SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:
HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

GRADY BEASLEY,

Plaintiff(s),

- against -

PARACO GAS CORPORATION and SHEIKH BANGURA,

Defendant(s).

DECISION & ORDER
Index No.: 50334/2016
Motion Date: 2/15/19

Defendants move for an order, (i) setting aside the verdict in plaintiff's favor and directing judgment in favor of defendants pursuant to CPLR 4404 (a), (ii) setting aside the verdict in plaintiff's favor as it is against the weight of the evidence and setting the matter down for a new trial on damages or reducing the jury verdict as excessive pursuant to CPLR 4404 (a), (iii) setting aside the verdict in plaintiff's favor in the interests of justice based upon errors in the trial court's rulings with regard to pre-trial and trial related motions all of which are renewed herein and preserved for purposes of appeal pursuant to CPLR 4404 (a), and (iv) staying proceeding upon the November 21, 2018 verdict and entry of judgment until 30 days after an order is entered on this motion pursuant to CPLR 2201.

The following papers were read:

Notice of Motion, Affirmation, and Exhibits (13)	1-15
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By way of background, plaintiff and defendants were involved in a motor vehicle accident on November 14, 2014 on the Cross Bronx Expressway (Accident). This action ensued. Subsequently, plaintiff moved for summary judgment on the issue of liability, which the Court (per Hon. Lewis J. Lubell, J.S.C.) granted. The action was then tried on damages before the undersigned, commencing on November 13, 2018. On November 21, 2018, the jury returned a unanimous verdict in favor of plaintiff, finding that the Accident was a substantial factor in causing plaintiff's injuries and finding that as a result of the Accident, plaintiff sustained (i) a significant limitation of use of a body function or system

(ii) a permanent consequential limitation of use of a body organ or member, (iii) a medically determined injury or impairment of a non-permanent nature that prevented him from performing substantially all of the material acts that constituted his usual and customary activities for not less than ninety (90) days during the one hundred and eighty (180) days immediately following the accident. The jury awarded plaintiff $1,200,000.00 for past pain and suffering and $1,000,000.00 for future pain and suffering for the next 19 years. Defendants now move to set aside the verdict and stay proceedings on the verdict and judgment for 30 days from the entry of this order.

CPLR 4404 (a) provides in relevant part that after a trial by jury, the Court, on motion or on its own initiative, "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 the evidence, in the interest of justice . . . ."

CPLR 2201 provides that, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

POSITIONS OF THE PARTIES

In support of their motion, defendants contend that plaintiff failed to proffer sufficient evidence to establish that he sustained a "serious injury," as defined by Insurance Law § 5102, as a result of the Accident. Additionally, defendants contend that the findings of the jury went completely against the weight of the evidence. Further, defendants contend that the award is excessive and should be reduced. Defendants cite to a number of cases wherein, defendants contend, plaintiffs suffering similar injuries were awarded considerably lower amounts.

Defendants also contend that the verdict should be set aside because of several errors by the Court. First, defendants contend that the Court erred in allowing the trial testimony of Jonas Gopez, M.D. and Marcia Beasley, plaintiff's wife. Defendants contend that the Court should have precluded Dr. Gopez from giving testimony because Dr. Gopez had been retained to perform an independent medical examination (IME) by a "no-fault carrier" and not by defendants. Defendants also contend that Dr. Gopez's testimony was speculative as to causation in that Dr. Gopez's report noted that plaintiff needed surgery, but not that that need was a result of the Accident. Defendants further contend that Dr. Gopez's testimony was cumulative, given the testimony of another of plaintiff's experts, Jeffrey Oppenheim, M.D. As to Mrs. Beasley, defendants contend that she was an undisclosed non-party witness, which presented unfair surprise and unduly prejudiced defendants.

Defendants further contend that the verdict should be set aside because the jury "rushed to judgment," which defendants contend is evidenced by the fact that the jury deliberated for less than three hours, did not ask to see any of the evidence, did not ask for any readbacks, did not submit any question to the judge, and because it was the day before Thanksgiving.

Lastly, defendants contend that the Court should stay execution of the judgment pending determination of this motion and toll the interest until the resolution of the motion.

In response, plaintiff outlines the various testimony from expert and law witnesses from which the jury could reasonably determine that plaintiff had suffered a "serious injury," as defined by Insurance Law § 5102. As to the reasonableness of the award, plaintiff outlines the proffered evidence, which, plaintiff contends, demonstrates the devastating effects that the Accident has caused to plaintiff's work and personal life and his need for future physical therapy and medical treatment. Plaintiff cites to a number of cases wherein, plaintiff contends, plaintiffs suffering similar injuries were awarded comparable amounts as plaintiff in this action.

Plaintiff also contends that the Court did not err in permitting Dr. Gopez and Mrs. Beasley to testify. As to Dr. Gopez, plaintiff contends that defendants' legal authority does not support the proposition that it was improper to permit Dr. Gopez to testify. In addition, plaintiff contends that a fair reading of Dr. Gopez's report does attribute the need for surgery to the Accident and, regardless, that it was not error to permit Dr. Gopez to testify as to causation as there was no surprise or prejudice as causation is implicit in the question of damages. Moreover, plaintiff contends Dr. Gopez's testimony was not cumulative of the testimony of Dr. Oppenheim as Dr. Gopez examined plaintiff in August 2015 before any surgery was performed and, by contrast, Dr. Oppenheim examined plaintiff on November 21, 2016, after surgery was performed. Thus, plaintiff contends, each physician testified from a different perspective. As to the testimony of Mrs. Beasley, plaintiff contends that it was not error to permit her to testify on the grounds of non-disclosure as defendants had knowledge of the witness' existence and at least as much knowledge as to the significance of her testimony as would have been received in response to a discovery notice.

Plaintiff further contends that there is no evidence that the jury rushed to judgment. As such, the jury verdict is entitled to a presumption of legitimacy.

Lastly, plaintiff contends that plaintiff is entitled to interest upon the total sum of a verdict from the date that the verdict is rendered until the date of entry of final judgment. As such, plaintiff contends that there is no basis to toll the interest.

ANALYSIS

The Court may set aside a verdict when it is contrary to the weight of the evidence (*see* CPLR 4404 [a]). The Second Department has explained that "[a] jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" (*Scalogna v Osipov*, 117 AD3d 934, 935 [2d Dept 2014]). Whether a jury verdict should be set aside as contrary to the weight of the evidence "does not involve a question of law, but rather requires a discretionary balancing of many factors" (*Tsimbalenko v Irizarry*, 104 AD3d 842, 843 [2d Dept 2013]). "When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Handwerker v Dominick L. Cervi, Inc.*, 57 AD3d 615, 616 [2d Dept 2008]). Here, plaintiff proffered competent evidence, including expert testimony, that he had suffered a "serious injury," as defined by Insurance Law § 5102. Defendants proffered competent evidence that plaintiff's injuries were not attributable to the Accident. "Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert" (*Ross v Mandeville*, 45 AD3d 755, 757 [2d Dept 2007]). The Court finds that there was a valid line of reasoning and permissible inference by which the jury could have reached its verdict on the evidence presented at trial and a fair interpretation of the evidence (*see generally Hendrickson v Dynamic Med. Imaging, P.C.*, 78 AD3d 999, 1000 [2d Dept 2010]; *Chery v Souffrant*, 71 AD3d 715, 716 [2d Dept 2010]; *Segal v City of New York*, 66 AD3d 865, 866 [2d Dept 2009]). Accordingly, defendants' motion pursuant to CPLR 4404 (a) to set aside the verdict as against the weight of the evidence is denied.

The Court may set aside a jury verdict on the issue of damages when it deviates materially from what would be reasonable compensation (*see Bock v City of Mount Vernon*, 123 AD3d 644, 646 [2d Dept 2014]). In determining whether the compensation is reasonable, the Court is not bound, but merely guided by relevant precedent in similar actions (*see Garcia v CPS 1 Realty, LP*, 164 AD3d 656, 658 [2d Dept 2018]). Here, plaintiff testified that the Accident has caused devastating effects on every aspect of his life, from work to personal activities. Plaintiff also proffered detailed medical evidence to support this position. Considering the nature and the extent of the injuries sustained by the plaintiff, the award for past pain and suffering and future pain and suffering does not deviate materially from what would be reasonable compensation (*see, e.g., Garcia*, 164 AD3d 656). Accordingly, defendants' motion pursuant to CPLR 4404 (a) to set aside the verdict as being excessive is denied.

The Court may set aside a jury verdict in the interest of justice if the Court erred in its rulings on, among other things, the admissibility of evidence (*see Daniele v Pain Mgt. Ctr. of Long Is.*, 168 AD3d 672, 675 [2d Dept 2019]). In making this determination, the Court "must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and 'must look to [her] own common sense, experience and sense

of fairness rather than to precedents in arriving at a decision' " (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381 [1976], quoting 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., ¶ 4404.11). Defendants contend that the Court erred in permitting Dr. Gopez and Mrs. Beasley to testify.

The Court finds no error in permitting Dr. Gopez to testify. Defendants have cited several cases for the proposition that it was error to permit Dr. Gopez to testify because he had been retained to perform an IME by a "no-fault carrier" and not by defendants, citing *Hughes v Webb* (40 AD3d 1035, 1036 [2d Dept 2007]) and *Bevilacqua v Gilbert* (143 AD2d 213 [2d Dept 1988]). After reviewing these cases, the Court finds nothing to support the proposition that it was an error to permit Dr. Gopez to testify. Additionally, given the different perspectives of Drs. Gopez and Oppenheim, that is, examining plaintiff before and after surgery, the Court finds that their testimony was not cumulative.

The Court finds no error in permitting Dr. Gopez to testify on the issue of causation. In his report, Dr. Gopez stated, among other things, that:

> "I make the following conclusions and remarks within a reasonable degree of medical certainty.
>
> 1. On 11/14/14, Mr. Beasley was involved in a motor vehicle accident resulting in a whiplash injury of his cervical spine. Along with this whiplash injury, Mr. Beasley also had pre-existing spondylosis and stenosis at C5-6 and C6-7 which was previously asymptomatic and aggravated by the subject motor vehicle accident. As a result, he has felt symptoms consistent with bilateral C7 radiculopathies causing pain in his forearm and into his 3rd and 4th digits. Additionally, he has also developed symptoms and signs of myelopathy resulting in his diffuse hyperreflexia, Hoffman signs and gait instability.
>
> 2. Given that Mr. Beasley is myelopathic and has abnormal signal changes in the spinal cord at the C5-6 level, there is no role for continuing conservative treatment. Surgical compression is really his only reasonable option.

A fair reading of these statements would have put defendants on notice that Dr. Gopez intended to testify about causation. Regardless, under the facts of this case, defendants "could not claim surprise or prejudice as a result of the challenged testimony, as 'the issue of causation was implicit on the question of damages' " (*Fishkin v Massre*, 286 AD2d 749 [2d Dept 2001], quoting *McLamb v Metro. Suburban Bus Auth.*, 139 AD2d 572, 573 [2d Dept 1988]).

The Court finds no error in permitting Mrs. Beasley to testify. The Second Department has explained that "[t]he penalty of preclusion is extreme and should be imposed only when the failure to comply with a disclosure order is the result of willful, deliberate, and contumacious conduct or its equivalent (*see Gendusa v Yu Lin Chen*, 71 AD3d 1085, 1086 [2d Dept 2010]). There is no evidence to indicate that this failure was willful or contumacious or defendants were unaware of the existence of plaintiff's wife or that she may witnessed some or all of plaintiff's activities from the Accident to the present.

Accordingly, defendants' motion pursuant to CPLR 4404 (a) to set aside the verdict in the interest of justice for improperly permitting Dr. Gopez and Mrs. Beasley to testify is denied.

The Court may set aside a jury verdict as a result of juror misconduct in limited circumstances (*Gabrielle G. v White Plains City School Dist.*, 106 AD3d 776, 777 [2d Dept 2013]; *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 611 [2d Dept 1996]). However, "[i]t is not every irregularity in the conduct of jurors that requires a new trial and, instead, the misconduct must be such as to prejudice a party in his substantial rights" (*see Russo v Mignola*, 142 AD3d 1064, 1066 [2d Dept 2016], internal quotation marks omitted). Here, defendants have offered no evidence that the jury "rushed" to verdict rather than simply expeditiously arriving at a verdict. In the absence of any such evidence, the Court will not impeach the jury verdict by probing into the jury's deliberative process (*see Gabrielle G.*, 106 AD3d at 777). Accordingly, defendants' motion pursuant to CPLR 4404 (a) to set aside the verdict in the interest of justice as a result of juror misconduct is denied.

It is well settled that " 'prejudgment interest must be calculated from the date that liability is established regardless of which party is responsible for the delay, if any, in the assessment of the plaintiff's damages' " (*see Grobman v Chernoff*, 63 AD3d 786, 789 [2d Dept 2009], *affd*, 15 NY3d 525 [2010], quoting *Love v State*, 78 NY2d 540, 544 [1991]). Defendants have provided no contradict this rule. Accordingly, defendants' motion to stay the execution of judgment and toll interest is denied.

To the extent not specifically addressed herein, the Court finds defendants' remaining arguments to be without merit. Based on the foregoing, defendants' motion is denied in its entirety.

Dated: May 29, 2019
White Plains, New York

HON. MARY H. SMITH
Justice of the Supreme Court