

Divietri v 1200 Fifth Assoc.

2012 NY Slip Op 33872(U)

February 23, 2012

Supreme Court, New York County

Docket Number: 150166/08

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

JOHN DIVIETRI,

INDEX NO 150166/08

- v -

MOTION DATE 02-01-2012

1200 FIFTH ASSOCIATES, CHETRIT GROUP LLC.,
AND BILLY CONTRACTORS, INC.,

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to set aside the verdict as to future lost earnings and medical expenses and cross-motion to increase award for past pain and suffering.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2, 5-6

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

7

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion for an order reducing the future lost earnings award, past and future medical expenses award and the cross-motion to increase the past pain and suffering award for the injury to the right knee are granted to the extent indicated herein. Defendant's motion for a collateral source hearing is denied.

Plaintiff a 39 year old construction worker sustained injuries to his right knee and back when the scaffolding on which he was standing while doing a beam inspection collapsed. Plaintiff was taken to the hospital where he complained mainly of right knee pain. The knee was swollen and painful. The knee was immobilized, he wore a metal brace on the knee, was given crutches which he used for approximately eight weeks and was sent home to rest. During this period he was in extreme pain and required the assistance of his wife. Approximately one month after the incident the swelling went down, although the pain persisted, and he returned to work because he couldn't afford to stay home.

Although he returned to work his duties changed and he was performing office duties. Approximately two years after the incident he changed jobs do to the nature of his injuries, and now works as a machine operator earning twice as much money as before the accident.

He treated with Dr. Montalbano for the knee injury. After an MRI and physical examinations Dr. Montalbano determined that he had sustained an injury to his right knee consisting of tears to the Anterior Cruciate Ligament, tear of the

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

medial and lateral menisci, and fluid in the knee resulting from bone bleeding into the knee. Dr. Montalbano recommended surgery but Plaintiff refused because he was having pain in his back. Approximately six years after the accident plaintiff has not had the knee surgery. Dr. Montalbano stated that surgery for the knee would cost 25,000 to \$30,000 and that physical therapy and rehabilitation would cost approximately \$400 per session, three sessions per week for approximately three to six months. Plaintiff presented evidence of past medical expenses in the amount of \$2,858.00.

The jury returned a verdict awarding plaintiff \$20,000 for past pain and suffering due to the injury to the right knee, \$20,000.00 for past medical expense, \$225,000 for future medical expenses and \$75,000 for future lost earnings.

Defendant now moves to set aside the awards for past medical expenses, future medical expenses and future lost earnings. Plaintiff opposes the motion and cross- moves to increase the award for past pain and suffering due to the injury to the right knee.

CROSS - MOTION FOR ADDITUR

Plaintiff argues that the jury award is inadequate and should be increased to \$200,000.00 for past pain and suffering for the right knee. In considering plaintiff's motion the court must ascertain if the jury's award deviated materially from what would be considered reasonable compensation (CPLR § 5501[C]). In analyzing what would be considered to be reasonable compensation this court has looked at cases involving similar injuries, although not necessarily similar age of the plaintiff or similar manner of occurrence.

Courts have previously found to be reasonable compensation an award of \$200,000 for past pain and suffering for an injury to the knee requiring two surgeries (Van Ness v. New York City Transit Authority, 288 A.D. 2d 374 , 734 N.Y.S. 2d 73 [2nd. Dept. 2001]); an award of \$125,000 for a knee injury requiring stitches and 10 days hospitalization (Sandy v. New York City Transit Authority, 297 A.D. 2d 667, 747 N.Y.S. 2d 110 [2nd. Dept. 2002]); \$100,000 for injury to a knee consisting of tears of medial and lateral menisci, torn ligament, torn cartilage in various places and damage to patella (Smith v. Manhattan Bronx Surface Transit Operating Authority, 58 A.D. 3d 552, 872 N.Y.S. 2d 107 [1st. Dept. 2009]); \$250,000 where 31 year old sustained fractured right patella requiring two surgeries (Alvarado v. City of New York, 287 A.D. 2d 296, 731 N.Y.S. 2d 153 [1st. Dept. 2001]).

The jury's award for past pain and suffering appears to this court to be inadequate. Plaintiff sustained an injury to the right knee consisting of a tear in the anterior cruciate ligament, a trabecular microfracture of the femur and tears

of the medial and lateral menisci with resulting instability and buckling of the knee . This injury will require surgery to repair. Plaintiff has lived with this condition and endured the pain associated with it from the date of the accident to the present. Given these facts this court is of the opinion that the amount for plaintiff's future pain and suffering should be increased from \$20,000 to \$150,000.

MOTION TO SET ASIDE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE

CPLR §4404(a) provides that after a jury trial, the court may, upon the motion of a party or on its own initiative, set aside the verdict and "direct that judgment be entered in favor of a party entitled to judgment as a matter of law or ... order a new trial of a cause of action.... where the verdict is against the weight of the evidence."

A jury verdict will be vacated only if the court finds the verdict could not be reached on any fair interpretation of the evidence. For a court to conclude that a jury verdict is not supported by legally sufficient evidence there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to conclusions reached by the jury on the basis of evidence presented at trial (see *Nicastro v. Park*, 113 A.D. 2d 129495 N.Y.S. 2d 194; *Cohen v. Hallmark Cards*, 45 N.Y. 2d 493, 410 N.Y.S. 2d 282, 382 N.E. 2d 1145); *Adamy v. Ziriakus*, 92 N.Y. 2d 396 [1998]; *Lolik v. Big v. Supermarkets*, 86 N.Y.2d 744 [1995]).

Defendant argues that the verdict on the issues of past and future medical expenses and future lost earnings is against the weight of the evidence. The proof presented to the jury on the issue of past medical expenses is that plaintiff had expenses in the amount of \$2,858. This was the amount requested of them from plaintiff's counsel. The verdict awarding \$20,000 is against the weight of the evidence presented and will be reduced to \$2,858. The proof presented on the issue of future medical expenses is the cost of the surgery from \$25,000 to \$30,000 and the cost for the therapy at \$400 per session three times a week for three to six months. At most given the evidence presented the jury could not have awarded more than \$44,400. The jury's award of \$225,000 is against the weight of the evidence presented and will be reduced to \$44,400.

Sufficient evidence on the issue of future loss of earnings was presented for the jury to render a verdict in the amount of \$75,000. Any objections to this item of damages has been waived. (see *Gibbon v. Missionary Sisters of the Sacred Heart*, 244 A.D. 2d 185, 664 N.Y.S. 2d 8 [1st. Dept. 1997]). On a fair interpretation of the evidence presented the jury could have reached that result on this issue of damages.

Accordingly, for the foregoing stated reasons it is the DECISION, ORDER and JUDGMENT of this court that plaintiff's cross - motion for ADDITUR is granted and the jury's award for PAST PAIN AND SUFFERING FOR INJURY TO THE RIGHT KNEE is increased from \$20,000 dollars to \$150,000 dollars, and it is further

ORDERED and ADJUDGED that defendant's motion to SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE on the jury's award for PAST MEDICAL EXPENSES is granted, the jury's award is reduced from \$20,000 to \$2,858.00 dollars, and it is further

ORDERED and ADJUDGED that defendant's MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE on the jury's award for FUTURE MEDICAL EXPENSES is granted, the jury's award is reduced from \$225,000 to \$44,400.00 dollars, and it is further,

ORDERED and ADJUDGED that defendant's MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE on the jury's award for FUTURE LOST EARNINGS is denied, and it is further

ORDERED and ADJUDGED that defendant's MOTION FOR A COLLATERAL SOURCE HEARING is denied.

The clerk of the court is to enter judgment accordingly.

This constitutes the DECISION, ORDER and JUDGMENT of this court.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: February 23, 2012


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE