Sweet v Rios

2014 NY Slip Op 00341

Decided on January 22, 2014

Appellate Division, Second Department

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Decided on January 22, 2014

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
JEFFREY A. COHEN
SYLVIA O. HINDS-RADIX, JJ.

2012-05003
(Index No. 6882/08)

[*1]Melody Sweet, respondent,

v

Estella Rios, et al., appellants.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains, N.Y. (Elizabeth M. Hecht of counsel), for appellants.
Evan M. Foulke, Goshen, N.Y., for respondent.

DECISION & ORDER

In an action to recover damages for personal injuries, the defendants appeal from a judgment of the Supreme Court, Dutchess County (Brands, J.), entered May 2, 2012, which, upon a jury verdict and upon an order of the same court dated July 14, 2011, denying their motion pursuant to CPLR 4404 to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, is in favor of the plaintiff and against them in the total sum of $959,882.78.

ORDERED that the judgment is modified, on the facts and in the exercise of discretion, by deleting the second, third, fourth, fifth, sixth, seventh, and ninth decretal paragraphs thereof, so much of the order dated July 14, 2011, as denied that branch of the defendants' motion pursuant to CPLR 4404 which was to set aside as excessive the damages awarded for future pain and suffering is vacated, and that branch of the motion is granted; as so modified, the judgment is affirmed, without costs or disbursements, the order dated July 14, 2011, is modified accordingly, and the matter is remitted to the Supreme Court, Dutchess County, for a new trial on the issue of damages for future pain and suffering, unless within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Dutchess County, a written stipulation consenting to reduce the verdict as to damages for future pain and suffering from the principal sum of $620,000 to the principal sum of $465,000, and to the entry of an appropriate amended judgment; in the event that the plaintiff so stipulates, the judgment, as so reduced and amended, is affirmed, without costs or disbursements.

On June 25, 2007, the plaintiff was injured when a vehicle owned by the defendant Estella Rios and operated by the defendant Christopher Rios suddenly pulled out of a parking space on the side of the road and collided with her vehicle. At trial, the plaintiff presented evidence that she sustained, as a result of the accident, protrusions of the discs at C4-5 and C5-6, and disc bulges at L4 and L5-S1 with right-sided radiculopathy, causing her chronic pain in her lower back, and pain radiating from her right hip down to the bottom of her foot where she has a "needles and pins" sensation requiring her to use a cane. She also suffered a left shoulder superior labrum anterior-posterior lesion which required arthroscopic surgery and resulted in restricted mobility, and a right [*2]knee meniscus tear which required arthroscopic surgery which was "largely successful."

Although the trial court suggested it would declare a mistrial and grant a new trial if

either party moved for one so that certain matters could be "cleaned up," the defendants declined to seek a mistrial prior to the verdict. Accordingly, the defendants waived the potential remedy of a mistrial, and cannot argue on appeal that a mistrial should have been declared (*see Rodriguez v Valentine*, 20 AD3d 558, 559; *Bonilla v New York City Health & Hosps. Corp.*, 229 AD2d 371; *see also* CPLR 4402; *Tirado v Miller*, 75 AD3d 153, 159).

Contrary to the defendants' contention, the trial court providently exercised its discretion in permitting the plaintiff to reopen her case to call her previously unavailable treating chiropractor as a witness and to introduce his complete office records into evidence. A trial court, in the exercise of discretion and for sufficient reasons, may allow a party to reopen and correct defects in evidence that have inadvertently occurred (*see Kay Found. v S & F Towing Serv. of Staten Is., Inc.*, 31 AD3d 499, 501; *Kennedy v Peninsula Hosp. Ctr.*, 135 AD2d 788, 790-791; *see also Feldsberg v Nitschke*, 49 NY2d 636, 643-644). When a motion to reopen is made, the trial court should consider whether the movant has provided a sufficient offer of proof, whether the opposing party is prejudiced, and whether significant delay in the trial will result if the motion is granted. Here, the plaintiff proffered a sufficient reason for the request and specified the evidence she would present if permitted to reopen, the defendants were not prejudiced by the presentation of such proof, and there was no undue delay (*see Kay Found. v S & F Towing Serv. of Staten Is., Inc.*, 31 AD3d at 501; *Frazier v Campbell*, 246 AD2d 509, 510; *Veal v New York City Tr. Auth.*, 148 AD2d 443, 444).

The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Brown v Elliston*, 42 AD3d 417). Under the circumstances presented herein, the jury award of $620,000 for future pain and suffering ($20,000 per year for 31 years) deviated materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Zimnoch v Bridge View Palace, LLC*, 69 AD3d 928; *Conte v City of New York*, 300 AD2d 430). An award of $465,000 ($15,000 per year for 31 years), would constitute reasonable compensation (*see Johnson v Freihofer Baking Co., Inc.*, 16 AD3d 461).

The defendants' remaining contention is without merit.

SKELOS, J.P., DICKERSON, COHEN and HINDS-RADIX, JJ., concur.