Watanabe v Sherpa
2006 NY Slip Op 30687(U)
April 25, 2006
Supreme Court, New York County
Docket Number: 118627/03
Judge: Donna M. Mills
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SCANNED ON 5/3/2006

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DONNA M. MILLS Justice PART 58

Watanabe, S

INDEX NO. 118627/03

- v -

MOTION DATE

MOTION SEQ. NO. 02

Sherper. M

MOTION CAL. NO.

RECEIVED
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SUPPORT OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See attached decision.

This judgment was entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

FILED
MAY 03 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4-25-06

DMM
J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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SHIRO WATANABE, Index No. 118627/03

Plaintiff, DECISION

-against-

MINGMAR SHERPA, NICOLAE E. KLEIN MOHAMAD RABBANI. SOBELL CAB CORP., VERA FELDMAN, WOODSIDE MANAGEMENT, INC and DIVA GARAGE CORP.,

Defendants.

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FILED
MAY 03 2006
COUNTY CLERK'S OFFICE
NEW YORK

DONNA M. MILLS, J:

A bifurcated jury trial of this matter was held before this court on October 20, 2005 and concluding on October 28, 2005. With respect to liability the plaintiff was found 80% liable for his injuries, defendant Sherpa was found 20% liable and defendant Rabbani was found 0% liable. The damages trial resulted in an award of $300,000 of which defendant Sherpa was responsible for $60,000 as a result of previously being found 20% culpable. Plaintiff now seeks to set aside the jury verdict pursuant to CPLR § 4404(a), granting a mistrial, or, in the alternative, for an Order granting additur and for other and further relief as this Court deems just and proper.

ENTERED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

FACTS

On September 7, 2003, at approximately 2:30 a.m., near the intersection of 53rd Street and Third Avenue in New York, New York, plaintiff was attempting to enter the taxi cab of defendant Mohamad Rabbani ("Rabbani"). Rabbani had just discharged some passengers and he was parked 3 to 4 feet from the curb. Plaintiff was standing near the passenger-side front window of the cab

speaking to the driver, Rabbani. While plaintiff was still standing at the cab operated by Rabbani, another cab operated by defendant Mingmar Sherpa ("Sherpa") struck both Rabbani's cab and plaintiff. As a result of the accident, plaintiff was seriously injured and suffered a broken left tibia which required open reduction and internal fixation. The liability phase of the trial was held on October 20, 2005. The jury found for the plaintiff against defendant Sherpa. However, the jury also found plaintiff 80% comparatively negligent and Sherpa 20% liable. No liability was attributed to defendant Rabbani.

The damages portion of the trial was held on October 27, 2005. At trial, plaintiff's witness, Dr. Craig Weiss, testified that the accident was a substantial factor in causing plaintiff's injuries. He further stated that in the future the internal fixation hardware and the screws should be removed and that plaintiff would continue to suffer pain for the rest of his life. The jury awarded a total sum of $300,000,000; $150,000 for past pain and suffering; $100,000.000 for future pain and suffering over a period of 41.7 years and future medical bills in the amount of $50,000.00.

After the parties' closing statements, but prior to the verdict, plaintiff's counsel reported to the court that, Dr. Weiss claimed that one of the jurors left an anonymous message on his answering service. In sum and substance the caller stated that two of the jurors were predisposed to find against the plaintiff and that there was an ex-parte communication between the Court and the jury against the plaintiff. This court questioned the jurors individually, in the presence of counsel, to ascertain whether they had any outside communication regarding the present case. All the jurors denied communicating with plaintiff's witness. Plaintiff's counsel moved for a mistrial on both portions of the trial which was denied by this Court with leave to renew if appropriate. A unanimous verdict was rendered.

There was a media contingent in the audience for most of this trial. One juror was a well known former president's daughter. Anonymous calls are often triggered by those seeking publicity, and how the doctor's phone number was obtained is still a mystery. However, whether the Court or counsel believed them, every juror denied making a phone call about this case to anyone, any unusual activity or conduct at anytime in the jury room or any juror to juror hostility or animosity. Several jurors expressed nervousness and anxiety about being individually questioned but that is a natural reaction under the circumstances.

Plaintiff now moves to set aside the verdict on the grounds that: (1) bifurcation of the trial prevented plaintiff from presenting evidence to refute defendant's argument that plaintiff's back was to the oncoming traffic, (2) the jury was prejudiced by defendant's unsubstantiated inferences that plaintiff was intoxicated at the accident, (3) the jury award deviated materially from what is considered reasonable compensation for plaintiff's injuries, and (4) the jury was exposed to improper influence as evidence by a taped communication between plaintiff's expert witness and one of the jurors as well as allegations that two of the jurors already determined that they would find against plaintiff.

Defendant Sherpa opposes plaintiff's motion on the ground that the jury's verdict was not unreasonable in light of the evidence produced at trial and that the phone call, while bizarre, it is not grounds to set aside the verdict since the jurors were each polled and denied engaging in any misconduct.

Defendant Rabbani also opposes plaintiff's motion on the ground that: (1) plaintiff introduced testimony that he was drinking, (2) defendant Rabbani was legally parked within the parking lane and was not required by law to have his flashing lights on, and (3) the phone message

is not credible since, it gave no specific information on who he/she was, and all the jurors denied that they were involved.

DISCUSSION

The standard for setting aside a jury verdict pursuant to CPLR §4404(a), is that there is simply no valid line of reasoning and permissible inferences which could possible lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial (Sow v Arias, 21 AD3d 317 [1st Dept 2005]). In making such a determination, great deference is given to a jury's verdict, particularly in a negligence case where the verdict is in favor of the defendant (Carpenter v Albee, 192 AD2d 1004 [3rd Dept 1993]).

In analyzing the case at bar, viewing the trial evidence favorable to the defendant, a rational basis exists for the jury's verdict based on the following reasons. First, plaintiff's claim that his case was prejudiced by the bifurcation is unpersuasive. Bifurcation is encouraged unless the nature of the injuries are such as to have an important bearing on liability (Faber v New York Hous. Auth., 227 AD2d 248 [1st Dept 1996]). The question whether to bifurcate a trial is generally committed to the discretion of the trial court (Cole v Macklowe, 15 AD3d 260 [1st Dept 2005]). A person seeking bifurcation must demonstrate that the nature of the alleged injuries have significant bearing on the issue of liability (Gogatz v New York City Transit Auth., 288 AD2d 115 [1st Dept 2001]).

Plaintiff claimed in his motion papers that by bifurcating the trial, plaintiff was unable to present Dr. Weiss's testimony that his injury was caused by a lateral force. According to plaintiff, the testimony would refute defendant's claim that plaintiff was injured while his back was facing traffic northbound. However, Dr. Weiss's testimony was not necessary to establish where plaintiff was hit since plaintiff could refute defendant's claim with his own testimony. Furthermore,

plaintiff's injuries were not intertwined with his damages to warrant a unified trial since the only questions before the court is who was at fault and to what extent (see Berthoumieux v We Try Harder, Inc., 170 AD2d 248 [1st Dept 1991]). Realizing the medical testimony was not necessary to establish liability, the court acted within its discretion and bifurcated the case for expedience which is a valid ground for bifurcation.

Second, the jury was allowed to consider the fact that plaintiff was drinking since plaintiff himself introduced it into evidence on direct examination. It is the jury's right to consider all factors including any permissible evidence that goes to plaintiff's negligence (Garcia v City of New York, 173 AD2d 175 [1st Dept 1991]). It is well established that the permissible scope of cross-examination lies within the sound discretion of the trial court, whose rulings should not be disturbed absent an improvident exercise of that discretion (Gutierrez v City of New York, 205 AD2d 425 [1st Dept 1994]). Direct or re-direct examination may open the door to certain collateral matters which would otherwise be inadmissible (id.). Furthermore, cross-examination of an adverse witness is a matter of right in every trial of a disputed issue of fact (Hill v Arnold, 226 AD2d 232 [1st Dept 1996]). Evidence tending to show a witness's bias, hostility or motive to lie is not collateral but directly probative of credibility (id.).

In the instant case, plaintiff introduced the fact that he was drinking in his May 25, 2004 deposition (Tr. P. 135), his counsel's opening statement (Tr. P. 48) and under direct examination (Tr. P. 127), thereby putting his drinking within the permissible scope of cross-examination. Additionally, considering that comparative negligence is an issue in this case, whether plaintiff was drinking that night is relevant to establish whether he himself was negligent and to what extent. Once plaintiff introduced the fact that he was drinking, defendants were within there right to further

question plaintiff of how much he drank and whether he was drunk to establish has negligence. Lastly, plaintiff was not entitled to an intoxication instruction since there neither defendant introduced evidence that plaintiff was intoxicated (see Arroyo v City of New York, 171 AD2d 541 [1st Dept 1996]). Therefore, the jury was allowed to consider the fact that plaintiff was drinking prior to the accident since it was introduced by the plaintiff and defendants were acting within their right to cross-examine him on a subject which was within the scope of direct examination.

Third, plaintiff failed to show that the award is unreasonable under the circumstances. Under §4404(a), a trial court should set aside a the jury's verdict only if the verdict could not have been reached on any fair interpretation of the evidence (Berry v Metro. Transp. Auth., 256 AD2d 271 [1st Dept 1998]). Based on the evidence that plaintiff was drinking and more importantly, that he was standing in the street when defendant Sherpa struck him, the jury's finding of 80% liability was a fair interpretation of the evidence. The evidence also supports the jury's finding that defendant Rabbani was not liable. As mentioned before, it is the jury's right to consider all the factors into evidence including the plaintiff's negligence. Therefore it was within the jury's right to find Rabbani not liable in light of the fact that Rabbani was parked within a parking lane when plaintiff was requesting whether Rabbani would take him and his friend to New Jersey.

Additionally, plaintiff's injuries did not deviate materially from what is considered reasonable compensation. When comparing injuries and awards, the court considers the type of injury, the level of pain, and the period for which the pain is calculated (Garcia v Queens Surface Corp., 271 AD2d 277 [1st Dept 2000]). Plaintiff seeks an additur of $200,000 for past pain and suffering and $400,000 for future pain and suffering on the grounds that the award he received is inadequate compared to prior cases with similar injuries. However, plaintiff's case is factually

distinct from the cases he cited.

In Rodriguez v New York City Hous. Auth., 238 AD2d 125 [1st Dept 1997], the Court found that plaintiff's award of $1,192, 502.25 was not excessive based on plaintiff's expert witness's testimony that plaintiff will require a future knee replacement, and plaintiff was missing a large portion of her kneecap, had an atrophied right leg and severe limitations of motion requiring use of a walking cane, suffered from degenerative arthritis, was in constant pain, could not fully perform her job duties, and will require two more operations. Similarly in Calzado v New York City Trans. Auth., 304 AD2d 385 [1st Dept 2003], the Court found that plaintiff's award of $ 100,000 for past pain and suffering, and $700,000 for future pain and suffering was reasonable compensation considering that he had a torn anterior cruciate ligament and a torn medial meniscus, and testimony that he would ultimately develop arthritis and require knee replacement surgery. Furthermore, the plaintiff was found 25% liable for his injuries.

In the instant case, plaintiff was found comparatively negligent and the jury found him 80% liable. Plaintiff suffered a fractured tibia with internal fixation hardware. He had three months of physical therapy in America and then returned to Japan where he continued his physical therapy. Plaintiff testified that: (1) he experiences pain when the weather changes, (2) he cannot run or jump, (3) experiences pain when he goes up and down the stairs, and (4) he can no longer walk long distances without feeling pain. He further testified that he wears a leg support and that he goes to the gym for rehabilitation purposes. His expert witness, Dr. Weiss, stated that plaintiff is prone to arthritic knee which sometimes leads to knee replacement (Tr. P. 299-300). He further suggested other methods be employed before a knee replacement would became necessary (Tr. P.300-301.) Lastly, Dr. Weiss stated that a knee replacement would only be necessary based on plaintiff's

symptoms (Tr. Li 16-23, P. 301).

Unlike the plaintiffs in both Rodriguez and Calzado, plaintiff received a verdict that made him more than 50% liable for his injuries. Plaintiff in the instant case only had one surgery in contrast to the numerous surgeries the plaintiffs in the former cases did. Furthermore, plaintiff's expert witness never testified that plaintiff would ultimately need a knee replacement. Dr. Weiss stated that it is an option if the other suggested methods such as medicine became ineffective. Therefore since plaintiff failed to show that his damages award was unreasonable or that it deviated materially from what is considered reasonable compensation, plaintiff's request for an additur is denied.

Lastly, plaintiff's request to seek a mistrial under CPLR §4402 is also denied. Under CPLR §4402, "at any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just." Plaintiff cites two cases to support his position that this court should reverse the verdict on the grounds of jury misconduct. However, similarly, like his award argument, this argument fails.

In People v Saunders, 120 Misc. 2d 1087 [Sup Ct, New York County 1983], the court held that defendant was denied a fair trial due the cumulative effect of four instances of proven jury misconduct: (1) an alternate juror's statement that defendant was a drug dealer prior to deliberation, (2) discussions that defendant had to be a drug dealer to be able to afford his defense counsel, (3) the jury's predeliberation discussions of defendant's guilt and (4) a juror's note taking prior to the court's cautionary instructions. Similarly, in People v Timmons, 175 AD2d 10 [1st Dept 1991], the court granted a new trial on the grounds that defendant's co-defendant had a discussion of the case with one of the jurors in a three part conversation with co-defendant's neighbor. An arrangement

had been made that the juror would vote to convict defendant and co-defendant in order to enhance her credibility in arguing for the acquittal of the testifying co-defendant. The court confronted the juror who admitted that she spoke to the neighbor but denied any misconduct. The court held that by the juror's interaction with the neighbor, a potential alibi witness for the testifying co-defendant, irreparably tainted the verdict and required a new trial.

In the instant case, there was no evidence of misconduct by the jury. Plaintiff failed to prove that any of the jurors engaged in any conspiracy to find against plaintiff. Further questioning of the jurors failed to yield new evidence of any jury misconduct. All the phone call proved was that an unknown caller contacted plaintiff's witness. Such enigmatic and unsubstantiated circumstances are not grounds for a mistrial under CPLR §4402.

Accordingly, plaintiff's motion is denied in its entirety. This constitutes the decision and judgment of this court.

4-25-06

Date

Donna M Mills

J.S.C.

DONNA M. MILLS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).