SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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RUSSELL LESTER,

Plaintiff,

- v -

JD CARLISLE DEVELOPMENT CORP, 835 6TH AVE MASTER LP, FACADE TECHNOLOGY, LLC. (3RD PARTY DEFT.), CENTURY-MAXIM CONSTRUCTION CORP. (3RD PARTY DEFT,), M.D. CARLISLE DEVELOPMENT CORP., EXTERIOR ERECTING SERVICES, INC. (4TH PARTY DEFT.),

Defendants.

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INDEX NO. 152112/12

MOTION SEQ. NO. 009

DECISION AND ORDER

PAUL A. GOETZ, J.:

Plaintiff Russell Lester moves post-trial pursuant to CPLR § 4404 (a) and CPLR § 5501 (c) to: 1) set aside the jury's damages verdict for past and future injury, disability, and pain and suffering as against the weight of the evidence and deviating materially from what would reasonably compensate plaintiff; and 2) direct a new trial solely on the issue of damages for past and future injury, disability and pain and suffering unless the parties stipulate to an additur for past injury, disability, and pain and suffering from $30,000 (the amount awarded by the jury) to $650,000, and for future injury, disability, and pain and suffering from $5,000. (the amount awarded by the jury) to $300,000. Defendants/Third-Party Plaintiffs, JD Carlisle Development Corp., MD Carlisle Development Corp, and 836 6th Master LP (collectively "Carlisle"), third-party defendant/fourth-party plaintiff Façade Technology, LLC ("Façade"), and fourth-party

defendant Exterior Erecting Services, Inc. ("Exterior"), (collectively defendants), oppose plaintiff's post-trial motion.[1]

Evidence at trial

On July 23, 2010, plaintiff, a carpenter-foreman, was working on the sloped roof of a parking garage installing metal panels for a video screen when he slipped on the fine granules covering the roof surface. Plaintiff's left arm came into contact with the sharp edge of the exposed flashing that had previously been installed as part of the installation of the video screen causing a deep laceration measuring thirty-two (32) centimeters in length and two (2) centimeters in width (TT pg 838). Plaintiff's co-worker, Richard Petrizzo observed that plaintiff was bleeding badly from his arm and tied two tourniquets around it to stanch the bleeding (TT pgs 206 – 208). Plaintiff was then transported by ambulance to Bellevue Hospital where he underwent surgery under general anesthesia for approximately 6 hours to repair his injuries (TT pg 826). During the surgery plaintiff required blood transfusions to replenish lost blood (TT pg 824). The Bellevue hospital records admitted at trial establish that plaintiff was released from the hospital after five days (Plaintiff's trial Exhibit 11). Following his release, for the next two (2) to two and a half (2 ½) years, plaintiff went to physical therapy twice a week for a total of eighty-three (83) visits (TT pg 832).

Plaintiff's medical expert, Dr. Scott Schmidt, a board-certified hand surgeon, credibly testified that plaintiff sustained a complete severance of the radial and ulnar arteries, ulnar, radial and median nerves and severance of the muscle belly controlling the fingers and wrist bending muscles (TT pgs 823 – 824). Dr. Schmidt explained that after plaintiff completed his physical therapy, he had reached maximal medical improvement, meaning his condition was not expected

[1] Carlisle withdrew its claims against Maxim Construction Corp. at trial (trial transcript ["TT"] pg 8).

to improve (TT pg 855). According to Dr. Schmidt, plaintiff has a loss of sensation and muscle weakness in his hand (TT pg 833). Because of the nerve damage, plaintiff has muscle atrophy and reduced grip strength (TT pgs 839 840). Dr. Schmidt described plaintiff's complaints of throbbing, numbness and swelling of his hand as classic nerve injury complaints (TT pg 839). Because of the nerve injury and resulting decreased sensibility, Dr. Schmidt testified that plaintiff suffered a frost bite injury (TT pg 832).

Regarding plaintiff's complaints that he was starting to drop objects when using his right hand and feelings of numbness and tingling in his right extremity, Dr. Schmidt opined that this was due to plaintiff's overuse of his right hand (TT pg 848). Dr. Schmidt testified that plaintiff's symptoms in his right extremity are signs of carpal tunnel syndrome which are directly related to plaintiff's left extremity trauma (TT pg 850).

After detailing objective criteria to support his conclusions, Dr. Schmidt opined that plaintiff's injuries and symptoms are permanent, that he is 80% disabled and should not engage in strenuous physical activity (TT pg 851).

Plaintiff credibly testified how his injuries have impacted his daily life. Plaintiff described numbness in his fingers and feeling like his hand is constantly swollen, and when the temperature is below 60 degrees, his hand feels like it is on fire (TT pg 94). Plaintiff further testified that because of his injuries, he is unable to return to work as a carpenter and has difficulty dressing himself (TT pg 101).

The only witness defendants called at trial was Joseph Pessalano, a rehabilitation expert. However, since plaintiff is not challenging the jury's determination pertaining to lost wages and fringe benefits, Mr. Pessalano's testimony is not relevant to the resolution of this motion.

Contentions of the parties

In support of his motion, plaintiff includes an affirmation from attorney John M. Hochfelder, who opines that the jury's past and future pain and suffering damages awards are grossly inadequate and that the overall award should be increased to at least $950,000. In support of his opinion, Mr. Hochfelder cites to several appellate division cases addressing the adequacy of damages awards. Carlisle contends that since it appears plaintiff offers Mr. Hochfelder as an expert on damages in personal injury cases, plaintiff is required to comply with CPLR § 3101 (d) and he has failed to do so. In his reply affirmation, plaintiff's counsel of record adopts the research and conclusions of Mr. Hochfelder. Exterior advances the additional argument against considering Mr. Hochfelder's affirmation that expert opinion as to a legal conclusion is impermissible.

Plaintiff further argues that support for his position that the past and future pain and suffering damages awarded by the jury are inadequate is found in counsel for Exterior's closing statement. During his closing statement, counsel for Exterior suggested a range of $250,000 to $500,000 for past pain and suffering and $200,000 for future pain and suffering. None of the defendants address Exterior's suggested damages awards during its counsel's closing argument. Instead, defendants aver that the jury's awards are appropriate since plaintiff has not received treatment for his injuries for the last four years and he does not take any pain medication because he is not in any actual pain. Carlisle and Exterior further argue that plaintiff exaggerated the nature and extent of injuries and disability and by giving him a modest recovery the jury held him accountable for his exaggerations. Carlisle makes the additional argument that CPLR § 5501 is inapplicable to trial courts since it is entitled "Scope of review" and subsection (c) is entitled "Appellate division". Finally, Façade askes that if the court vacates the damages

awarded for past and future pain and suffering, the percentages of liability found by the jury should also be revisited.

Discussion

In *Bock v City of Mount Vernon*, the Second Department held that CPLR § 4404 (a) authorizes a trial court, "on motion of the parties or on its own motion, to review the question of whether the jury's verdict on the issue of damages was against the weight of the evidence and to set it aside if it finds that the verdict deviated materially from what would be reasonable compensation" (123 AD3d 644, 646 [2nd Dept 2014] [citations and brackets omitted]). In *Ramos v New* York, the First Department implied that it agrees that trial courts should apply the "deviates materially from what would be reasonable compensation" standard found in CPLR § 5501 (c) when deciding a CPLR § 4404 (a) motion (169 AD2d 687 [1st Dept 1991). Citing CPLR 5501 (c), the *Ramos* Court held that the trial court properly determined the damages awarded "deviated materially from what would be reasonable compensation (*id.*, *accord Thompson v Toscano*, 2018 NY Slip Op 07676 [1st Dept Nov. 13, 2018] [affirming trial court's order directing a new trial unless parties stipulate to a reduced award and noting favorably trial court's review of cases with comparable injuries and awards and that amount determined by the trial court "constituted reasonable compensation for the injuries sustained"], *Morales v Manh. & Bx. Surface Tr. Operating Auth.*, 106 AD3d 459 [1st Dept 2013] [modifying trial court's order directing a new trial unless parties stipulate to a reduced award so as to increase the future pain and suffering award, and holding that amount awarded by the jury deviated materially from what is reasonable compensation]). Therefore, Carlisle's argument that CPLR § 5501(c) is inapplicable to trial courts is rejected.

When exercising discretion over damage awards, courts should do so sparingly (Shurgan *v Tedesco*, 179 AD2d 805, 806 [2nd Dept 1992]). Moreover, trial courts lack the authority to substitute their determination as to what is an appropriate award for that of the jury (*Ashton v Bobruitsky*, 214 AD2d 630, 631 – 632 [2nd Dept 1995]). Instead, the proper procedure to be used when a trial court determines that the damages awarded by the jury is against the weight of the evidence, is to grant a new trial on the issue of damages unless the parties stipulate to an adjustment in the jury's award (*id.; Bock*, 123AD3d at 646).

Plaintiff's argument that Exterior's mention of specific dollar amounts during its closing and that these amounts represent a judicial admission is incorrect. "In order to constitute a judicial admission, the statement must be one of fact" (*Naughton v NYC*, 94 AD3d 1, 12 [1st Dept 2012]). Specific dollar amounts mentioned during a party's closing are merely argument, not statements of fact (*accord* PJI 2:277A). Therefore, Exterior (and the other defendants) are not bound by the dollar amounts mentioned by Exterior's counsel during his closing statement.

Defendants' argument that the jury's awards are appropriate because plaintiff has not received treatment for his injuries for the last four years is unpersuasive since as the Court of Appeals observed in the no-fault insurance context, "[a] plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness . . . of his injury" (*Pommells v Perez*, 4 NY3d 566, 577 [2005]). Plaintiff addressed his cessation of treatment through the testimony of Dr. Schmidt who explained that plaintiff stopped treatment for his injury because he had reached "maximum medical improvement" (*cf Barhak v L. Almanzar-Cepedes*, 101 AD3d 564, 565 [1st Dept 2012]).

Defendants' argument that the jury's awards are appropriate since plaintiff is not in pain is likewise unpersuasive. Defendants' emphasis on pain leaves out the remainder of what is

considered when awarding damages in a personal injury action, to wit: injury, disability and suffering (PJI 2:280). Indeed, "[t]he term 'pain and suffering' has been utilized to encompass all items of general, non-economic damages" (PJI 2:280, Comment, pg 908). Plaintiff's evidence of muscle atrophy, reduced grip strength, throbbing, numbness and swelling in the left extremity and numbness and tingling in his right extremity, are indications of injury, disability and suffering.

Carlisle and Exterior's argument that the jury awarded plaintiff a modest recovery because they were holding him accountable for his testimony exaggerating his injuries is also unavailing. Damages are awarded to "justly and fairly compensate the plaintiff for all losses resulting from the injuries and disabilities he sustained" (PJI 2:277). "[A]n award of damages to a person injured by the negligence of another is to compensate the victim, not to punish the wrongdoer. The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred" (*McDougald v Garber*, 73 NY2d 246, 253 - 254 [1989] [citations omitted]). Consequently, it is not the jury's function to hold plaintiff accountable for any embellishment he may have added when describing his injury but rather to restore him to the extent possible with an award of money damages to the position he would have been in had he not been injured. Of course, this rests on "the legal fiction that money damages can compensate for a victim's injury" (*id.* at 254). This fiction is accepted in New York and other jurisdictions "knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong" (*id.*).

Having considered defendants arguments against reconsidering the jury's awards for past and future pain and suffering and finding them unpersuasive, the question of what is adequate

compensation must now be addressed. While no two cases are factually identical, nevertheless, determining whether an award deviates materially from what would be reasonable compensation requires a survey of appellate authority where Courts considered the material deviation issue in cases where the injuries sustained are similar to plaintiff's injuries and disability (*Donlon v NYC*, 284 AD2d 13, 15 [1st Dept 2001]). For example, in *Mane v Brusco*, the fourteen-year-old plaintiff suffered a severed ulnar nerve, ulnar artery and two tendons in his non-dominant hand and underwent two surgeries and physical therapy (280 AD2d 436 [1st Dept 2001]). The Court observed that the damage to the plaintiff's left hand is permanent and that because of the injury, plaintiff experienced a loss of sensation, muscle atrophy and weakness in his hand and forearm (*id.* at 437). The Court found that the jury's award of $31,911 for past and future pain and suffering deviated materially from what is reasonable compensation (*id.*). The Court directed a new trial on the issue of damages for past and future pain and suffering unless the parties "stipulate to increase the award for past pain and suffering to $50,000 and to increase the award for future pain and suffering to $100,000 and to entry of an amended judgment in accordance therewith" (*id.*). In another First Department case, *Widawski v United Beef Packers, Inc.*, the "plaintiff sustained a severed ulnar nerve of his dominant right hand . . ." (183 AD2d 444 [1st Dept 1992]). The Court in *Widawski* upheld the jury's award of $100,000 for past pain and suffering, and $187,000 for future pain suffering since it did not deviate materially from what would be reasonable compensation (*id.*).

In *Harris v NYC*, "[t]he plaintiff injured the primary tendon in his wrist and thereafter underwent surgery to reconstruct and stabilize the tendon. His orthopedic surgeon described the surgery as successful, although the plaintiff continued to experience pain, weakness, numbness, and loss of motion in his wrist" (2 AD3d 782,784 [2nd Dept 2003]). The

Court found that the jury's award for past and future pain and suffering were excessive and ordered a new trial unless the parties stipulate "to reduc[ing] the verdict as to past pain and suffering from the sum of $500,000 to the sum of $200,000, and as to future pain and suffering from the sum of $550,000 to the sum of $350,000 . . ." (*id.*).

Finally, in a Fourth Department case, *Keefe v E & D Specialty Stands, Inc.*, the plaintiff "suffered a laceration to his ulnar nerve while performing iron work on bleachers and, despite three surgeries, ha[d] a permanent loss of feeling in his right hand, which [was] his dominant hand, and a permanent 50% loss of strength in that hand" (272 AD2d 949 [4th Dept 2000]) . The Court rejected defendant's contention that the award of $1,000,000 for future pain suffering to cover a 40-year period, materially deviated from what would be reasonable compensation (*id.*).

Taking into account the injuries sustained by plaintiff – complete severance of the left radial and ulnar arteries, ulnar, radial and median nerves and severance of the muscle belly controlling the fingers and wrist bending muscles – and the resulting disability and suffering - loss of sensation, muscle weakness and atrophy with reduced grip strength along with feelings of throbbing, numbness and swelling in his left hand and numbness and tingling in his right extremity from overuse – and considering the cases above where the plaintiffs suffered similar injuries, the amount awarded to plaintiff by the jury for past and future pain and suffering is against the weight of the evidence and deviates materially from what would be reasonable compensation. Therefore, plaintiff's motion is granted and a new trial is directed on the issue of past and future pain and suffering unless the parties stipulate to increasing the verdict as to past pain and suffering from the sum of $30,000 to the sum of $300,000, and as to future pain and suffering from the sum of $5,000 to the sum of $225,000 and to entry of amended judgment in accordance therewith.

To the extent that Façade requests in its opposition that if a new trial is ordered, the percentages of liability also be addressed, the request is denied. Façade has not cross-moved for this relief nor has it submitted any evidentiary basis for retrial of apportionment of liability.

Accordingly, based on the foregoing it is hereby

ORDERED that plaintiff's motion to set aside the jury's damages verdict for past and future pain and suffering and for a new trial on the issue of damages for past and future pain and suffering is GRANTED and the issue of damages for past and future pain and suffering shall be retried unless the parties stipulate to increasing the verdict as to past pain and suffering from the sum of $30,000 to the sum of $300,000, and as to future pain and suffering from the sum of $5,000 to the sum of $225,000 and to entry of amended judgment in accordance therewith within 30 days of service of a copy this order with notice of entry.

Dated: November 15, 2018

ENTER:

Hon. Paul A. Goetz, JSC