SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **IAS MOTION 26**

Justice

----------X

LINDA MILLER,

Plaintiff,

- v -

CAMELOT COMMUNICATIONS GROUP, INC., CORANET CORP., MANUEL ALMONTE

Defendant.

----------X

INDEX NO. 150387/2015

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for SET ASIDE VERDICT.

Defendants Camelot Communications Group, Inc. (Camelot), Coranet Corp. (Coranet), and Manuel V. Almonte (Almonte) move, pursuant to CPLR 4404 (a), for an order setting aside the January 31, 2020 jury verdict, scheduling a new trial, and/or scheduling this matter for a collateral source and Article 50-B hearing, pursuant to CPLR 4545 and 5041. The motion was referred to this court by the Hon. Lisa S. Headly because this court presided over the trial.

This action arises from an accident, in which plaintiff was injured on December 13, 2014, when she was struck by a van driven by Almonte, while she was crossing a street on a green traffic light. Almonte, at that time, was employed by Camelot. Plaintiff brought suit and, after discovery, a trial commenced on January 21, 2020. On January 31, 2020, the jury awarded plaintiff a total of $4,030,000, including $1,759,000 for past pain and suffering; $1,250,000 for future pain and suffering; $30,000 for past medical expenses; and $1,000,000 for future medical expenses, anticipated to be incurred over 22 years. Prior to the commencement of this lawsuit,

Plaintiff previously brought suit, after she suffered injuries to her head and neck when an usher at Lincoln Center opened a door onto her (the "Lincoln Center action").

DISCUSSION

Pursuant to CPLR 4404(a), the Court has discretion to "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 [or] in the interest of justice . . . ." A motion to set aside the verdict on these grounds "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" (*Russo v Levat*, 143 AD3d 966, 968 [2d Dept 2016]).

This statutory provision is "predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein" and the trial court must decide "whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or 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 NY 2d 376, 381 [1976] [internal quotation marks and citations omitted]; *Smith v Rudolph*, 151 AD3d 58, 62-63 [1st Dept 2017]). Such power granted "upon a court to order a new trial is discretionary in nature" (*Micallef* at 381).

It is well-settled that a jury verdict for the plaintiff "should only be set aside, based on the weight of the evidence, where the evidence so preponderates in favor of the defendant that it could not have been reached on any fair interpretation of the evidence" (*Yammoto v Carled Cab Corp.*, 66 AD3d 603, 604 [1st Dept 2009] [internal quotations omitted]). In determining whether to set aside the verdict, the court must engage in "a discretionary balancing of many factors"

(*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205 [1st Dept 2004]). "[T]he court must cautiously balance the great deference to be accorded to the jury's conclusion . . . against the court's own obligation to assure that the verdict is fair" (*id.* at 206 [internal quotations omitted]).

The discretionary nature of this inquiry does not imply that the court can freely reject any verdict that is unsatisfactory or with which it disagrees, as this would "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" (*id.* [internal quotations omitted]). "In the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*McDonald v. 450 West Side Partners, LLC*, 70 AD3d 490, 491-492 [1st Dept 2010], *citing Nicastro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]).

Moreover, if the verdict is set aside and an award of judgment entered in favor of the unsuccessful party, it would require the court to determine on its own the outcome of the case. Since this would deny the parties the opportunity to resubmit their cases to the jury, the burden on the party moving for such relief is very high (*Nicastro v. Park*, 113 AD2d 129, 132 [2d Dept 1985]).

Defendants' principal argument, here, is that this court erred when it precluded defendants from introducing a transcript of plaintiff's testimony in the Lincoln Center action during the trial of this action. It is undisputed that defendants failed to produce either the deposition transcript or the IME questionnaire from the Lincoln Center action in discovery here.

Clearly, a transcript of a party's deposition in a prior action is a 'party statement," within the meaning of CPLR 3101 (e), which provides that "[a] party may obtain a copy of his own statement" (*Zarate v Mt. Sinai Hosp.*, 142 Misc 2d 426, 428 [Sup Ct, NY County 1989]; *see also Ancona v Net Realty Holding Trust Co.*, 153 Misc 2d 946, 952 [Sup Ct, Nassau County

1992] [statement "made pursuant to an examination before trial," in a different action, is a "party statement"]). Here, defendants failed to produce the transcript in the course of discovery and then sought to use it at trial. Defendants now argue that plaintiff should have moved to compel production of the transcript (NYSCEF Doc. No. 97, 4), that she had a copy, obtained during the course of the earlier action (NYSCEF Doc. No. 109, 2-3), and that, if she did not, she could easily have obtained a copy (*id.* at 3). The scheduling order in this case (Bluth, J.) required all parties to exchange statements of opposing parties. *See* NYSCEF Doc. No. 22. Defendants failed to comply with that order. Indeed, they failed to acknowledge their possession of the transcript until they attempted to use it during their cross examination of plaintiff at trial. This court sees no error in having precluded defendants from seeking a tactical advantage made possible by their deliberate failure to comply with an order of the court. That preclusion was well within the ambit of CPLR 3126 (2), which provides, in relevant part, that when

> "any party . . . . willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure . . . as are just, among them . . . an order prohibiting the disobedient party from . . . producing in evidence designated things or items of testimony."

Defendants also argue that both the verdict sheet and the court's jury instructions were flawed. These arguments are related, both to each other and to defendants' argument about preclusion. They will be discussed in turn.

Towards the end of the trial, counsel for defendants requested a change from the verdict sheet that they had initially proposed. The court declined that request and issued a verdict sheet

largely indistinguishable from defendants' initial request. The verdict sheet asked the jury to answer the following questions:

> Question 1: "Was defendant Manuel V. Almonte negligent?"
>
> Question 2: "Was defendant Manuel V. Almonte's negligence a substantial factor in causing the accident that occurred on December 13, 2014?"
>
> Question 6: "State the amount of damages, if any, sustained by plaintiff Linda Miller for past pain and suffering . . . from the date of the accident on December 13, 2014 up to the date of your verdict."
>
> Question 7: "State the amount of damages, if any, which will fairly and justly compensate the plaintiff Linda Miller for pain and suffering . . . from the date of your verdict to the time plaintiff could be expected to live."

Defendants argue that the second question impermissibly blends the issue of liability with that of damages. Obviously, however, the jury would reach the second question only if it had already answered the first question in the affirmative. Defendants also argue, citing *Rodgers v New York City Tr. Auth.* (70 AD3d 917, 920 [2d Dept 2010]), among other cases, that claims that an accident exacerbated a prior injury must be specially pleaded and proved, and that the verdict sheet failed to state that principle. Defendants appear to believe that plaintiff should have contended that the subject accident exacerbated the injuries that she suffered in her earlier accident. Plaintiff made no such claim, however.

Defendants' argument about the jury charge is similarly circular. Defendants contend that the charge "failed to mention that the plaintiff can only recover for those injuries caused solely by the subject accident." NYSCEF Doc. No. 109 ¶ 38. To be sure, defendants attempted to introduce evidence of plaintiff's prior accident, but, as discussed above, they were precluded

from introducing a transcript of plaintiff's deposition in the Lincoln Center action. Plaintiff, plainly, did not claim that she could recover for any injuries that had not been caused by the subject accident.

Moreover, as defendants acknowledge, the jury was specifically charged that "[i]f you decide that defendants are liable, plaintiff is entitled to a sum of money which will justly and fairly compensate her for any injury, disability and conscious pain and suffering to date caused by defendants." NYSCEF Doc. No. 99 ¶ 50 (quoting Trial Transcript at 1053). There could be no plainer statement that any award of damages to plaintiff had to be based on, and limited to, the injuries that she sustained in the subject accident.

Defendants also argue that an additional charge (VTL 1111) that had been given to the jury after it began deliberations, could have been confusing. Notably, however, defendants do not contend that the jury's verdict was against the weight of the evidence. Initially, before the jury began deliberating, the court charged that the jury could find that plaintiff had violated Vehicle and Traffic Law (VTL) §1152 (a), which provides, in relevant part:

> "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway[.]"

or, if the jury found that plaintiff was within a crosswalk at the time of the accident,

> "You must consider section 1151 of the [VTL], which provides, subsection (a) 'When traffic control signals are not in place or are not in operation, the driver of the vehicle shall yield the right of way . . . to a pedestrian crossing the roadway within the crosswalk."

Trial transcript at 1042-49. Plaintiff, however, had testified that she was in a crosswalk at the time of the accident, and that traffic signals were operating properly. Accordingly, the court gave this additional charge:

> "In this case, there is no dispute that the intersection . . . was controlled by traffic-control devises for both motorists and pedestrians.
>
> I am now reading to you a section from the [VTL], section 1111:
>
> 'Whenever traffic is controlled by traffic-control signals . . . only the colors green, yellow and red shall be used and said lights shall indicate and apply to drivers of vehicles and to pedestrians as follows: Subsection (a) (1) "Green Indications":
>
> Traffic, except pedestrians, facing a steady, circular green signal, may proceed straight through or turn left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited.'
>
> And then we get to section [sic] (3): 'unless otherwise directed by a pedestrian-control signal as provided in section 1112, pedestrians facing any steady green signal, except when the sole green signal is a turn arrow, may proceed across the roadway within any marked or unmarked crosswalk.'
>
> . . . So you are to deliberate and if you have any questions, of course, you know what to do."

Trial transcript, 1097-98.

Defendants speculate that the jury could have been confused by this additional charge, but they fail to offer any indication of the nature of such possible confusion. Indeed, defendants

are reduced to arguing that plaintiff cannot prove that the jury was not confused, which is not a basis to vacate a verdict. *See* NYSCEF Doc. No. 109 ¶ 41.

Finally, defendants argue incorrectly that the jury's verdict was not supported by the evidence adduced at trial. Specifically, they point out that plaintiff's expert witness testified that plaintiff was likely to incur approximately $825,000 in future medical expenses and that the jury appears to have rounded this figure to $1,000,000. However, it seems that defendants, in their calculations, omitted certain services that plaintiff's expert witness testified that plaintiff would need and also miscalculated the total costs of services in their papers. Plaintiff's expert witness provided a range of costs and frequencies of visits for certain services and even just taking the lower numbers in those categories would bring the amount over $1,000,000 in total costs. Thus, the jury's determination as to the award of future medical expenses was supported by the testimony and documentation admitted into evidence.

With respect to the collateral source reduction, the court will provide the parties a reasonable opportunity to stipulate as to the appropriate collateral source reduction in the total award, if any, and to agree upon the form of a structured judgment, pursuant to CPLR Article 50-B, inasmuch as the award for future damages exceeds $250,000 (*see* CPLR 5041 [e]).

CONCLUSION

The court has considered all other arguments and finds them to be without merit.

The court will thus provide the parties with an opportunity to stipulate as to the appropriate collateral source reductions in the total award, if any, and to agree upon the form of a structured judgment pursuant to CPLR article 50-B, inasmuch as the award for future damages is in excess of $250,000 (*see* CPLR 5041).

Any requested relief not expressly addressed in this order is denied.

Accordingly, it is hereby

ORDERED that the motion of defendants Camelot Communications Group, Inc., Coranet Corp., and Manuel V. Almonte to set aside the January 31, 2020 jury verdict and to schedule a new trial is denied subject to the conditions listed above; and it is further

ORDERED that if the parties do not file a stipulation as to the amount of any collateral source set-off as set forth herein within 30 days, the court will schedule a collateral source hearing pursuant to CPLR 4545; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon each defendant herein.

This constitutes the Decision and Order of the court.

5/27/21
DATE

Mary V Rosado
MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE