

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

HON. HOWARD R. SILVER

YDAIZA DECASTRO,

: Index No.: 23683/05

Plaintiff,

:
: **JUL 27 2009**
:

-against-

: **NOTICE OF POST-TRIAL**
: **MOTION**

ANDREWS PLAZA HOUSING ASSOCIATES L.P.
and METRO MANAGEMENT & DEVELOPMENT, INC.,

: **Motion Support Office Room 217**

Defendants.

: Please refer to Honorable Edgar
: Walker, Part IA-6

:
: Return Date: August 13, 2009

IA-6

8/13

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COUNSELORS:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of **JACQUELINE MANDELL, ESQ**, dated the 23rd day of July 2009, with exhibits annexed thereto, and upon all of the pleadings and proceedings heretofore had and held herein, the undersigned, on behalf of the defendants, **ANDREWS PLAZA HOUSING ASSOCIATES L.P. and METRO MANAGEMENT & DEVELOPMENT, INC.**, will move this Court, before the Honorable Edgar Walker, Part IA-6, located at 851 Grand Concourse, Bronx, New York on the 13th day of August 2009, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order, pursuant to CPLR §5501(c), setting aside the jury's verdict as excessive and for such other and further relief as to this Court may seem just and proper.

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Sub

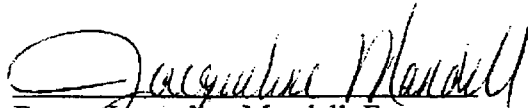
PLEASE TAKE FURTHER NOTICE, that, pursuant to CPLR §2214 (b), answering affidavits, if any, are to be served upon the undersigned no later than seven (7) days prior to the return date of this motion.

Dated: Valhalla, New York
July 23, 2009

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this paper or the contentions herein are not frivolous, as that term is defined in Part 130 of the Court Rules.

Yours, etc.,

KAUFMAN BORGEEST & RYAN LLP



By: Jacqueline Mandell, Esq.

Attorneys for Defendants

ANDREWS PLAZA HOUSING ASSOCIATES

L.P. and METRO MANAGEMENT &

DEVELOPMENT, INC.

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TO: **OMRANI & TAUB, P.C**
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3. This Affirmation is submitted in support of defendants' motion seeking an order pursuant to CPLR §5501(c), setting aside the jury's verdict as excessive and for such other and further relief as to this Court may seem just and proper.

4. This damages only trial was held before the Honorable Justice Edgar Walker and a jury from June 4, 2009 through June 12, 2009. The jury returned a verdict in favor of the plaintiff in the total amount of \$700,000, awarding \$350,000 for the plaintiff's past pain and suffering, \$250,000 for the plaintiff's future pain and suffering and \$100,000 for plaintiff's future medical expenses. A complete copy of the entire trial transcript is annexed hereto as Exhibit "A" (References to the Transcript are denominated as "TT"). The defendants respectfully submit that the jury's verdict deviated materially from what would be considered reasonable compensation and therefore, the verdict must be set aside and a new trial must be ordered unless the plaintiff stipulates to a reduction in damages.

5. The plaintiff commenced this action to recover damages for injuries she sustained on September 11, 2005, when she fell at the defendants' property. The plaintiff was seen in the Emergency Room where she complained of knee pain (TT. 33). She was diagnosed with a knee sprain and released from the hospital with prescriptions for pain medication and muscle relaxants (TT. 34). Later that evening, Ms. Decastro began to experience back pain (TT. 34). Approximately two weeks later, the plaintiff consulted Dr. Guy, a pain management specialist for the pain in her back and her knee (TT. 34-35). Dr. Guy treated the plaintiff's knee with hot baths and electrical massage patches for approximately six months and he used hot towels and electrical massage patches to treat her back for the same period of time (TT. 35-36).

6. When the plaintiff did not obtain complete relief of her knee pain, Dr. Guy referred her to Dr. Struhl, an orthopedic surgeon. Ms. Decastro saw Dr. Struhl for the first time on December 13, 2006, 14 months after her accident (TT. 193). Dr. Struhl testified that the plaintiff's main complaint was pain in her knee when she walked up and down stairs (TT. 194). Dr. Struhl performed arthroscopic surgery on the plaintiff's knee in January 2007 (TT. 38). The surgery was followed by six weeks of physical therapy (TT. 39). Post-operatively, Ms. Decastro saw Dr. Struhl on only two occasions, once on January 23, 2007 and once on May 15, 2007 (TT. 206). She has not seen Dr. Struhl since that time. Ms. Decastro testified that after she completed treatment for her knee (in approximately February or March 2007), she was able to climb stairs without her prior pain and she was able to move around much better than before the surgery and physical therapy (TT. 39). At trial, Ms. Decastro testified that, "I feel a lot better than before" (TT. 40). In fact, she testified that by May 2007, she had virtually normal range of motion in her knee (TT. 54-55). Moreover, Dr. Struhl corroborated Ms. Decastro's testimony. He said that when he saw the plaintiff in May 2007, she was doing extremely well, she had only mild pain in the knee which was improving and she had virtually full range of motion at that time (TT. 219).

7. With respect to her back pain, on January 4, 2007, 16 months after her accident, Ms. Decastro consulted Dr. Klein, a back surgeon (TT. 41, 150). Dr. Klein did not provide the plaintiff with any actual treatment at that time and he did not see Ms. Decastro again until August 21, 2008, 20 months after the first visit (TT. 153). Dr. Klein recommended surgery for the plaintiff, but she did not undergo that treatment and, in fact, the jury was not permitted to consider the issue of back surgery for the plaintiff as her counsel conceded that Dr. Klein, "...could not articulate what that future surgery was. Can't ask you for anything for that" (TT. 450). In fact, other than the hot towel and electrical massage treatment that Ms. Decastro

received for her back from Dr. Guy over a period of six months, she has not had any further treatment for her back at all. Notwithstanding the lack of treatment, Ms. Decastro testified that by the time of trial she experienced only intermittent back pain which occurred only three times per week after physical activity (TT. 56). Further evidence of the very limited discomfort that Ms. Decastro has experienced since her accident is found in her trial testimony that since she finished the prescription pain medication that was given to her in the Emergency Room on September 11, 2005, she has not taken any other prescription medication for the injuries she claimed in this case. If Ms. Decastro experiences pain, she takes over-the-counter Motrin (TT. 62).

8. Thus, the foregoing undisputed facts of this case show that the only treatment that Ms. Decastro ever had for her back consisted of six months of physical therapy. That treatment started in September 2005 and it ended in March 2006. The facts of this case also reveal that the only treatment that Ms. Decastro had for her knee involved six months of physical therapy, also from September 2005 to March 2006 and arthroscopic knee surgery followed by six more weeks of physical therapy. As a result of that treatment, Ms. Decastro experiences back pain after engaging in physical activity three times per week and she experiences virtually no knee pain. Ms. Decastro has taken no prescription pain medications for her injuries. Her pain is relieved by over-the-counter Motrin. Accordingly, the jury's award to this plaintiff of \$350,000 for her past pain and suffering and \$250,000 for her future pain and suffering was excessive and not at all commensurate with her injuries. A new trial is required unless the plaintiff stipulates to a reduced amount of damages.

POINT I

THE JURY'S AWARD OF \$600,000 TO YDAIZA DECASTRO FOR HER PAST AND FUTURE PAIN AND SUFFERING DEVIATED MATERIALLY FROM REASONABLE AND JUST COMPENSATION; THE VERDICT SHOULD BE SET ASIDE AND A NEW TRIAL ORDERED UNLESS THE PLAINTIFF STIPULATES TO A REDUCED AWARD.

9. The Appellate Division, First Department has repeatedly and consistently held that a jury's verdict should be set aside if the damages awarded deviate materially from what would be reasonable compensation. Stewart v. Manhattan and Bronx Surface Transit Operating Authority, 60 A.D.3d 445, 875 N.Y.S.2d 26 (1st Dept. 2009); Rodriguez v. New York City Health and Hospitals Corporation, 40 A.D.3d 442, 834 N.Y.S.2d 658 (1st Dept. 2007); Sow v. Arias, 21 A.D.3d 317, 800 N.Y.S.2d 150 (1st Dept. 2005). In this case, the jury's award of \$600,000 for the plaintiff's past and future pain and suffering as a result of arthroscopic knee surgery and back pain deviated materially from reasonable compensation and therefore it should be set aside.

10. In determining whether an award for damages deviates materially from reasonable compensation, the courts examine awards in other cases with comparable injuries. Morsette v. The Final Call, 309 A.D.2d 249, 764 N.Y.S.2d 416 (1st Dept. 2003) (In order to determine whether an award deviates from reasonable compensation, we are required to review awards approved in similar cases); Bonanno v. Port Authority of New York and New Jersey, 14 A.D.3d 377, 787 N.Y.S.2d 325 (1st Dept. 2005); Acton v. Nalley, 38 A.D.3d 973, 831 N.Y.S.2d 277 (1st Dept. 2007) (Because pain and suffering awards are not subject to precise quantification,

examination of comparable cases is necessary to determine whether the award materially deviated from reasonable compensation). "Although prior damage awards involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation." Miller v. Weisel, 15 A.D.3d 458 at 459, 790 N.Y.S.2d 189 at 190 (2nd Dept. 2005). This Honorable Court is respectfully referred to cases decided by the First Department for examples of recent awards that that court has sustained for the kinds of injuries the plaintiff has alleged in this case (**Exhibit "B"**).

11. In Jackson v. Kubashy, 15 Misc.3d 135, 839 N.Y.S.2d 433 (App. Term 1st Dept 2007) (**Exhibit "B"**), plaintiff suffered a lumbar radiculopathy and the Bronx County jury awarded her \$50,000.00 for past pain and suffering and \$200,000.00 for future pain and suffering. The First Department affirmed both awards. In Gaston v. City of New York, 59 A.D.3d 281, 874 N.Y.S.2d 33 (1st Dept. 2009) (**Exhibit "B"**), the plaintiff injured her knee when she tripped and fell on a sidewalk. She was transported to Montefiore Medical Center where she was treated for an abrasion of the knee and released. Eleven days later, a MRI revealed tears of the right knee's medial and lateral menisci. Five months later, the plaintiff underwent arthroscopic knee surgery. The jury awarded the plaintiff only \$5,000.00 for her past pain and suffering. The First Department increased that award to \$200,000.00 and added another \$50,000.00 for her future pain and suffering.

12. In the present matter, Ms. Decastro likewise suffered a back injury described as a lumbar radiculopathy and she also underwent arthroscopic knee surgery. Very much like the plaintiff in Gaston, the plaintiff was treated and released from an Emergency Room with a

diagnosis of a minor injury and then much later underwent arthroscopic knee surgery. The plaintiff in Gaston received \$200,000 for her past pain and suffering and \$50,000 for her future pain and suffering, which is vastly different from the award this jury made to Ms. Decastro of \$350,000 for her past pain and \$250,000 for her future pain. In fact, the combined sustainable damages for each of these injuries in the Jackson and Gaston cases totaled only \$500,000.00. However, the jury in the present matter awarded Ms. Decastro \$600,000.00 for the identical injuries.

13. In McLeod v. Foster, 269 A.D.2d 280, 704 N.Y.S.2d 457 (1st Dept. 2000) (Exhibit "B"), the plaintiff suffered a chondral fracture of her knee requiring arthroscopy. She testified that she experienced swelling, pain, clicking and weakness in the knee and that she often worked in pain. The jury awarded the plaintiff \$150,000 in pain and suffering damages. The First Department found the award excessive and reduced it by half to \$75,000. In Juliano v. Prudential Securities Incorporated, 287 A.D.2d 260, 731 N.Y.S.2d 142 (1st Dept. 2001) (Exhibit "B"), the plaintiff suffered torn lateral and medial menisci, synovitis, grade IV patella defect, grade III defect over the medial femoral condyle and patello-femoral osteoarthritis. He underwent two arthroscopic surgeries. The First Department held that plaintiff was entitled to total pain and suffering damages in the amount of \$200,000. In Hill v. City of New York, 2002 WL 1012520 (App. Term, 1st Dept. 2002) (Exhibit "B"), plaintiff fractured her patella in several places. She underwent an arthroscopic knee surgery followed by a total knee replacement and a surgical knee manipulation. The First Department held that the plaintiff was entitled to total pain and suffering damages in the amount of \$200,000.

14. Even more compelling is the case of Perry v. Manoco Corp., 309 A.D.2d 654, 766 N.Y.S.2d 422 (1st Dept. 2003) (Exhibit "B"). Plaintiff fell and suffered chondral damage to his knee. He underwent arthroscopic surgery six months after the accident. He also had a lower back injury which required facet-block and epidural injections. The plaintiff also developed a post-surgical septic infection which required two additional surgeries. The jury awarded the plaintiff \$20,000 for his past pain and suffering and \$30,000 for his future pain and suffering and the First Department affirmed both awards. Obviously, Ms. Decastro's injuries were not nearly as extensive as were the plaintiff's injuries in Perry, yet the First Department found that total pain and suffering damages in the amount of \$50,000 constituted adequate compensation for his injuries. In comparison to the facts of the present matter wherein the plaintiff underwent only one arthroscopic knee surgery and a few months of physical therapy, it is clear that the jury's award of pain and suffering damages deviated from what would be considered reasonable compensation and it must be set aside.

15. In those cases where the First Department has sustained damage awards greater than what the jury awarded in the present matter, the respective plaintiffs' injuries were far more severe than the injuries that Ms. Decastro sustained. For example, in Figueroa v. Center Associates, 283 A.D.2d 324, 728 N.Y.S.2d 5 (1st Dept. 2001) (Exhibit "B"), the plaintiff suffered a torn anterior cruciate ligament and a torn medial meniscus. He underwent two arthroscopic surgeries and two surgeries for the reconstruction of the anterior cruciate ligament. The evidence at trial established that the plaintiff would likely need two future surgeries as well. The jury awarded the plaintiff \$230,000 for his past pain and suffering (\$120,000 less than what Ms. Decastro received) and \$800,000 for future pain and suffering and the First Department affirmed that result. In Schultz v. Turner Construction Co., 278 A.D.2d 76, 717 N.Y.S.2d 182

(1st Dept. 2000) (Exhibit "B"), the plaintiff suffered a torn medial and lateral meniscus requiring arthroscopic surgery followed by eight months of physical therapy, three times each week, along with continued follow-up care. The evidence at trial established the need for additional surgery in the future. The First Department affirmed awards of \$200,000 for past pain and suffering (\$150,000 less than what Ms. Decastro received) and \$400,000 for future pain and suffering.

16. The First Department has held that it is incumbent upon the courts to keep verdicts reasonable and relatively uniform for similar injuries. In Donlon v. City of New York, the court held that:

The method of that review [under CPLR 5501(c)] is to evaluate whether the appealed award deviates materially from comparable awards. Such a method cannot, due to the inherently subjective nature of non-economic awards, be expected to produce mathematically precise results, much less a per diem pain and suffering rate. Our task necessarily involves identification of relevant factual similarities and the application of reasoned judgment.

The 1986 amendment to CPLR 5501(c) replaced the prior "shocks the conscience" review. This new standard in design and operation influences outcomes by tightening the range of tolerable awards.

... analysis of appealed verdicts using CPLR 5501(c) is not optional but a legislative mandate.

While 5501(c) review has of course been used as a control on "runaway juries", the vast bulk of decisions have involved fractional reductions as a by-product of greater scrutiny in a legislatively-mandated attempt to keep compensation reasonable and uniform. (Emphasis added)

Donlon, 284 A.D.2d 13 at 15, 16, 18, 727 N.Y.S.2d 94 at 96, 97, 98 (1st Dept. 2001). The same standard of review must be applied to the present matter.

17. The jury's awards to Ms. Decastro of \$350,000 for her past pain and suffering and \$250,000 for her future pain and suffering were inconsistent with what the First Department has considered appropriate for the kinds of injuries she sustained in this case. The awards deviated from what would be considered reasonable compensation and therefore, the verdict must be set aside and a new trial ordered unless the plaintiff stipulates to a reduced amount of damages.

WHEREFORE, your Affirmant respectfully requests that the within motion be granted in its entirety, that the jury's verdict be set aside in accordance with CPLR 5501(c) and a new trial ordered unless the plaintiff stipulates to a reduced award of damages and for such other and further relief as to this Court may seem just and proper.

Dated: July 23, 2004
Valhalla, New York


JACQUELINE MANDELL, ESQ.