Gibson v Batia Realty Corp.
2019 NY Slip Op 33858(U)
December 23, 2019
Supreme Court, Bronx County
Docket Number: 21984/2012E
Judge: Ruben Franco

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

FELIX GIBSON and SOFIA GIBSON,

Plaintiffs,

-against-

BATIA REALTY CORP., NASIR SASOUNESS AND SASSON REG MG,

Defendants.

Index No. 21984/2012E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

On April 22, 2012, inside 69 East 115th Street, in New York County, a five-story walkup building, plaintiff Felix Gibson (Felix), a 52-year-old New York City building inspector fell while descending the interior stairs from the second to the first floor. On April 19, 2019, a jury determined that defendants Batia Realty Corp. and Nasir Sasouness were negligent in causing Felix's accident and awarded him $250,000 for past pain and suffering and $700,000 for future pain and suffering. Prior to the verdict, the parties stipulated to the dismissal of the claims against Sasson Reg Mg. The defendants now move, pursuant to CPLR § 4404 (a), *inter alia*, to set aside the verdict on liability as against the weight of the evidence; to set aside the verdict against defendant Sasouness in his individual capacity; and, alternatively, reducing the awards for past and future pain and suffering because they deviate materially from what would be reasonable compensation.

At the trial, Felix testified that "as I was walking on the steps a -- my foot twisted and I slide and I hold onto the handrail with my left shoulder, because it was kind of wet, and that's what hold me. I hit my back, my shoulder, my knee and my ankle." He stated that the varying height of the steps caused him to fall and that the steps were slippery because they were painted with a

gloss paint. and that when he reached out, he was unable to arrest his fall by grabbing onto the existing handrail. He injured his left shoulder and left knee.

On August 15, 2012, Felix underwent arthroscopic surgery on the left knee to repair a medial meniscus tear and to treat inflammation and loose cartilage. On October 24, 2012, he had surgery on his left shoulder to repair a "slap one tear." Both injuries were caused by the accident of April 22, 2012, according to Dr. Albert Graziosa, the orthopedic surgeon who performed the surgeries and treated Felix until May 18, 2016. Dr. Graziosa testified that Felix had rotator cuff and labrum tears of the left shoulder. He also testified that Felix's shoulder will continue to cause pain and inflammation which will be treated with injections. However, with respect to the knee, he testified that it suffered significant trauma and is a weight bearing joint, thus, its condition is expected to worsen and may require total knee replacement surgery. Felix was out of work for several months before he returned full-time in May or June 2013. He testified that he enjoyed dancing Salsa and Merengue, which are an important part of his Panamanian culture, and Punta dancing, which is very popular in his wife's country, and that as a result of his injuries, he can no longer dance. He has trouble kneeling, as well as walking, going up stairs and climbing ladders, all of which he is frequently required to do as part of his employment.

Defendants' argue that Felix did not testify about the direction of his fall – backwards, forwards, or to his side; that he did not recall whether he tried to grab the handrail; that an email that Felix supposedly sent to his supervisor reporting the incident was not produced; that he did not report the incident to anyone in the building; and, that he returned to work immediately after the accident, and only later went home in pain.

Plaintiff's expert Stanley Fein (Fein), a licensed engineer, testified that he conducted an inspection of the stairs on July 10, 2012, and found that the varying riser heights caused an

imbalance in the steps which created a fall hazard; that the steps were not painted with a sand-based paint causing them to be slippery; and, that there was not enough space between the wall and the handrail, preventing Felix from grabbing the handrail to break the fall. He noted that the stairs were prefabricated with open treads, consisting of concrete that had been poured into wooden bracing, which become slippery in certain instances; and, that the defects were not "de minimus." Fein used photos to illustrate his findings.

Defendants contend that Fein was wrong in his calculation of the height differential of the risers, which was within the tolerance range. They also contend that Fein did not measure all of the steps. Defendants conclude that Felix fell because he lost his balance. In response, plaintiffs assert that Fein's opinions were not countered by testimony from a defense expert and were supported by photographic and direct evidence.

As to damages, defendants assert that plaintiff had injured his shoulder and knee prior to the instant accident, and that plaintiff stopped treating in May 2016, and returned to work full-time and did not receive treatment after May 2016.

Defendants did not call medical or other witnesses to controvert plaintiff's proof on the issue of damages. In fact, defendants called no witnesses at all.

Defendants' claim that Nasir Sasouness should not be held individually liable for plaintiff's injuries was the subject of a motion during the trial outside of the presence of the jury. Mr. Sasouness had testified at his deposition and at the trial that he is a partner in the ownership of the subject building. He also testified that he visits the building two or three times per month and is involved in the daily management, operation and maintenance of the building. The court ruled that as a partner, Mr. Sasouness is jointly and severally liable for the torts that are committed in furtherance of the partnership business. The Court of Appeals has stated that, "When a tort is

committed by the firm, the wrong is imputable to all of the partners jointly and severally, and an action may be brought against all or any of them in their individual capacities (Partnership Law, §§24-26; ...) or against the partnership as an entity (CPLR 1025)." (*Pedersen v Manitowoc Co.*, 25 NY2d 412, 419 [1969].) Defense counsel has argued that the defendant corporation, and not Sasouness' partnership, owns the building, however, he submitted no evidence to substantiate this. The party who asserts the affirmative of an issue has the burden of proving it (*see* 17 Carmody-Wait 2d § 101:52; *Ramirez v Columbia Presbyt. Hosp.*, 51 AD3d 456 [1st Dept 2008]).

The jury weighed the evidence, and the credibility of Felix, as well that of defendant Sasouness, and chose to accept Felix's version regarding how he fell and credited Dr. Graziosa's testimony regarding the extent of the injuries. The court finds that the jury reached its conclusion based on a fair interpretation of the evidence (*see Williams v City of New York*, 109 AD3d 744 [1st Dept 2013]). The First Department has made it clear that a jury verdict should be set aside as against the weight of the evidence, "only where it seems palpably wrong and it can be plainly seen that the preponderance is so great that the jury could not have reached their conclusion upon any fair interpretation of the evidence" (*see Bernstein v Red Apple Supermarkets*, 227 AD2d 264, 265 [1st Dept 1966], quoting *Cornier v Spagna*, 101 AD2d 141, 149 [1st Dept 1984]). The jury also found that by failing to repair the defective stairs in their building business, where Felix fell, defendants were responsible for the injuries that he suffered.

Upon a review of the record, the court cannot conclude that the evidence presented by defendants weighed so heavily in their favor, that the verdict could not have been reached on any fair interpretation of the evidence (*see Grassi v. Ulrich*, 87 NY2d 954 [1996]; *Lolik v. Big V Supermarkets, Inc.*, 86 NY2d 744 [1995]). And, viewing the evidence, as the court must, in the

light most favorable to plaintiff, the prevailing party (*see Yass v Liverman*, 233 AD2d 110 [1st Dept 1996]), the court declines to disturb the jury's verdict on the issue of liability.

The cases are legion, too many to cite, that confirm a trial court's authority to overturn a jury's award of damages in a negligence action. In exercising that authority, the court must determine whether the compensation awarded by the jury deviates materially from what is reasonable under the circumstances (*see Once v Service Center of New York*, 96 AD3d 483 [1st Dept 2012]; *Grant v City of New York*, 4 AD3d 158 [1st Dept 2004]; *Yass v Liverman*, 233 AD2d 110 [1st Dept 1996]). In determining what is reasonable compensation, it is useful to compare the compensation found to be reasonable in cases where the plaintiff suffered similar injuries (*see St. Pierre v St. Victor*, 202 AD2d 479 [2nd Dept 1994]) In *Donlon v City of New York* (284 AD2d 13, 17 [1st Dept 2001]), the Court noted that "analogous cases will be useful as benchmarks." However, as stated in *Caprara v Chrysler Corp.* (52 NY2d 114, 127 [1981]), "In no two cases are the quality and quantity of such damages identical." (*See Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003].)

In *Smith v Manhattan & Bronx Surface Tr. Operating Auth.* (58 AD3d 552 [1st Dept 2009]), plaintiff suffered medial and lateral menisci tears of the left knee, a torn ligament and damage to the patella. She experienced severe pain, swelling and buckling of the knee and underwent arthroscopic surgery. She continued to experience chronic pain, swelling and buckling of the knee. Her orthopedic surgeon testified that the injury was permanent and that she would probably require a knee replacement. The Court determined that the jury's award of $100,000 for past pain and suffering and $800,000 for future pain and suffering did not deviate materially from what would be reasonable compensation.

In *Reyes v New York City Tr. Auth.* (126 AD3d 612 [1st Dept 2015]), the Court affirmed a jury award of $750,000 for future pain and suffering for a plaintiff who suffered a medial meniscus tear to her left knee and underwent arthroscopic surgery and her treating surgeon testified that she would eventually need a total knee replacement. Plaintiff also suffered three bulging discs.

In *Diaz v City of New York*, (80 AD3d 425 [1st Dept 2011]), the plaintiff suffered a torn meniscus, underwent four arthroscopic surgeries, and was highly likely to require knee replacement during his lifetime. The Court sustained a jury award of $800,000 for six years of past pain and suffering but increased the award for future pain and suffering over 31 years, from $150,000 to $600,000.

In *Sanchez v Morrisania II Assoc.*, (63 AD3d 605 [1st Dept 2009]), the Court found that the jury's award of $100,000 for past pain and suffering deviated materially from what would be reasonable compensation and increased it to $250,000. In addition to a fracture of her ankle, the 32-year-old plaintiff sustained a tear of the rotator cuff in her right shoulder for which she underwent surgery and two months of physical therapy. Inasmuch as the injuries were not permanent, there was no award for future pain and suffering.

In *Burnett v City of New York* (104 AD3d 437 [1st Dept 2013]), plaintiff suffered a fracture to his ankle which required surgery and had surgery on his right shoulder to repair a fracture and labral and rotator cuff tears. The Court affirmed the trial court's increase in the jury's total award from $250,000 to $500,000.

Notwithstanding the comparisons, where a defendant fails to controvert a plaintiff's proof at the trial on the issue of damages, as was the case here, the defendant implicitly concedes the propriety of the plaintiff's damages claim (*see Martelly v New York City Health & Hosps. Corp.*, 276 AD2d 373, 374 [1st Dept 2010]; *Kane v Coundorous*, 11 AD3d 304, 305 [1st Dept 2004]; *Reed*

v City of New York, 304 AD2d at 6; *Cabezas v City of New York*, 303 AD2d 307, 308 [1st Dept 2003]).

Defendants have failed to establish that the jury's award for pain and suffering constituted a material deviation from reasonable compensation.

Accordingly, defendants' motion is denied.

This constitutes the Decision and Order of the court.

Dated: December 23, 2019

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO