NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 01

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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DELACRUZ,ALICE

Index Nº. 0014302/2001

-against-

Hon. DIANNE T. RENWICK ,

PORT AUTHORITY

Justice.

----------X

The following papers numbered 1 to 4 Read on this motion, ANNUL, SET ASIDE & VAC
Noticed on January 28 2008 and duly submitted as No. ____ on the Motion Calendar of 4/28/08

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED AS PER ATTACHED DECISION AND ORDER.

fully Referred to:

Hon. _____
DIANNE T. RENWICK, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-1

ALICE DELACRUZ,
Plaintiff,

Index No.: 14302/2001
On January 28, 2008

DECISION/ORDER

-- against --

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, and COSMO INTERIOR & EXTERIOR CONSTRUCTION COMPANY,

Defendants.

Present:
Hon. Dianne T. Renwick
Justice of the Supreme Court

The following documents were considered in reviewing plaintiff's post-trial motion, for an order setting aside the jury verdict on damages as deviating materially from what should be reasonable compensation:

Papers	**Numbered**
Plaintiff's Affirmation In Support of Motion	**1,2 (exhibits)**
Defendant's Affirmation in Opposition to Motion	**3 (exhibits)**
Plaintiff's Reply Affirmation	**4**

Alice Delacruz commenced this action seeking to recover money damages for personal injuries sustained during a slip and fall on the premises owned and operated by the Port Authority of New York and New Jersey. During a trial before this Court, the jury awarded plaintiff damages of $25,000 for past pain and suffering and $11,148 for past lost wages. The jury, however, refused to award any money damages for future pain and suffering or future loss of wages. Plaintiff now moves, pursuant to CPLR §5501(c), for an order setting aside the jury award as inadequate, i.e., deviating materially from what should be reasonable compensation under the circumstances.

Factual Background

At trial the evidence established that on June 14, 2000, plaintiff Alice Delacruz tripped and fell in a parking lot of the LaGuardia Airport, Queens, New

York. At the time, plaintiff was a 30-year old female who worked for Continental Airlines as a Customer Service Representative. The slip and fall occurred when plaintiff, who was in the parking lot walking to her job at the airport, slipped and fell as a result of an uneven and depressed area of the pavement. After the accident, plaintiff remained out of her job for about two months. A month after returning to work, she took a maternity leave of absence, due to the birth of her first child. Two months later, she returned to work. Within approximately a year and a half, plaintiff had a second child and permanently left her job. Soon thereafter, she had gastrectomy surgery. A few years later, she obtained an accounting degree.

At the trial of this action, plaintiff presented the testimony of several medical experts. Dr. Shad Mian, plaintiff's treating orthopedist, testified that in June 2004, he performed surgical procedures upon plaintiff's right knee and lower back (two herniated disks). Dr. Lieberman, who treated plaintiff from 2003 to 2004, testified that plaintiff's lower back and knee injuries were caused by the slip and fall in 2000. Both Dr. Shad Mian and Dr. Lieberman testified that the lower back and knee injuries caused pain to the plaintiff and limited her ability to perform daily activities. Also, Dr. Mian conceded, on cross examination, that he was unaware of plaintiff's obesity (she was nearly 350 pounds at the time of the accident) and of her repetitive heavy lifting as an airline ticket agent.

Conversely, defendant's expert, Dr. April, testified that plaintiff's conditions (knee and lower back) were caused by numerous factors, including plaintiff's obesity, her pregnancies, her repetitive lifting of heavy baggage at work, and the natural disk degeneration that occurs in the aging process, and were not caused by a single traumatic event. In addition, defendant introduced a surveillance video into evidence which showed plaintiff easily stepping over mounds of snow and ice, walking from a supermarket carrying bags of groceries, running after a child, climbing into and out of a Ford Expedition truck, and lifting children into the truck. Based upon this evidence and the medical testimony, defendant concluded that plaintiff had an excellent post-surgery recovery and lacked the functional disability claimed as a result of the slip and fall, as corroborated by the fact that she returned to work shortly after the accident, continued to lift heavy luggage at the airport as per her job description, and had two babies within the span of two years after the accident.

Discussion

In setting aside a jury award of damages as inadequate or excessive pursuant to CPLR §5501 (c), the court must find that such award "deviates materially from what would be reasonable compensation." The 1986 amendment to CPLR §5501 (c) replaced the prior "shocks the conscience" review. Harvey v. Mazal American Partners, 79 N.Y.2d 218, 225 (1992). This new standard "in design and operation, influences outcomes by tightening the range of tolerable awards." Gasperini v. Center for Humanities, 518 U.S. 415, 425 (1996).

Generally, the method of that review is to evaluate whether the appealed award deviates materially from comparable awards. Donlon v. City of New York, 284 A.D.2d 13, 14 (1st Dept. 2001). For more than a decade appellate review has been performed by analogizing an appealed case with relevant precedent and "tightening the range" to accomplish the purposes of the 1986 reform. Donlon v. City of New York, 284 A.D.2d at 14. "Such a method cannot, due to the inherently subjective nature of non-economic awards, be expected to produce mathematically precise results, much less a per diem pain and suffering rate." Donlon v. City of New York, supra. This "task necessarily involves identification of relevant factual similarities and the application of reasoned judgment." Donlon v. City of New York, supra, at 14.

Although CPLR §5501(c) expressly addresses the Appellate Division's authority to overturn a jury's damage verdict, its "material deviation" standard has been applied to trial courts. See, Ashton v. Bobruitsky, 214 A.D.2d 630, 631 (2d Dept. 1995) ("the trial court had the power . . . to set [the verdict] aside if it found that the verdict deviated materially from what would be reasonable compensation.") See, also, Inya v. Ide Hyundai, Inc., 209 A.D.2d 1015 (4th Dept. 1994) (error for trial court to apply old "shocks the conscience" test to motion to set aside damages; proper test is "deviates materially" standard); Cochetti v. Gralow, 192 A.D.2d 974, 975 (3rd Dept. 1993) ("settled law" that "deviates materially" standard applies at the trial court level); Shurgan v. Tedesco, 179 A.D.2d 805 (2d Dept. 1992) (approving trial court's use of "deviates materially" test); see, also, Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 135 L. Ed 2d 659 (1996) ("although phrased as a direction to New York's intermediate appellate courts, §5501(c)'s 'deviates materially' standard, as construed by New York's courts, instructs state trial judges as well.") Ultimately, when comparing injuries and awards, it is incumbent upon the court to consider not only the type of

injury and the level of pain, but the period of time for which that pain is being calculated. Garcia v. Queens Surface Corp., 271 A.D.2d 277 (1st Dept. 2000).

This Court first examines whether the jury award for pain and suffering deviated materially from what should be reasonable compensation under the circumstances. In accordance with the foregoing, this Court has examined the most recent damages awards in reported cases in the First Department in which plaintiffs have suffered back injuries, in the nature of herniated disks. Most recent awards, to which the Appellate Division has granted its imprimatur, in cases involving comparable injuries, have been significantly higher than the award in this case. For instance, in Newman v. Aiken, 278 A.D.2d 1156 (1st Dept. 2000), the trial court found an award of $10,000.00 and $0 for past and future pain and suffering to be inadequate and increased it respectively to $75,000.00 and $50,000.00 for a total award of $125,000.00. In Newman v. Aiken, supra, plaintiff's injuries consisted of several herniated disks with root impingement. The Appellate Division sustained the increased damage award.

In contrast, in Donatiello v. City of New York, 301 A.D.2d 436 (1st Dept. 2003), the Appellate Division reduced a jury award for past and future pain and suffering, from $350,000.00 to $175,000.00. In Donatiello v. City of New York, supra, plaintiff suffered a herniated disk with root compression, soft tissue injuries of the neck and shoulders, and sporadic limitation of range of motion in lumbar flexion. At the time of trial, plaintiff still felt pain in his lower back. However, there had been little reduction of his daily activities and his alleged need for surgery was speculative. Under the circumstances, the Appellate Division upheld the $100,000.00 award for past pain and suffering, but found the $250,000.00 award for future pain and suffering excessive and reduced it to $75,000.00.

Conversely, in Skow v. Jones, Lange & Wooton, Corp., 240 A.D.2d 194 (1st Dept. 1007), the Appellate Division found an award for past and future pain and suffering of $10,000.00 and $7,000.00 to be inadequate. In Skow, supra, plaintiff sustained a herniated disk which required steroids and ultimate surgery. It rendered plaintiff unable to lift heavy loads and required medication indefinitively. Under the circumstances, the Appellate Division increased the award for past and future pain and suffering to $300,00.00, consisting of $175,000.00 for past pain and suffering and $125,000.00 for future pain and suffering.

Similarly, in Sow v. Arias, 21 A.D.3d 317 (1st Dept. 2005), the Appellate

Court reduced a damage award for past and future pain and suffering, from a combined $450,000 to a combined $300,000. In Sow v. Arias, supra, the plaintiff testified as to how his neck was injured in a 1999 accident, the 16 months of treatment he received, his inability to work for five months, his limited work schedule thereafter, and his subsequent inability to engage in physical activities that he had previously enjoyed. A board-certified radiologist, testified that the MRI films, taken six days after the accident and admitted into evidence, showed that plaintiff had suffered traumatic injury to his cervical spine, including straightening and reversal of the normal curvature of the spine, disc herniation, and mild compression of the thecal sac and spinal cord. After examining plaintiff and reviewing the MRI films, a board-certified orthopedic surgeon, testified that plaintiff had suffered two herniated cervical discs as a direct result of the trauma from the accident, with one disc impinging upon a nerve root. He opined that these injuries resulted in a chronic, permanent condition, including an objective, quantified decrease in the range of motion of his cervical spine. Under the circumstances, the Appellate Division held, the jury's damage awards in the amount of $150,000 for past and $300,000 for future pain and suffering deviate materially from what is reasonable compensation and reduced them respectively to $100,000 and $200,000.

Despite the broad range of verdicts involved, the above cited authorities, in this Court's view, are a useful gauge in determining whether the compensation here is a material departure from reasonable compensation, since this Court is not required to attempt to conform the case at bar to prior precedents with mathematical precision. Agliato v. City of New York, N.Y.L.J., October 10, 1998, p.30, col.3 (NY County, Sup. Ct.) (citing Bernstein v. Red Apple Supermarkets, 227 A.D.2d 254 (1st Dept. 1996). In this Court's opinion, the injuries and disabilities that plaintiff suffered here are somewhat similar to the injuries involved in the summarized cases. Like in those cases, the back injuries (herniated disk) and knee trauma here caused plaintiff substantial pain and required surgery. Unlike those cases, however, here there was significant evidence introduced at trial, such as surveillance videos, plaintiff's excessive weight, and heavy repetitive lifting, which the jury may have relied upon as a substantial factor in causing plaintiff's back and knee injuries. This is further suggested by the modest amount of money damages awarded for past pain and suffering. Additionally, there was only minimal evidence that her injuries were permanent. Indeed, it seems also clear that the jury either rejected these allegations based on the aforementioned opposing evidence or believed that the surgeries alleviated

plaintiff's condition as inferred by the failure to award damages for future pain and suffering. Either conclusion is consistent with the weight of the evidence. Nonetheless, the jury's award of $11,148 in lost wages is the equivalent of six months of plaintiff's wages. The jury's award of $25,000 for past pain and suffering is inconsistent with its award of six months of lost wages. Thus, utilizing the above precedents as a reference, this Court concludes that the jury award for past pain and suffering here deviated materially from what would be reasonable compensation in light of the nature and extent of the injuries, pain, and loss of enjoyment of life, and compared to the award for six months of wages.

Accordingly, this Court finds that the jury award of damages of $25,000 for past pain and suffering deviates materially from what is reasonable compensation given the $11,148 or six months of lost wages. Rather, given the previously discussed case law, and considering all the relevant facts and circumstances of this case, $75,000 for past pain and suffering damages represents an appropriate award. See Sow v. Arias, supra. Cf. Vargas v. ML 1188 Grand Concourse, L.P. and in Bromelski v. U-Haul Co., supra.

However, this Court cannot say that the jury award of zero ($0) for future pain and suffering or $11,148 for past and zero ($0) for future loss of wages deviated materially from what would be reasonable compensation. Indeed, the evidence established that plaintiff was able to return to work two months after the accident. In addition, plaintiff twice took maternity leave due to the birth of two of her children within the span of two years. Moreover, plaintiff was overweight, worked for several years doing repetitive heavy lifting, and was viewed on surveillance videos getting around ably. Under the circumstances the jury could have reasonably concluded that plaintiff did not suffer any significant loss of time from work due to the injuries attributed to the vehicle accident. Although plaintiff claims that she resigned her position due to her worsening condition, it was the jury's providence to assess this conflicting evidence. This Court finds no valid reason to disturb the jury's decision not to award damages for future pain and suffering or future loss of wages.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff's post trial motion seeking, pursuant to

CPLR §5501(c), to set aside the jury award on future pain and suffering and past and future loss of wages, as deviating materially from what should be reasonable compensation under the circumstances of this case, is denied; and it is further

ORDERED that the part of plaintiff's post trial motion seeking, pursuant to CPLR §5501(c), to set aside the jury award on past pain and suffering, as deviating materially from what should be reasonable compensation under the circumstances of this case, is granted but only to the extent that it grants a new trial on the issue of damages (past pain and suffering) unless, within 30 days of service of a copy of the Decision and Order with notice of entry, defendants execute a stipulation agreeing to increase the jury award for past pain and suffering from $25,000.00 to $75,000.00 past pain and suffering.

This constitutes the Decision and Order of the Court.

Dated: February 15, 2008
Bronx, New York

Hon. Dianne T. Renwick, J.S.C.