

Delmar v Burger King Corp.
2019 NY Slip Op 33854(U)
December 23, 2019
Supreme Court, Bronx County
Docket Number: 307681/2012
Judge: Donald A. Miles
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8**

Index No.: 307681/2012

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JULIE DELMAR, As Administratrix of the Estate of
MICHAEL DELMAR, deceased.

Plaintiff(s),
-against-

DECISION/ ORDER
Present:
Hon. Donald Miles
Justice Supreme Court

BURGER KING CORPORATION, POPEYE'S
LOUISIANA KITCHEN, GRAND CONCOURSE
REALTY CORP. and LAL RESTAURANT GROUP, INC.,
Defendant(s).

Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this post trial motion by plaintiff to set aside jury award:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support and Exhibits thereto.....	1
Affirmation in Opposition.....	2

Upon the foregoing papers, the Decision/Order on this motion is as follows:

In this personal injury action, it was alleged that Plaintiff Michael Delmar was injured on August 12, 2011 while at Defendants' Popeye's and Burger King restaurant at 149th Street and Grand Concourse in the Bronx, when he was caused to slip and fall on a wet floor while walking with his food tray looking for a place to sit. As a result of the accident, Mr. Delmar sustained injuries to his right foot. Specifically, he suffered a depressed, comminuted, intra-articular fracture of his right tibial plateau. Plaintiff was not able to undergo surgery, due to pre-existing health issues. At the time of his trial, plaintiff was deceased for reasons not alleged to be related to the accident.

A jury trial was held before this Court and on June 13, 2018, the jury returned a verdict finding that defendants were negligent in permitting the floor of the restaurant to be in a wet

condition, which proximately caused Mr. Delmar's injuries; and that plaintiff was 50% at fault. The jury awarded plaintiff \$30,000 for past pain and suffering, from time date of the accident until his death on September 20, 2014. Plaintiff now moves, pursuant to CPLR §§ 4404(a) and 5501 (c), for an order setting aside the jury's verdict insofar as damages were awarded for Mr. Delmar's pain and suffering as inadequate and contrary to the weight of the evidence.

Discussion

In moving to set aside the verdict on the issue of damages, the plaintiff argues that the award to Mr. Delmar for past and future pain and suffering was against the weight of the evidence in that it should have been significantly higher. It is well settled that the determination of pain and suffering awards are within the province of the jury and the court should not invade that province unless the verdict was clearly against the weight of the evidence. See *Grassi v. Ulrich*, 87 N.Y.2d 954, 956, 641 N.Y.S.2d 588, 664 N.E.2d 499 (1996); *Lolik v. Big V Supermarkets, Inc.*, 86 N.Y.2d 744, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163 (1995). The standard for making this determination is whether the "evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence." *Moffatt v. Moffatt*, 86 A.D.2d 864, 447 N.Y.S.2d 313 (2nd Dept.1982), *aff'd*, 62 N.Y.2d 875, 478 N.Y.S.2d 864, 467 N.E.2d 528 (1984). See also *Lolik v. Big v. Supermarkets, Inc.*, 86 N.Y.2d at 746, 631 N.Y.S.2d 122, 655 N.E.2d 163. As long as there is at least one fair interpretation of the evidence to support the verdict, the verdict must stand. See *Gaston v. Cicillo Realty Company*, 215 A.D.2d 174, 626 N.Y.S.2d 131 (1st Dept.1995).

Excerpts from plaintiff's examination before trial were read back to the jury on the record. Plaintiff was born on June 7, 1953. On the date of the accident he used a cane. However, after the accident, he had to use a wheelchair, a rollator - a walker that has wheels - and then a scooter. As he was walking from the Popeye's section to the Burger King area, he slipped on wet floor. As he fell, his leg got twisted and he could not get up and laid on the ground until EMS arrived. He was taken via ambulance to Bronx Lebanon Hospital with complaints of right knee pain and was admitted. Due to pre-existing ulcerations to his lower right leg, they were unable to fit him with a traditional cast and instead they had to use a velcro cast which he wore for six -

eight weeks. This resulted in his leg being permanently deformed as it never healed properly and he continued to feel pain when he tried to walk.

While defendants called no experts at trial, plaintiff's own medical expert, Dr. Jerry Lubliner, testified that the medical records stopped in the beginning of 2012. A period of pain and suffering of approximately six months and the medical evidence establishing right leg pain attributable to pre-existing health issues demonstrates that the jury's award of \$30,000.00 was reasonable.

According to Dr. Lubliner, under normal circumstances, a fracture this severe results in surgery but due to pre-existing health issues, plaintiff was unable to undergo surgery. As a result Mr. Delmar's fracture and the various fragments were caused to heal in a displaced manner resulting in his inability to ambulate thereafter. Plaintiff was also treating for right leg pain not necessarily related to the fracture due to other pre-existing right leg issues.

Q. Knowing that Mr. Delmar did not have surgery, can you tell this jury, to a reasonable degree of medical certainty, what pain he would have suffered after the injury until his death?

A. Through the beginning of 2012 he had pain in his knee, okay. The records stopped. I don't have records for the knee after that.

Q. Okay. He was treating for other pain too, though, right?

A. He was treating for pain in his leg. He was treating for pain in his tibia. He also had ankle pain; he had pain from his ulcers; he had a fracture that healed. So he had lots of visits for the right lower leg pain but the notes don't indicate exactly where they were from; it said "tibia" but it didn't say ankle or knee.

In opposing the motion defendants contend that the jury's award to Mr. Delmar for past pain and suffering reflected a fair interpretation of the medical evidence presented at trial. Defendants highlight Mr. Delmar's extensive list of prior health problems and disabilities as alluded to by Dr. Lubliner's testimony which rendered plaintiff impaired in his mobility and disabled from performing activities of daily living before the accident. Dr. Lubliner confirmed that Plaintiff suffered from a long history of ankle pain and treatment prior to the subject accident; that several days before the accident the plaintiff was admitted to the hospital for an

altered mental state after taking unprescribed Xanax, and left the hospital against medical advice. Plaintiff testified at his deposition that he never sustained a prior right leg fracture, despite Dr. Lubliner and the medical records showing a prior fibula and tibia fracture. Dr. Lubliner also confirmed plaintiff's use of a rollator to ambulate prior to the accident despite plaintiff's claims to the contrary that he never used walking devices before the accident. Defendants maintain that there was no medical records or testimony submitted to show plaintiff was in any way disabled or suffering from pain related to his injuries suffered in this accident, up until the time of his death, rather than from pre-existing and underlying medical conditions.

Since the credibility of witnesses and the resolution of conflicting testimony are matters left exclusively for the jury to determine, the verdict cannot be said to be against the weight of the evidence and this court therefore has no power to set it aside. See *Wiseberg v. Douglas Elliman-Gibbons and Ives, Inc.*, 224 A.D.2d 361, 362, 638 N.Y.S.2d 82 (1st Dept.1996). The plaintiffs' motion must therefore be denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied, and plaintiff shall serve a copy of this decision and order on all parties.

This constitutes the Decision and Order of the Court.

DEC 23 2019

DATE



HON. DONALD A. MILES, J.S.C.