upper extremity and scarring and permanent change in appearance of his right bicep (*id.* at ¶¶ 130-131). They further contend that there is no rational process by which the jury could have found no future damages for loss of services and society for plaintiff Lindsay Nardone (*id.* at ¶132). The defendant opposes the motion through the affirmation of Leonard Kessler, Esq., (*see* NYSCEF Docket No. 68). The defendant argues that the jury's damages verdict is consistent with the trial record, including plaintiff Eugene Nardone's testimony, which the defendant characterizes as "blatantly contradictory" and "arguably false" (*id.* at ¶12).

DISCUSSION

Motions to set aside jury verdicts are governed by CPLR 4404[a]. That rule provides that:

- (a) Motion after trial where jury required. After a trial of a cause of action or issue triable 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

¹ The parties had stipulated to this amount prior to submission of the case to the jury.

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 the 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.

“[T]o hold that a jury verdict is insufficient as a matter of law, [a court] must first determine that the verdict is ‘utterly irrational’” (*Killon v. Parrotta*, 28 NY3d 101, 108 [2016], quoting *Campbell v. City of Elmira*, 84 NY2d 505, 510 [1994]). “To conclude that a verdict is utterly irrational, requiring vacatur of the verdict, the Court must determine that ‘there is simply no valid line of reasoning and permissible inferences which could possibly lead [a] rational [person] to the conclusion reached by the jury on the basis of the evidence presented at trial’” (*id.*; see also *Barril v. McClure*, 163 AD3d 752, 752-753 [2d Dept. 2020]). “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 a light most favorable to the nonmovant’” (*Barril*, 163 AD3d at 753, quoting *Szczerbiak v. Pilat*, 90 NY2d 553, 556 [1997]; see also *Messina v. Staten Island University Hosp.*, 121 AD3d 867, 868 [2d Dept. 2014]).

“A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence” (*Nielsen v. Vermeer Manufacturing Co.*, 193 AD3d 750, 750 [2d Dept. 2021], citing *Lolik v. Big V Supermarkets, Inc.*, 86 NY2d 744 [1995]). Whether a jury verdict should be set aside as contrary to the weight of the evidence “does not involve a question of law, but rather requires a discretionary balancing of many factors” (*Raso v. Jamdar*, 126 AD3d 776, 776 [2d Dept. 2015] [citations omitted]). Although the trial court has the discretion to set aside a verdict, it should

afford considerable deference to the jury's determination regarding the credibility of witnesses, as it was the jury who had the opportunity to see and hear the witnesses (*Nielsen*, 193 AD3d at 750; *Stancati v. Gunzburg*, 159 AD3d 1011, 1012 [2d Dept. 2018]). The amount of damages to be awarded for personal injuries is generally a question of fact for the jury (*Murphy v. Ford*, 173 AD3d 882, 883 [2d Dept. 2019]).

"Where the 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" (*Raso*, 126 AD3d at 777, citing *Tapia v. Datco, Inc.*, 32 AD3d 842, 845 [2d Dept. 2006]). Here, defense counsel, through cross-examination and in his summation², argued to the jury that plaintiff Eugene Nardone was exaggerating and embellishing the extent of his injuries at the time of trial. Contrary to plaintiffs' contention, defense counsel's argument – which the jury apparently adopted – is supported by a fair interpretation of the evidence.

Dr. John McLaughlin, the plaintiffs' expert and treating physician, testified that most patients who undergo rotator cuff surgery recover most of their prior strength after months of physical therapy and exercise (NYSCEF Docket No. 64, p 151). Dr. McLaughlin characterized plaintiff Eugene Nardone's surgery in January of 2021 as "a successful repair of the rotator cuff" (*id.* at p 169). Dr. McLaughlin testified that the last time he saw plaintiff Eugene Nardone after the surgery was in September of 2021 – over two years prior to the trial and over eight months after the surgery (*id.* at pp 160, 172). During that last visit, Dr. McLaughlin noted some

² During his summation, Mr. Kessler argued:

"I submit to you money is Mr. Nardone's motivation. You can assess, using your life's experience and common sense, how he presented himself. Do you think he embellishes? Do you think he exaggerates? You know why he does. He wants to cash in" (NYSCEF Docket No. 65, p 264).

restrictions on range of motion (about 150 degrees instead of 180) but that plaintiff could raise his arm over his head (*id.* at pp 156-157).

Plaintiff Eugene Nardone did not treat again with Dr. McLaughlin after September of 2021 nor did plaintiffs present any evidence of further medical treatment for Eugene Nardone's right shoulder/extremity from September of 2021 through the commencement of trial. Thus, even if the jury fully credited the testimony of Dr. McLaughlin, the only evidence supporting plaintiff Eugene Nardone's complaints of pain at the time of trial, and claim for future pain and suffering, was the testimony of Eugene Nardone himself. And there is evidence in the record from which the jury could have agreed with defense counsel that plaintiff Eugene Nardone exaggerated the extent of his pain and suffering during his trial testimony. For example, he testified at trial that in the days following the accident, his right arm "was just flopping ... I had no control over my arm at all ... [t]here was no strength at all" (NYSCEF Docket No. 64, p 67). Yet, certain pictures introduced into evidence by the plaintiffs (*see* Pltf Trial Exhibits Nos. 16 & 20) show plaintiff, during this same time where he supposedly had no strength in his arm, using his right arm to raise his pants/undergarments up to demonstrate bruising on his leg. In light of this apparent exaggeration by plaintiff regarding the condition of his arm days after the accident, it would not have been unreasonable for the jury to adopt the defendant's argument that plaintiff was exaggerating about his present pain and suffering during his trial testimony.

Based upon the foregoing, it was not unreasonable, and certainly not "utterly irrational," for the jury to conclude that plaintiff Eugene Nardone had continued to improve and that his complaints during his trial testimony were exaggerated and not credible. The jury's failure to award damages for future pain and suffering and future lost services "was based upon a fair

interpretation of the evidence presented at trial, with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom ..." and there is no basis in this record for the Court to disturb the jury's resolution of credibility issues against the plaintiffs (*Raso*, 126 AD3d at 777; *see also Mecca v. Buffalo Niagara Convention Center Management Corp.*, 158 AD3d 1161, 1163 [4th Dept. 2018]).

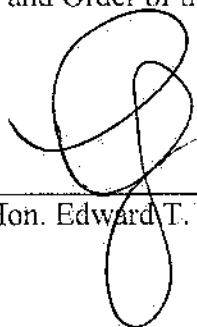
For the same reasons, the Court finds that the amount awarded by the jury for future pain and suffering and future loss of services did not "deviate[] materially from what would be reasonable compensation" and, thus, the plaintiffs' motion to set aside the damages verdict as inadequate pursuant to CPLR §5501[c] is denied (*Taylor v. Martorella*, 35 AD3d 722, 724 [2d Dept. 2006]; *Vasquez v. Jacobowitz*, 284 AD2d 326, 327 [2d Dept. 2001]; *Minscher v. McIntyre*, 277 AD2d 435, 436 [2d Dept. 2000]).

Based upon the foregoing, it is

ORDERED that plaintiffs' motion is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 11, 2024
Poughkeepsie, New York



Hon. Edward T. McLoughlin, AJSC

TO: Counsel of Record via NYSCEF