NEW YORK SUPREME COURT---------COUNTY OF BRONX

PART IA - 5

BLANCA SOLTERO,

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendants.

INDEX NUMBER: 305833/2009

Present:
HON. ALISON Y. TUITT
*Justice*

The following papers numbered 1 to 4,

Read on this Plaintiff's Motion for Additur and Defendant's Motion to Reduce Verdict Award

On Calendar of 10/1/12

Notice of Motion/Cross-Motion-Exhibits, Affirmations 1, 2

Affirmation in Opposition 3

Reply Affirmation 4

Upon the foregoing papers, plaintiff's motion for additur and defendant's cross-motion to reduce the jury award are consolidated for purposes of this decision. For the reasons set forth herein, the motion and cross-motion are denied.

The within personal injury matter came to trial before this Court. Summary judgment on the issue of liability had been previously granted to plaintiff. Thus, the trial herein was limited to the issue of damages. The jury awarded plaintiff $108,000.00 for past pain and suffering and $400,000.00 for future pain and suffering. The jury also awarded $988,000.00 for future loss earnings.

The evidence adduced at trial revealed that plaintiff was injured on March 29, 2009 when she fell and landed on her right leg and dislocated her right knee, tore her anterior cruciate ligament (ACL), tore her medial collateral ligament (MCL), partially tore her posterior collateral ligament (PCL), tore her lateral

meniscus and partially tore her medial meniscus. As a result thereof, plaintiff underwent four surgeries, had extensive physical therapy, had various cortisone and lubricant injections, developed arthritis, was limited in mobility and suffered constant pain and discomfort. Plaintiff's treating orthopedic surgeon, Laith Jazrawi, M.D., testified that plaintiff's arthritis is permanent in nature and will require two knee replacements in the future. Plaintiff was employed as a track worker for the New York City Transit Authority and an apprentice carpenter with the Carpenter's Union and the testimony revealed that plaintiff will never return to either of those occupations.

Plaintiff now moves pursuant to C.P.L.R. §4404(a) for additur on damages awarded by the jury for past pain and suffering and future pain and suffering. Plaintiff argues that the jury's award is inadequate and deviates materially from reasonable compensation. Plaintiff also argues that the award of $988,000.00 is inadequate and against the weight of the evidence. Defendant cross moves to reduce the jury's verdict for past lost earnings and future loss earnings arguing that both deviated materially from the evidence adduced at trial.

Pursuant to C.P.L.R. §4404(a), the Court in its discretion may set aside a verdict and order a new trial in the interests of justice. The applicable standard of review here is whether the jury's monetary award for past and future pain and suffering, and past and future loss earnings, deviates materially from what would be reasonable compensation. See, Donlon v. City of New York, 727 N.Y.S.2d 94 (1st Dept. 2001). Where a damages award deviates materially from what would be reasonable compensation for comparable injuries, the Court has the authority to order a new trial conditioned on the non-moving party stipulating to the additur or remittitur of the damages award. See, C.P.L.R. §5501( c); Ortiz v. 975 LLC, N.Y.S.2d (1st Dept. 2010)(Generally, the amount of damages awarded for personal injury is primarily a question for the jury, the judgment of which is entitled to great deference based upon its evaluation of the evidence). To support a claim that a verdict deviates from reasonable compensation, a party must point to cases involving a similar injury. Malki v. Kreiger, 624 N.Y.S.2d 167 (1st Dept. 2005).

The exercise of the discretion of a trial Court over damage awards should be exercised sparingly. Shurgan v. Tedesco, 578 N.Y.S.2d 658 (2d Dept. 1992) citing James v. Shanley, 423 N.Y.S.2d 312 (3rd Dept. 1979). Not all awards lend themselves to review and approval by comparison with previously approved verdicts. See Launders v. Steinberg, 828 N.Y.S.2d 36 (1st Dept. 2007), *mod. on other grounds*, 9 N.Y.3d 930 (2007); see also Morisette v. "The Final Call", 764 N.Y.S.2d 416, 422 (1st Dept.2003), *lv. dismissed*, 5 N.Y.3d

756 (2005) (Personal injury awards, especially those for pain and suffering, are subjective in nature, formulated without the availability of precise mathematical quantification).

Both parties cite cases in support of their respective positions for the award for past and future pain and suffering. Plaintiff cites the following cases: Urbina v. 26 Court Street Associates,847 N.Y.S.2d 67(1st Dept. 2007)(Award of $700,000 (reduced from $1 million) for past pain and suffering and $1.5 million (reduced from $2.5 million) for future pain and suffering where plaintiff suffered a fractured patella and meniscal tear with surgery with likely knee replacement in the future); Smith v. MABSTOA, 872 N.Y.S.2d 107 (1st Dept. 2009) ($900,000 pain and suffering where plaintiff underwent two arthroscopic surgeries with possible knee replacement in the future); Cruz v. MABSTOA, 687 N.Y.S.2d 350 (1st Dept. 1999)(Award of $375,000 for past pain and suffering and $650,000 for future pain and suffering was reasonable for plaintiff who underwent arthroscopic procedures to his knee with possible knee replacement in the future); Gonzalez v. NYCTA, 929 N.YS.2d 159 (2d Dept. 2011)($400,000 for past pain and suffering and $500,000 for future pain and suffering for plaintiff who sustained a fractured kneecap and could walk without an aid with a normal gait but developed traumatic arthritis with possible reconstructive knee surgery in the future).

In support of its position that the award for past and future pain and suffering was sufficient, defendant also cites Smith v. MABSTOA, 872 N.Y.S.2d 107 (1st Dept. 2009) where defendant clarifies that there was an award of $100,000 for past pain and suffering and $800,000 for future pain and suffering to plaintiff which the First Department held that did not materially deviate from what would be reasonable compensation. In Smith, plaintiff suffered severe damage to her left knee including tears of medial and lateral menisci, a torn ligament, torn cartilage in various places, and damage to patella. Defendant also cites Lopez v. Consolidated Edison Company of New York, 835 N.Y.S.2d 115 (1st Dept. 2007) where the Court held that $66,250 award for past pain and suffering did not deviate from reasonable compensation where plaintiff sustained two meniscus tears and chondromalacia in her knee. This Court finds this case without any probative value with respect to the past pain and suffering award as Lopez only required one surgery and the injuries sustained by plaintiff herein are of a more severe nature.

Defendant also cites Garcia v. Queens Surface Corp., 707 N.Y.S.2d 53 (1st Dept. 2000) where the First Department held that the award of $150,000 for past pain and suffering was reasonable. It should be noted that the Court also held that plaintiff's award for $450,000 for future pain and suffering for a period of 20 years

was not unreasonably high, regardless of whether plaintiff walked with a limp. The Court noted that plaintiff suffered a torn medial meniscus, which was removed, following which degenerative arthritis began to develop, a second surgery was required three years later to allow her kneecap to return to its normal position, she continued to experience pain, swelling and buckling of the knee, she had difficulty even walking for a sustained period of time, and she could expect ongoing development of arthritic changes and chondromalacia.

The remainder of the cases cited by defendant are not instructive to this Court. In Arujo v. State, 877 N.Y.S.2d 315 (1st Dept. 2009), the Court upheld an award of $65,000 for past pain and suffering. However, Arujo was a non-jury trial where the trial judge found that the worsening condition of plaintiff's knee was actually due to a degenerative condition from surgery nine years early. In Forman v. McFadden, 844 N.Y.S.2d 217 (1st Dept. 2007), the Court upheld a verdict for $100,000 for past pain and suffering. Forman, however, involved two non-displaced fractures in the right knee and rupture of the ACL, where plaintiff did not undergo any surgery.

Based on this record and in comparison to cases with similar injuries, the jury's award for past pain and suffering of $108,000 and future pain and suffering of $400,000 is materially deviates from what would be reasonable compensation under the circumstances. However, the award of $988,000 for future loss of earnings is supported by the evidence. Accordingly, plaintiff's motion for additur is granted to the extent of setting aside the verdict as insufficient and directing a new trial solely on the issue of damages, unless defendant, within twenty (20) days after service of a copy hereof, with notice of entry thereon, consent to the entry of a judgment increasing the amount awarded to plaintiff for past pain and suffering from $108,000 to $375,000 and future pain and suffering from $400,000 to $750,000.

This constitutes the decision and Order of this Court.

Dated: 2/5/2013

**Hon. Alison Y. Tuitt**