Mendez v 131 & 137 7th Ave. S., LLC

2007 NY Slip Op 34593(U)

July 3, 2007

Supreme Court, New York County

Docket Number: 107170/04

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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ERIC MENDEZ,

Plaintiff,

Index No: 107170/04

-against-

Decision and Order

131 & 137 7th AVENUE SOUTH, LLC, CROMAN, REALTY CORP. and VILLAGE GRILL INC., d/b/a EDELWEISS BAR and LOUNGE,

Defendant.

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FILED
JUL 17 2007
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Martin Shulman, J.S.C.:

Plaintiff, Eric Mendez ("Mendez" or "plaintiff"), moves for an order vacating a jury verdict rendered on February 28, 2007 which awarded Mendez $15,000.00 for plaintiff's past pain and suffering, $26,000.00 for past lost earnings and $75,000.00 for future pain and suffering for forty (40) years. Plaintiff claims no other errors of fact or law underlying the jury verdict determining defendant Village Grill's negligence, plaintiff's and Village Grill's respective percentages of fault and a damage award for only past lost earnings.

Specific to the issue of liability, the jury found both co-defendant, Village Grill Inc. d/b/a Edelweiss Bar and Lounge ("Village Grill")[1] and plaintiff negligent and their respective negligence to have been a substantial factor in causing plaintiff's slip and fall accident on ice on the sidewalk in front of Village Grill. In determining the percentage

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[1] The jury unanimously concluded that defendant 131 & 137 7th Avenue South, L.L.C., the owner of the building in which Village Grill rented commercial space, and the owner's managing agent, defendant Croman Realty Corp., were not liable for plaintiff's accident.

of fault, the jury found Mendez was 65% responsible and Village Grill 35% responsible for this accident. Plaintiff contends the past and future pain and suffering awards are inadequate and deviate materially from what would be reasonable compensation (CPLR 4404[a]).[2] Village Grill opposes plaintiff's motion.

In his request for additur, plaintiff claims the trial evidence indubitably showed he suffered a bi-malleolar fracture of his ankle and underwent two surgeries. The first surgery performed on February 26, 2004, over a month after the accident, required internal fixation with a plate and six (6) screws to stabilize the fibula and two (2) additional screws to stabilize the medial malleolus. During the second surgery performed a year later, the orthopedic surgeon removed the hardware previously inserted to promote proper alignment and healing of the fractured ankle joint. Mendez's treating surgeon also testified at trial that plaintiff's reduced range of motion of his right ankle is permanent, plaintiff will be incapable of performing work which requires "extensive lifting, walking or standing . . ." (Pollack Aff. in support of Motion at ¶7) and Mendez will continue to suffer pain and arthritic changes within the ankle joint. Relying on these and other facts as well as certain Appellate Division precedents, plaintiff seeks an increase of the aggregate pain and suffering award (after apportionment) to $250,000.00.

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[2] After the verdict was rendered, this court granted plaintiff's counsel leave to file this motion seeking additur and permitted the parties to stipulate to extend their time to present written arguments. *See*, *Brown v. Two Exchange Plaza Partners*, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept.,1989), *affd*, 76 N.Y.2d 172, 556 N.Y.S.2d 991 (1990), citing "(CPLR 2004; *see*, Weinstein-Korn-Miller, NY Civ Prac para. 4405.05)."

In opposition, Village Grill argues that: 1) the aggregate award for pain and suffering was not against the weight of the evidence; 2) there was no credible evidence to support the notion that at any time prior to his accident, plaintiff had engaged in any occupation which required heavy lifting, jumping or other related activity which he would be unable to perform since the accident, to date; 3) as recorded as a July 22, 2005 note in the narrative report, plaintiff's treating surgeon cleared Mendez for full activity and duty except for "impact" activity (Exhibit A to Walsh Opp. Aff. at p. 12); 4) in Mendez's deposition testimony read to the jury, plaintiff acknowledged making no effort to seek sedentary, clerical work approximately a year and half after the accident; and 5) plaintiff's credibility was sorely tested when a surveillance video taken in January, 2007 revealed the plaintiff:

> walking outside, near his residence, on two particular occasions. The jury viewed the plaintiff walking around his fairly new mini van on both occasions. Although there were no overt comments made during the defendant's summation about the van, and how it came to be that an individual who apparently had not done any work subsequent to the accident, was able to afford a fairly new van, it became the elephant in the room; in that while it may not have been discussed, was clearly there for all to see . . . (Walsh Opp. Aff. at p. 10).

Discussion

CPLR §5501(c) states, in relevant part:

> In reviewing a money judgment in an action in which an itemized verdict is required in which it is contended that the award is . . . inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is . . . inadequate if it deviates materially from what would be reasonable compensation.

Trial courts may also apply this material deviation standard in overturning jury awards but should exercise their discretion sparingly in doing so. *Shurgan v. Tedesco*, 179 A.D.2d 805, 578 N.Y.S.2d 658 (2nd Dept., 1992); *Prunty v. YMCA of Lockport, Inc.*, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dept., 1994); see also, *Donlon v. City of New York*, 284 A.D.2d 13, 727 N.Y.S.2d 94 (1st Dept., 2001) (implicitly approving the application of this standard at the trial level). For guidance, a trial court will typically turn to prior verdicts approved in similar cases, but must undertake this review and analysis with caution not to rigidly adhere to precedents (because fact patterns and injuries in cases are never identical) and/or substitute the court's judgment for that of the jurors whose primary function is to assess damages. *So v. Wing Tat Realty, Inc.*, 259 A.D.2d 373, 374, 687 N.Y.S.2d 99, 101 (1st Dept., 1999).

After a review of the trial record and appropriate appellate precedents, this court finds that the jury award for past pain and suffering deviates materially from what would be reasonable compensation and is inadequate. This Court grants plaintiff's motion for additur to increase the jury's past pain and suffering award of $15,000.00 to $75,000.00 resulting in an aggregate pain and suffering award of $150,000.00 ($75,000.00 for past pain and suffering and $75,000.00 for future pain and suffering) and which constitutes reasonable compensation under these circumstances. *See Lepore v. City of New York*, 258 A.D.2d 288, 685 N.Y.S.2d 52 (1st Dept., 1999)(pre-apportionment past pain and suffering award of $20,000 increased to $75,000.00 and a future pain and suffering award of "0" increased to $10,000.00 for a trimalleolar right ankle fracture); *Sherry v. North Colonie Central School District*, 39 A.D.3d 986, 833 N.Y.S.2d 746 (3rd Dept.,

2007)(citing to *Lepore*, *supra*, and affirming an aggregate pain and suffering award after re-trial of $100,000.00 for a trimalleolar left ankle fracture); and *Condor v. City of New York*, 292 A.D.2d 332, 738 N.Y.S.2d 587 (2nd Dept., 2002), *lv. to app. den.* 98 N.Y.2d 607, 746 N.Y.S.2d 691 (2002)(past pain and suffering award of $75,000 found to be reasonable for a trimalleolar right ankle fracture). *See also*, *Ordway v. Columbia County Agricultural Society*, 273 A.D.2d 635, 709 N.Y.S.2d 691 (3rd Dept., 2000).

As noted earlier, plaintiff found the past loss of earnings award to be fair and reasonable and ostensibly calculated to cover only a year's worth of lost income for a magazine distribution job which lasted only two (2) days. Plaintiff also did not question the jury's decision not to make any award for future lost earnings. The jury was free to consider the fact that Mendez's treating physician cleared plaintiff for work at least two years before the trial and plaintiff chose to do nothing. The jury was also free to question plaintiff's credibility and reasonably found that plaintiff "substantially [albeit, not completely] recovered from the effects of the trauma by the time of trial. . ." *Lyerly v. Madison Square Garden*, 3 Misc.3d 128(A), 787 N.Y.S.2d 678 (A.T., 1st Dept., 2004)(bracketed matter added).

Accordingly, except for additur to increase the past pain and suffering award from $15,000.00 to $75,000.00, this court otherwise finds that the jury fairly interpreted the evidence and granted a future pain and suffering award of $75,000.00 which is consistent with the weight of the record evidence and did not deviate materially from what would be reasonable compensation.

For the foregoing reasons, this court grants plaintiff's motion to set aside the jury verdict on damages for past pain and suffering and grants a new trial only on this damage issue unless, within ten days after service of a copy of this Decision and Order with notice of entry, Village Grill executes a stipulation agreeing to increase the jury award for past pain and suffering from $15,000.00 to $75,000.00 resulting in a pre-apportionment, aggregate pain and suffering award of $150,000.00 ($75,000.00 for past pain and suffering and $75,000 for future pain and suffering).

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
July 3, 2007

HON. MARTIN SHULMAN, J.S.C.

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