

2011 WL 10621135 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Kings County

Charles BACON, Plaintiffs,
v.
John P. BOSTANY, Defendants.

No. 9972008.
June 23, 2011.

Memorandum

Herbert Kramer, Judge.

*1 CIVIL TERM PART 13

BY: H. KRAMER J.

DATED: June 23, 2011

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1&2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
_____ (Affirmation)
Other Papers

Defendants move for a mistrial, to set aside the verdict, and to dismiss the complaint on pursuant to CPLR §§ 4401, 4404(a), and 5501(c). The Court “must afford the nonmoving party every favorable inference which may be properly drawn from the facts presented and the facts must be considered in a light most favorable to the nonmovant.” *Cohen v. Hallmark Carts*, 45 NY2d 493 [1978].¹

Defendant contends that plaintiff failed to prove *prima facie* that he suffered from an injury which satisfies the insurance Law § 5102 and therefore the jury's determination is against the weight of the evidence. Second, that the testimony elicited on cross examination regarding current treatment, which was not disclosed during discovery, was prejudicial and warrants a mistrial. Last, defendant seeks to set aside the verdict as the amount awarded materially deviates from what would be considered reasonable compensation for plaintiff's purported injuries.

For the foregoing reasons the motion is granted in part and denied in part. The portion which seeks a mistrial is denied. The defendant was entitled to utilize proper mechanisms during the trial to cure the testimony i.e. a motion to strike or a new physical examination. The defendant failed to utilize those tools and now re-moves for a mistrial.² Furthermore, the testimony regarding current treatment was not so prejudicial to warrant a new trial.³

*2 In regards to defendants contention that plaintiff failed to meet his *prima facie* burden of suffering a serious physical injury, the Court disagrees as well. There was testimony from treating physicians and a physical therapist regarding the plaintiffs restricted ranges of motion both close in time to the accident and to the trial, plateau in improvement, continued pain, limitations in daily activity, permanency and likelihood of required surgery. While there was also testimony that the plaintiff was able to engage in physical activities there is no requirement in the law that plaintiff must be completely disabled or unable to engage in any activities. See insurance law § 5102 (d). The jury's determination that plaintiff suffered a serious injury as defined by the Insurance law was not against the weight of credible evidence. See *Szczerbiak v. Pilat*, 90 N.Y.2d 553 [1997]

Defendant also asserts that the plaintiff failed to prove that he suffered from an "impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such persons usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment. The record reflects that the plaintiff missed five days of work, was unable to continue pursuing his masters degree and to engage in his usual and customary activities. Therefore, the jury's finding is not against the weight of the credible evidence.

Finally, the jury awarded plaintiff \$100,000 for past pain and suffering and \$750,000 for future pain and suffering. The cases illustrate that the award for future pain and suffering is excessive. The parties may stipulate to an award of \$350,000 for future pain and suffering, if the parties do not stipulate to that amount a new trial shall be had to determine the amount of future pain and suffering.

This constitutes the decision and order of the court.

<<signature>>

J.S.C.

Footnotes

- 1 Holding that the standard of review in assessing a motion for judgement notwithstanding the verdict is whether there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.
- 2 Defendant moved for a mistrial during the trial The original application was denied by the Court,
- 3 In fact, after his objection, the defendant continued his line of questioning regarding plaintiff's current treatment.