A-11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Trial Term Part 35 x
ROSE WALKER,

Index No.: 32691/08

Plaintiff(s)

-against-

DECISION AND ORDER

NEW YORK CITY TRANSIT AUTHORITY,

Defendant(s),
x

Recitation as required by CPLR 2219(a), of the papers considered in plaintiff's motion for an order pursuant to CPLR 4404(a) and CPLR 4401.

Papers	Numbered
Motions and supporting affidavits	1-5
Cross-motions and supporting affidavits	
Answering Papers	6-8
Reply Papers	9
Memorandum of law	10

The decision/Order on this motion is as follows:

In this action by plaintiff to recover damages for personal injuries, a bifurcated jury trial on the issue of liability and damages was held before this Court between the dates of October 26 and November 9, 2011. The jury apportioned 100% of the fault in the happening of the accident to the defendant and awarded damages to the plaintiff in the amount of $250,000.00 for past pain and suffering, $130,000.00 for past lost earnings, $20,000.00 for future pain and suffering over 4 years, $15,000.00 for future medical expenses over 3 years, and nothing for future lost earnings.

Defendant now moves for an order pursuant to CPLR 4404 setting aside the jury verdict in favor of the plaintiff and for a directed verdict pursuant to CPLR 4401 on the grounds that the jury's findings on the issues of liability, past loss of earning and past pain and suffering were against the weight of the evidence.

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 (*see Lolik v. Big V Supermarkets*, 86 NY2d 744 [1995]). The apportionment of

fault is an issue of fact for the jury and should not be set aside unless it could not have been reached based upon a fair interpretation of the evidence (*see Sydnor v. Home Depot U.S.A., Inc.*, 74 AD3d 1185 [2010]) Here, the jury's resolution of the credibility issues in favor of the plaintiff finding defendant 100% at fault is supported by a fair interpretation of the evidence, and thus should not be disturbed (*see Christoforatos v. City of New York*, 90 AD3d 970 [2011]).

Turning to defendants argument that the amount of damages awarded by the jury for past pain and suffering was excessive, the court notes that the amount of damages is principally a question of fact to be resolved by the jury (*see Coker v Bakkal Foods, Inc.*, 52 AD3d 765 [2008], and will only be adjusted by the court where the record indicates that an award deviates so materially from what would be reasonable compensation, that the verdict could not have been reached on any fair interpretation of the evidence (*see Giugliano v Giammarino*, 37 AD3d 533 [2007]). Therefore, unless the evidence militates against upholding the amount of damages awarded, "considerable deference should be accorded to the interpretation of the evidence by the jury" (*Duncan v Hillebrandt*, 239 AD2d 811, 814 [1997]; *see Nash v Sue Har Equities*, LLC, 45 AD3d 545, 545 [2007]).

Here, plaintiff presented evidence establishing that as a result of the accident of June 11, 2008, she suffered a comminuted fracture to her left index finger and a nail bed injury, which required two surgical procedures. The first surgery, on the day of the accident, to repair the plaintiff's nail bed and to close the fracture in her finger, and ten months after the accident, a second surgery to remove scar tissue causing her reduced mobility in her index finger. According to Dr. Lubliner, the orthopedist who examined plaintiff approximately one year and seven months after the accident, plaintiff's injuries caused her permanent deformities, permanent scarring, permanent loss of motion, permanent atrophy, permanent loss of strength, and permanent numbness. In addition to the crush injury to her finger, plaintiff testified that she also suffered pain in her arm and shoulder. Dr. Friedman, a neurologist, who examined plaintiff in September, 2009, testified that his examination revealed a "significant painful disability" with "very limited usefulness of her left non-dominant arm." Dr. Friedman also testified that at the time of his exam plaintiff was also suffering from complex regional pain syndrome, pain secondary to nerve damage.

Plaintiff testified that because of her injuries she has had great trouble performing ordinary functions of daily life including activities that require "close dexterity" such as untying shoes, fastening or buttoning clothes, hand washing clothes, flossing her teeth as well as reduced grip strength. Plaintiff also testified that she was relieved from her employment as a nurse's aid as she was unable to perform the tasks required for that job.

In view thereof, the jury's award of $250,000.00 for past pain and suffering did not deviate materially from what would be reasonable compensation (see CPLR 5501; *Biejanov*

v. Guttman, 34 AD3d 710 [2006]). Accordingly, the court declines to set aside the verdict and order a new trial on that issue of damages.

As to past loss earnings, despite defendant's argument to the contrary, the jury's verdict finding that plaintiff was entitled to past lost earnings was not contrary to the weight of the evidence. The jury could have reasonably concluded, based on the evidence presented at trial, that the plaintiff was disabled and unable to work. However, as the plaintiff's economist testified that the value of the lost wage and fringe benefits to the plaintiff from June 11, 2008 to the date of trial, November 1, 2008 was a total of $86,644.00, the jury's award of $130,000.00 for past lost earnings was excessive.

Accordingly, that part of defendant's motion pursuant to CPLR 4404(a) to set aside the damages award for past lost earnings is granted to the extent of reducing the award for past lost earnings from the principal sum of $130,000.00 to the principal sum of $86,644.00. The remainder of defendant's motion is denied.

The plaintiff is directed to settle a judgment on notice.

This constitutes the Decision and Order of this Court.

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court