

Linzer v Town of Oyster Bay

2009 NY Slip Op 30355(U)

January 23, 2009

Supreme Court, Nassau County

Docket Number: 17121-06

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6

DIANE L. LINZER,

MOTION DATE: 11/26/08

Plaintiff,

MOTION SEQ. NO.: 006, 007

-against-

INDEX NO.: 17121/06

**THE TOWN OF OYSTER BAY, NEA
ASSOCIATES II, LLC and REALTY
MANAGEMENT ASSOCIATES, LLC,**

Defendants.

The following papers read on this motion (numbered 1-4):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3
Notice of Cross Motion.....4

Defendant THE TOWN OF OYSTER BAY (“Town”) moves for an order pursuant to **CPLR §4404(a)** setting aside the verdict of August 21, 2008 as against the weight of the evidence; or in the alternative, for an order directing a new trial on the issue of damages unless the parties stipulate to a different damage award on grounds that the award of damages was excessive and contrary to the weight of the evidence; and for an order to set a hearing in order to assess all applicable collateral source set-offs and reductions pursuant to **CPLR §4545(c)**. Defendants NEA ASSOCIATES II, LLC (“NEA”) and REALTY MANAGEMENT ASSOCIATES, LLC (“Realty Management”), cross move to set aside the verdict of August 21, 2008 and to order a new trial or to reduce the verdict.

This is an action for personal injuries sustained by plaintiff DIANE LINZER. Plaintiff alleges that on February 1, 2006, she tripped and fell on a sidewalk in the Town of Oyster Bay adjacent to premises known as 120 Bethpage Road, Hicksville owned and maintained by defendants NEA and Realty Management. Plaintiff went to the emergency room of Winthrop University Hospital where she was diagnosed with a comminuted displaced patella fracture of the right knee (Trial transcript, p. 371) and on February 3, 2006 underwent knee surgery. On August

15, 2008, in the liability portion of the trial, the jury found defendant Town seventy percent at fault and defendants NEA and Realty Management thirty percent at fault. A trial on damages was held on August 18, 2008 through August 21, 2008 when the jury returned a verdict (the “Verdict”) as follows:

- (i) Pain and suffering from the date of the accident until the date of trial: \$450,000;
- (ii) Future pain and suffering from the date of trial into the future: \$500,000;
- (iii) Number of years for which the award for future pain and suffering is intended to compensate plaintiff: 36.3 years;
- (iv) Medical expenses from the date of trial into the future: \$155,000; and
- (v) Number of years for which the award for future medical expenses is intended to compensate plaintiff: 36.3 years (Trial transcript, pp. 695-699).

The Town claims that the Verdict in each of its branches and in totality is excessive and deviates materially from what would be considered reasonable compensation. In determining whether to set aside a jury verdict as against the weight of the evidence, the standard to be applied is whether the jury could have reached its decision on any “fair interpretation of the evidence.” **Nicastro v Park** 113 AD2d 129; **Frances G. v. Vincent G.**, 145 AD2d 599. When a motion is directed to the excessiveness or inadequacy of an award, the standard applicable in the trial court, as well as the appellate court, is whether or not the award deviates materially from what would be reasonable compensation. **CPLR 5501(c)**; **Gasperini v. Center for Humanities, Inc.**, 518 US 415 (1996); **Shurgan v. Tedesco**, 179 AD2d 805. The accepted methodology for trial courts in determining whether or not a given verdict “deviates materially” from what is reasonable compensation is for courts to consider awards approved by appellate courts in comparable cases. **Gasperini v. Center for Humanities, Inc.**, *supra*; **Donlon v. City of New York**, 284 AD2d 13; **Leon v. J & M Peppe Realty Corp.**, 190 AD2d 400.

Past and Future Pain and Suffering

It was not disputed that plaintiff sustained an injury to only her right knee as a result of her accident of February 1, 2006. Nor was it disputed that on February 3, 2006, plaintiff underwent a single operation on that knee which required the insertion of two metal screws to hold the two large fragments of the patella in place and the sewing of a third smaller fragment to the larger piece in order to hold the patella together (Trial transcript, p. 380), that plaintiff was hospitalized until February 6, 2006 (Trial transcript, p. 46) and that the trial took place from August 18, 2008 to August 21, 2008 indicating a past pain and suffering period of two and one-half years.

The salient evidence which demonstrate, in the Court's view, that the Verdict deviates materially from what would be reasonable compensation, is as follows: (1) after surgery, plaintiff was placed first in a long leg cast which was removed on February 22, 2006 and then in a "Bledsoe brace" until March 15, 2006 and did not suffer from post surgery complications (Trial transcript, pp. 385, 387, 415-416); (2) plaintiff received prescription pain medication for approximately one month following surgery and on occasion took over-the counter Ibuprofen (Trial transcript, p. 182); (3) plaintiff used a walker for the first seven to ten days after being released from the hospital and then only used a cane until mid March 2006 (Trial transcript, p. 181-182); (4) there was no testimony that plaintiff walked with a limp after she stopped using the cane or that she walked with a cane at the time of trial; (5) plaintiff returned to work as an internist as of late April/early May of 2006 (three months post surgery) on a reduced schedule and worked 3 ½ days per week for up to 8 hours per day (Trial transcript, pp. 56, 132, 179, 187, 214-215), (6) plaintiff resumed her full pre-accident work schedule working 35-40 hours per week by approximately January 2007 (Trial transcript, pp. 215-216, 562-563); and (7) there was no evidence that plaintiff required additional surgery, with the exception of surgery to remove the hardware, which plaintiff's orthopedist, Jeffrey Kaplan, MD testified was not medically necessary (Trial transcript, p. 273) and there was no surgery scheduled to remove said hardware.

With respect to physical therapy, there was testimony that plaintiff began a course of physical therapy, three times a week, beginning in February 2006 continuing until November 2006 (Trial transcript, pp. 97-98, 122, 238) and that, after November 2006, she had not received any further physical therapy at a facility (Trial transcript, pp. 200, 238) despite a recommendation by her orthopedist that she continue formal physical therapy treatment (Trial transcript, pp. 238, 563). There was also testimony that (i) her physical therapy benefits terminated in July 2006 (Trial transcript, pp. 121-122) but that she was being seen for no charge between August 2006 and November 2006 (Trial transcript, pp. 122-123); (ii) plaintiff did not contact her insurance carrier to inquire whether she could receive further benefits (Trial transcript, p. 244); and (iii) in any event, she could afford the cost of therapy on her own (Trial transcript, p. 199). Significantly, the Court notes that the physical therapy discharge notes, dated February 1, 2007, introduced into evidence, indicate that plaintiff was "discharged [from physical therapy] for noncompliance after several phone calls for patient to reschedule" (Trial transcript, p. 112).

Moreover, although there was testimony that plaintiff suffered from some atrophy in her right leg, it was not clear how much was directly related to the surgery and how much to the lack of exercise or aging process. Although Dr. Kaplan testified that he did not observe pre-existing arthritis in x-rays (Trial transcript, p. 295), the Court finds that the evidence as to arthritis is insufficient to establish that any arthritic condition was the direct result of her injury as opposed to an arthritic condition which could have been caused by the natural progression of arthritis commensurate with the aging process. *See generally Pommells v. Perez*, 4 NY3d 566.

The Town cites several Appellate Division cases to support its position that the Verdict did not represent reasonable compensation under the facts of this case including *Adames v. Awad*, 47 AD3d 737; *Van Ness v. New York City Transit Authority*, 288 AD2d 374; and

Barlatier v. Rollins Leasing Corp., 292 AD2d 480. In **Van Ness**, plaintiff had two arthroscopic surgeries to her right knee, the second surgery after pain worsened. Plaintiff there also suffered an injury to her lower back, was diagnosed with spasms and severe myofascial pain and received trigger point injections directly into the spasmodic muscle. The surgeon who performed plaintiff's second knee surgery indicated that, in the future, plaintiff would have to undergo several arthroscopies, a total knee replacement and physical therapy. The Second Department reduced the jury's award for past pain and suffering to \$200,000 (a period of 5 ½ years) and for future pain and suffering to \$400,000 (for a period of 45 years). The Town argues that given the more severe injuries in **Van Ness**, a lesser award in this case would be reasonable. In **Adames**, the Second Department increased the jury award to \$150,000 for past pain and suffering from \$7,500 (for a pretrial period of 3 1/2 years) and to \$150,000 for future pain and suffering from \$0 despite the fact that the injuries suffered by the plaintiff in that case (arthroscopic surgery, knee replacement surgery, and likelihood of future knee replacement) were more severe than the injuries suffered by the plaintiff herein. In **Barlatier**, the Second Department found \$140,000 to be reasonable compensation for past pain and suffering (for a pretrial period of 5 years) and raised the future pain and suffering award to \$250,000 (for a period of 31.6 years) (plaintiff had to undergo three surgical procedures and required a crutch or cane to walk and plaintiff could no longer work in his chosen field).

In the Appellate Division decisions cited by plaintiff to support her position that the Verdict was reasonable, the plaintiffs in those cases sustained far more serious injuries compared to the injuries sustained by plaintiff in this case. Plaintiff would like the Court to rely on **Urbina v. 26 Court Street Associates, LLC** [46 AD3d 268] in which the First Department reduced the jury award to \$700,000 for past pain and suffering (for a pretrial period of 4 years), and to \$1.5 million for future pain and suffering (for a period of over 41.5 years) for a patella fracture. The Court notes, however, that **Urbina** is clearly distinguishable from this case. In **Urbina** plaintiff suffered from a comminuted displaced traverse patella fracture and a tear of the lateral meniscus, underwent three surgical procedures prior to trial, used a heavy knee brace and walked with a limp at time of trial. Plaintiff in **Urbina** also needed future surgeries including knee replacements and was unable to return to work in his chosen profession. The other cases cited by plaintiff decided after the amendment to the CPLR which changed the standard for post trial review of jury verdicts, are equally inapposite. *See e.g.*, **Brown v. Elliston**, 42 AD3d 417 (pretrial period of 3 years, comminuted fractures to tibia and fibula, plaintiff casted for nine months and wore a plastic brace for several more months rendering him unable to perform basic physical tasks, shin ulcer, wedging procedure which failed, extensive hardware, plaintiff's left foot remained inwardly positioned, plaintiff walked with a limp and future pain and suffering awarded for 25 years); **Singh v. Gladys Towncars Inc.**, 42 AD3d 313 (fracture of tibia and fibula with nerve damage, five week hospitalization, facial fractures, pretrial period of 2 years and future pain and suffering awarded for a period of over 31 years). Many of the additional cases relied on by plaintiff do not provide sufficient information for the Court to make a reasoned comparison. *See e.g.* **Forman v. McFadden**, 44 AD3d 523; **Salop v. City of New York**, 246 AD2d 305; **Reger v. Long Island Railroad Company**, 145 AD2d 618.

Based on a review of these and other comparable appellate court decisions and the trial evidence in this case, the Court finds that the jury award of \$450,000 for past pain and suffering and \$500,000 for future pain and suffering was unreasonable given the quantity and quality of the evidence before the jury concerning the extent and duration of plaintiff's past pain and suffering, prior to and including the time of trial, and plaintiff's future pain and suffering for a period of 36.3 years.

Future Medical Expenses

Likewise, the Court finds that the jury verdict \$155,000 for future medical expenses is not supported by the evidence. With respect to future orthopedic costs, the jury heard testimony from Dr. Kaplan that plaintiff should be seen by an orthopedist one to two times per year at a cost of \$150 to \$200 per visit and have x-rays once per year at an approximate cost of \$250 in order to monitor her progress (Trial transcript, pp. 315-320). By the Court's calculation, based on the foregoing testimony, the future medical expenses for orthopedic visits and x-rays will amount to approximately \$23,595.

With respect to physical therapy, Mark Grossman, MD (the orthopedist who performed the surgery on plaintiff's knee) testified that "it would be good" for plaintiff to continue to receive physical therapy once a month subsequent to December 2006 (Trial transcript, p. 430) whereas Dr. Kaplan testified as to his recommendations that plaintiff have formal physical therapy twice a month for the rest of her life at a cost of \$150 per visit (Trial transcript, pp. 321-322). However, the jury also heard testimony that at the time of trial, plaintiff had not sought out any formal physical therapy for twenty-one months and that although plaintiff's insurance coverage for physical therapy ceased in July, 2006, plaintiff was receiving therapy free of charge since July, 2006 (Trial transcript, pp.69, 121-123, 199-200). Plaintiff testified she could afford the cost of therapy on her own but that, in any event, plaintiff never contacted her insurance company to inquire about further benefits (Trial transcript, p. 244). Furthermore, the physical therapy discharge summary, admitted into evidence, indicated that plaintiff was discharged from therapy for noncompliance (Trial transcript, p. 112). Accordingly, the Court finds that the jury award for physical therapy costs as part of its award for future medical expenses, was purely speculative. *See e.g. Hernandez v. New York City Transit Authority*, 52 AD3d 367; *Pouso v. City of New York*, 22 AD3d 395; *Guerrero v. Djuko Realty, Inc.*, 300 AD2d 542; *Korn v. Levick*, 231 AD2d 606.

Based on the foregoing, it is

ORDERED, that defendants' motion to set aside the Verdict is **granted** to the extent that a new trial on damages is ordered unless plaintiff stipulates in writing, within thirty (30) days of service of this Order with notice of entry, to reduce the Verdict as follows: from \$450,000 to **\$150,000** for past pain and suffering from the date of the accident [February 1, 2006] until the date of trial; from \$500,000 to **\$225,000** for future pain and suffering; and from \$155,000 to

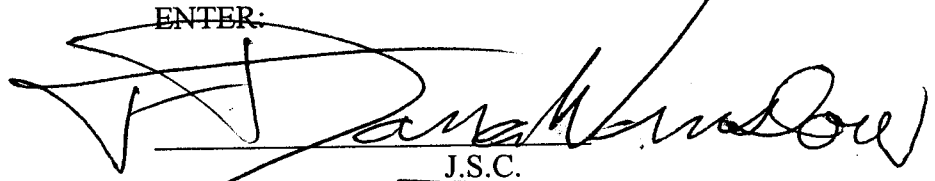
\$25,000 for future medical expenses from the date of trial extending into the future; and it is further

ORDERED, that the parties are to appear for a collateral source hearing pursuant to CPLR §4545(c) with respect to the award of future medical expenses be held on February 24, 2009 in 100 Supreme Court Drive, Mineola, NY, Part 6 at 2:30pm. The parties must contact chambers one day before the scheduled hearing to confirm that there is no trial or other conflict.

Defendant Town is directed to serve a copy of this Order upon all parties within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the Order of the Court.

Dated: January 23, 2009

ENTER:

J.S.C.

ENTERED
FEB 09 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE