SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT PART 62
*Justice*

FITZROY BURNETT and MICHELLE BURNETT,

Plaintiff/Petitioner(s)

- v -

NEW YORK CITY,

Defendant/Respondent(s)

INDEX NO. 109318/07

MOTION DATE _____

MOTION SEQ. NO. 004

The following papers, numbered 1 to 4 were read on this motion/petition to reargue prior decision

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Petition Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 3 |
| Replying Affidavits | 4 |
| Other | |

**Cross-Motion: X Yes No** 2

Upon the foregoing papers, it is ordered that this motion/petition by the both sides to reargue my decision of June 22, 2011, and for clarification of the recommended settlement amount in lieu of a new trial, is decided as follows, as per the decision filed herewith: (1) the motion by the Defendant is granted to the extent of clarifying my calculation of appropriate damages, and otherwise denied. The cross-motion by the Plaintiff for a clarification of my recommended settlement is granted as also set forth in my decision.

Oct. 31, 2011

GEOFFREY D. WRIGHT
AJSC J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

FILED

DEC 07 2011

NEW YORK
COUNTY CLERK'S OFFICE 9

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT PART 62
*Justice*

FITZROY BURNETT and MICHELLE BURNETT,

Plaintiff/Petitioner(s)

- v -

THE CITY OF NEW YORK,

Defendant/Respondent(s)

INDEX NO. 109318/07

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to 6 were read on this motion/petition to set aside the jury verdict

| | NUMBERED | PAPERS |
|---|---|---|
| Notice of Motion/Petition Order to Show Cause — Affidavits — Exhibits ... | 1,2 | |
| Answering Affidavits — Exhibits | 3,4 | |
| Replying Affidavits | 5,6 | |
| Other | | |

**Cross-Motion: X Yes No**

**Upon the foregoing papers, it is ordered that this motion/petition by both sides to set aside the jury verdict: the Plaintiff's motion is granted, the amount of $91,000.00, is to be added to the award to reflect medical liens and a new trial on damages in ordered unless the Defendant executes a stipulation to settle the case for $591,000.00. The City's motion to set aside the verdict is denied, a/p/o.**

Dated: June 22, 2011

GEOFFREY D. WRIGHT J.S.C.
AJSC

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 62

----------X

FITZROY BURNETT and MICHELLE BURNETT,

Plaintiff(s),

-against-

THE CITY OF NEW YORK,

Defendant(s).

----------X

Index #109318/07
Motion Cal. #
Motion Seq. #
**DECISION/ORDER**
Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: amend and set aside jury verdict

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion, Affidavits & Exhibits Annexed | 1,2 |
| Order to Show Cause, Affidavits & Exhibits | |
| Answering Affidavits & Exhibits Annex | 3,4 |
| Replying Affidavits & Exhibits Annexed | 5,6 |
| Other (Cross-motion) & Exhibits Annexed | |



Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Two post trial motions in the above matter are consolidated for determination. The trial itself involved a fall suffered by Fitzroy Burnett, a track worker who was part of a track replacement project at the 155th Street station on the D line. Mr. Burnett's shift started around midnight. He was directed to a point south of the station, where he had to remove cement shoring. He used what is known as a pinch bar to pry the shoring loose. Mr. Burnett had just started his chore, when his foot slipped, he was caused to fall, breaking his ankle. Later, Mr. Burnett suffered a seizure while at home, resulting in an injury to his shoulder.

The pivotal issue in the trial was the presence of water in the area where Mr. Burnett was working. The Plaintiff blames the presence of water for making his work area potentially slippery, a potential that was realized. There was evidence back and forth as to whether (1) there was water in the area and (2) if so, whether the water was an integral part of the work.

Even though the accident took place in a subway tunnel that was maintained by the New York City Transit Authority, the City, as the owner of the tunnel remained responsible to the Plaintiff for the condition of the work are [*COLEMAN v. CITY OF NEW YORK*, 91 N.Y.2d 821, 666 N.Y.S.2d 553, 689 N.E.2d 523, which left it to the Legislature to exempt the City from the

general liability of land owners to those performing work on their property pursuant to Labor Law 240(1) "[l]iability rests upon the fact of ownership and whether Eastern had contracted for the work or benefitted from it are legally irrelevant...The Legislature has, in the past, carved out exceptions from liability for certain owners ( see, e.g., L.1980, ch. 670 [creating ownership exception for owners of one- and two-family dwellings] ) but it has not created a similar exception for the City. We therefore decline to exempt the City-which is in fact the owner-from the plain word and reach of the statute, leaving that for the Legislature if it so chooses "(citing *GORDON v. EASTERN RY. SUPPLY*, 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912.; *GRAYBILL v. CITY OF NEW YORK*, 2003 WL 21649704 (N.Y.Sup.), 2003 N.Y. Slip Op. 51078(U)].

That being, it was left to the jury to determine which explanation of the occurrence it chose to accept. It chose to accept the Plaintiff's account, and I cannot find any ground to upset that conclusion, so the liability phase of the verdict will remain.

The real issue is the amount of damages awarded by the jury. I note at this point that the Plaintiff is not challenging the allocation of fault, which was (50/50%). The Plaintiff does challenge the amount awarded for past and future pain and suffering. As to the former, the jury awarded $175,000.00, as to the latter, the jury awarded $75,00.00. Each award of course reduced by 50%.

Looking to plaintiffs in other cases who have suffered similar injuries leads me to the conclusion that the award in this case, $250,000.00, in total, is inadequate. In the matter of *GUILLORY v. NAUTILUS REAL ESTATE, INC.*, 208 A.D.2d 336, 624 N.Y.S.2d 110, the Appellate Division of this Department affirmed a total award of $1.2 million. [see also *FUDALI v. NEW YORK CITY TRANSIT AUTHORITY*, 6 Misc.3d 1020(A), 800 N.Y.S.2d 346 (Table), 2005 WL 320990 (N.Y.Sup.), 2005 N.Y. Slip Op. 50136(U)]. Taking into consideration the finding that the Plaintiff was 50% at fault, and taking into account his ankle injury, I find that a total award, after taking into account the allocation of fault, of $500,000.00, to be sufficient. Accordingly, the Plaintiff's motion to set aside the jury's award in this case is granted, and a new trial on the issue of damages is ordered unless the Defendant stipulates in writing to an increase in the award to $500,000.00 in pain and suffering to cover the past and the future. In addition, the award, irrespective of the pain and suffering issue, is amended to reflect the $91,000.00, in medical expenses for which the Plaintiff is potentially liable at this time.

In view of the foregoing, the defense motion to set aside the jury's award as excessive is denied.

The foregoing constitutes the decision and order of the Court.

Dated: June 22, 2011

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

GEOFFREY D. WRIGHT
AJSC