Kurthy v Sands
2021 NY Slip Op 33193(U)
November 8, 2021
Supreme Court, Nassau County
Docket Number: Index No. 600117/2019
Judge: Thomas Rademaker
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 21 NASSAU COUNTY

PRESENT:

Honorable Thomas Rademaker
Justice of the Supreme Court

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DIANA KURTHY,

Plaintiff(s),

-against-

ELAINE SANDS,

Defendant(s).

---x

Index No. 600117/2019
Motion Sequence: 003
Submitted: 11/3/2021
DECISION AND ORDER

The following papers read on this motion:

Notices of Motion/Supporting Exhibits/Memorandum of Law.....X
Affirmation in Opposition.....X
Reply Memorandum of Law.....X

Defendant, ELAINE SANDS ("Defendant"), moves the Court for an Order, pursuant to CPLR § 4404, setting aside the jury verdict rendered in favor of the Plaintiff as against the weight of the evidence and setting the matter down for a new trial on damages, or in the alternative, to reduce the jury's verdict as "excessive." The Plaintiff opposes this motion.

The case at bar involves a motor vehicle versus pedestrian accident that occurred on December 11, 2018, at the intersection of Mackey Avenue and Main Street in Port

Washington, New York. The trial concerned damages only as the Defendant conceded liability prior to trial.

The action was tried before the Court on July 26, 2021 and July 27, 2021, with the jury rendering its verdict on July 28, 2021. The jury awarded the Plaintiff $125,000 for past pain and suffering and $700,000 for future pain and suffering. The Defendant challenges the jury's verdict with respect to future pain and suffering damages, but does not challenge the jury's past pain and suffering award.

CPLR Rule 4404 provides, in pertinent part:

> (a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, 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 the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as it deemed reasonable by the court.

For the Court to grant a motion to set aside the verdict as a matter of law, pursuant to Rule 4404(a) of the CPLR, ". . . the court must conclude that there is 'simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial' " (*Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 29 [2d Dept 2008]). Moreover, 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 on any fair interpretation of the evidence"(*Nicastro v*

Park, 113 AD2d 129, 134 [2d Dept 1985]). "[T]he determination of the jury which observed the witnesses and the evidence is entitled to great deference" (*Hernandez v Carter & Parr Mobile*, 224 AD2d 586, 587 [2d Dept 1996]).

The Defendant contends that the jury's award of $700,000 in future pain and suffering damages was not in line with the credible proof that was offered at the time of trial, and that such award is excessive and deviates from what would be reasonable compensation for her injuries.

The Defendant acknowledges that the Plaintiff, who is seventy-three years old, had sustained five broken ribs and a fractured clavicle as a result of the accident, but contends that other injury sites and symptoms were not causally related to the accident. The Plaintiff has been involved in a prior pedestrian motor vehicle accident, in which she sustained a fracture wrist and herniated discs, in which the Plaintiff reported pain conditions to her physicians prior to the accident at bar, and that any testimony that the Plaintiff was "pain free" prior to her accident with the Defendant as not support by the credible evidence introduced at th time of trial.

The Plaintiff reported severe pain complaints to her pain management doctor, which predate the accident at bar, but were approximately eighteen months subsequent to a prior motor vehicle pedestrian accident, in which the Plaintiff was sustained a pelvic fracture and disc herniations to lumbar spine. The Defendant contends that the jury failed to consider the Plaintiff's pre-existing osteoarthritis when considering the loss of range of motion in her

shoulder, did not consider the Plaintiff's pre-existing carpel tunnel syndrom with respect to her continuing pain complaints, and that no credible view of the evidence would causally link the Plaintiff's pre-existing conditions to her 2018 pedestrian/vehicle accident at issue herein.

In contrast, the Plaintiff contends that her comminuted clavicle fracture resulted in a mal union, and that she had limited range of motion in her left arm, a 50% permanent loss of abduction in her left should, and a twenty percent loss of strength to her deltoid, biceps, supr and infraspinatus muscles on her left side, and cervical herniations at her C3/C4/ and C6/C7 vertebrae and disc bulges at C4/C5 and C5/C6. The Plaintiff's treating physician characterizes these losses as permanent, and contends that the referenced cervical spine herniations were not present on the Plaintiff's 2015 MRI study. The Plaintiff's treating provider attributes a permanent loss of range of motion to the Plaintiff's neck as related to the accident, and was not the result of degeneration, aging, or prior injury.

A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party" (Tapia v Dattco, Inc., 32 AD3d 842, 844 [2006]; see Szczerbiak v Pilat, 90 NY2d 553, 556 [1997]; Jourbine v Ma Yuk Fu, 67 AD3d 865, 866[2009]). In considering such a motion, " 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant' " (Hand v Field, 15 AD3d 542, 543 [2005], quoting

Szczerbiak v Pilat, 90 NY2d at 556; see also *Eastman v Nash*, 153 AD3d 1323, 1324-1325 [2d Dept 2017]).

Here, based on the evidence adduced at trial, there was a valid line of reasoning and permissible inferences from which the jury could have credited the testimony of the Plaintiff and her treating physician both with respect to the assessment of the Plaintiff's present and future pain level as well as her treating physician's determinations regarding the causal linkage between the accident at bar and the Plaintiff's injuries, including but not limited to those injuries sustained to the cervical spine, as well as the permanency of these injuries.

While the Defendant's examining physician offered some opinions which contrasted with those offered by the Plaintiff's treating physician, a jury verdict is entitled to great deference based on its evaluation of the evidence, including expert testimony. Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another. (Nuzzo v. LM Feinman, 2019 AD2d 634[2nd Dept 1995]).

Further, issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence, and its resolution is entitled to deference. A successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence. " A jury verdict should not be set aside as against the weight of the evidence unless the evidence so preponderates in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence. (Lalla v. Connolly 17 AD3d 322, 323 [2nd Dept 2005]).

In sum, the award of damages for future pain and suffering did not deviate materially from what would be reasonable compensation. (Lauro v. City of New York, 67 AD3d 744[2nd Dept.

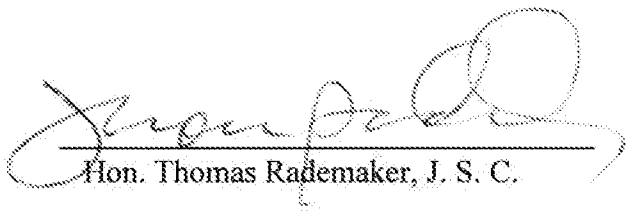
2009] [An award of $650,000 for future pain and suffering for plaintiff who sustained one fractured rib and lumbar herniations affirmed]; Wimbish v. NY City Transit Auth, 305 AD2d 596 [2nd Dept 2003] [jury award of $500,000 in future pain and suffering damages found not excessive for plaintiff in motor vehicle accident who sustained herniated discs at C3-4,C4-5, and C5-6 with impingement, but who otherwise did not present with fractures]).

Accordingly, it is hereby

ORDERED, that the Defendant's motion to set aside the jury's verdict with respect to future pain and suffering damages is **DENIED** in its entirety.

This constitutes the Decision and Order of the Court.

Dated: November 8, 2021
Mineola, N.Y.



Hon. Thomas Rademaker, J. S. C.

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