Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Joseph J. Esposito IA Part 6
Justice

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DIEGO SEBASTIAN NIEVA-SILVERA, Index No. 708337/17

Plaintiff,

Motion Date: 10/7/19

-against-

Motion Sequence No.4

MATHEW KATZ and GARY KATZ,

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendants, Mathew Katz and Gary Katz, for an order: (1) pursuant to CPLR Section 4404 setting aside the damages award as unsupported by and contrary to the weight of the evidence as well as excessive and deviating materially from what is considered reasonable compensation; and (2) ordering a new trial and (3) for such other, further and different relief as this court deems just and proper.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits..... | 1-4 |
| Affirmation in Opposition..... | 5-7 |
| Affirmation in Reply..... | 8-9 |

Upon the foregoing papers, it is ORDERED that the motion is granted to the extent of reducing the award as set forth herein. The branch of the motion seeking a new trial is denied.

In this rear-end collision personal injury case, plaintiff was awarded summary judgment on the issue of liability by Short Form Order dated February 14, 2018 by the Hon. Pineda-Kirwan, J.S.C. The damages portion of the trial was assigned to the undersigned and after several weeks of testimony a verdict was rendered in the following amounts:

$5,000,000 for past pain and suffering and loss of enjoyment of life from the date of the accident of February 23, 2017 through the date of the verdict; future pain and suffering in the sum of $36,000,000 was awarded from the date of the verdict for 41 years into the future; past medical expenses were awarded in the sum of $100,000 which is not being contested in this motion. Finally future medical expenses were awarded in the sum of $5,000,000 over the next 41 years.

Parenthetically, the jury found the following threshold categories were met by plaintiff, pursuant to NY Insurance Law Section 5102(d): Permanent loss of the use of a body, organ, member, function or system; permanent consequential limitation of use of a body, organ or member; significant limitation of use of a body, function or system. Plaintiff had a cervical spinal fusion and arthroscopic knee surgery. He had no claim for lost wages.

CPLR Section 4404(a) reads in relevant part that: "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court." Moreover, the compelling factor in the court's decision to set aside the verdict is a determination that "the jury could not have reached the verdict on any fair interpretation of the evidence" (*see Delgado v Board of Education,* 65 AD2d 547, *aff'd* 48 NY2d 643 [1979]; *see also Nolan v Union Coll. Trust of Schenectady, N.Y.,* 51 AD3d 1253 [2008]).

It is well settled that a jury's award regarding awards for past and future pain and suffering shall not be set aside unless the award deviates materially from what would be reasonable compensation (*see McEachin v City of New York,* 137 AD3d 753 *citations omitted* [2nd Dept 2016]. In *McEachin v City of New York,* plaintiff suffered severe pain in his lumbar spine and after two epidural steroid injections, plaintiff's orthopedic surgeon implanted a spinal cord stimulator in plaintiff's lumbar spine to block pain. Plaintiff, Elgin McEachin was 49 years of age at the time of

the accident and he also underwent arthroscopic surgery on his left knee. His expert orthopedic surgeon testified that plaintiff would eventually need knee replacement surgery. The jury awarded plaintiff McEachin $600,000 for past pain and suffering; $500,000 for 20 years of future pain and suffering $55,000 for past medical expenses and $87,500 for future medical expenses. Plaintiff moved under CPLR Section 4404(a) to set aside the verdict as inadequate and the trial court denied the motion. Plaintiff then appealed and the Appellate Division modified and remitted the matter to the Supreme Court for a new trial on damages for past and future pain and suffering unless the parties stipulated within thirty days of notice of entry, reducing the amount of damages for past pain and suffering from $600,000 to $400,000 and reducing the future pain and suffering from $500,00 to $350,000.

In *Kowalsky v County of Suffolk,* 139 AD3d 903 [2nd Dept 2016], Mr. Kowalsky underwent a laminectomy and spinal fusion surgery at L4-5 and evidence was presented that he required pain management medication which had side effects including but not limited to cognitive impairment and his physicians testified that he could no longer return to his employment as a Verizon technician. The jury awarded Mr. Kowalsky $200,000 for past pain and suffering and $850,000 for future pain and suffering for a period of 41 years and $4,038,000 in economic damages. After the judgment was entered, defendants appealed. The Appellate Division affirmed the judgment, with costs.

In *Starkman v City of Long Beach,* 148 AD3d 1070 [2nd Dept 2017], plaintiff was struck by a patrol car while he was lying on the beach in a lounge chair. He suffered three broken ribs and fractures of the transverse processes of the C6, C7 and T1 vertebrae and seventeen months after the accident he underwent a multi-level cervical fusion and when the bone did not fuse properly plaintiff underwent a second surgery which was successful in fusing the vertebra; however he still experienced significant neck and back pain and was prescribed several pain medications, suffered ongoing sexual dysfunction and was unable to participate in athletic activities. The jury awarded Mr. Starkman $100,000 for past medical expenses; $200,000 for past loss of earnings; $500,000 for past pain and suffering; $200,000 for future medical expenses; $450,000 for future loss of earnings and $750,000 for future pain and suffering. Plaintiff appealed on the grounds of inadequacy

of the judgment amount. The Appellate Division modified the judgment, finding that " Based on the totality of his injuries and pain and suffering, we conclude that the verdict was inadequate to the extent indicated" *citations omitted.* The Appellate Division modified and remitted the matter to the Supreme Court for a new trial on damages for past and future pain and suffering unless the parties stipulated within thirty days of notice of entry to increasing the verdict for past pain and suffering from $500,000 to $750,000 and for future pain and suffering from $750,000 to $1,500,000.

In the case at bar, plaintiff did not sustain a life-altering debilitating injury as a result of the rear-end collision. The record shows that the motor vehicle accident occurred on the Long Island Expressway and no medical attention was sought at the time of the accident. Plaintiff did not request an ambulance and drove away from the scene and did not seek medical attention for over a week. Moreover, plaintiff did not seek past or future loss of earnings.

Based upon the credible evidence and the demeanor of the witnesses, this court finds that the awards for past and future pain and suffering and future medical expenses are exorbitant and contrary to the weight of the credible evidence. Accordingly, it is ORDERED that these awards are forthwith set aside and vacated in their entirety.

The court finds that based upon the credible evidence, a fair and reasonable sum for plaintiff, Nieva-Silvera past pain and suffering is $625,000. The court further finds that a fair and reasonable sum for future pain and suffering is $1,000,000. Finally, the court finds that a reasonable sum for future medical expenses is $680,000. The jury award for past medical expenses in the sum of $100,000 remains undisturbed.

The foregoing constitutes the decision and order of this court.

A copy of this order is being emailed to both sides this date.

Dated: November 8, 2019

FILED
NOV 15 2019
COUNTY CLERK
QUEENS COUNTY

JOSEPH J. ESPOSITO, J.S.C.