SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

Anthony Waring,

Plaintiff,

-against-

Sunrise Yonkers SL, LLC,

Defendant(s).

Index No.304505/2009

DECISION AND ORDER

Hon. Sharon A. M. Aarons:

Defendant Sunrise Yonkers SL, LLC (Owner) moves post-trial pursuant to CPLR 4404 to set aside the verdict of the jury in favor of the plaintiff, supporting the motion with selected excerpts from the trial testimony, but not a full transcript of the trial proceedings. The plaintiff submits written opposition to the motion. For the reasons which follow, the motion is granted in part and denied in part.

This case was tried before this Court and a jury, resulting in a verdict in favor of the plaintiff. Plaintiff Anthony Waring, while employed by non-party Sunrise Assisted Living Management, Inc. ("Management"), as a "housekeeper" at an assisted living facility located at 65 Crisfield Street, Yonkers, New York, was allegedly injured on December 20, 2008, when he slipped and fell on snow and ice on a ramp leading into a storage shed located on the property. The ramp and shed had been built approximately two months prior to the accident by an independent contractor hired by Management. The ramp, according to the testimony of Robert Schwartzberg, a professional engineer called by the plaintiff as an expert at trial, was erected without a permit in violation of the Yonkers Building Code, and violated New York State Uniform Fire Prevention and Building Code §§ 752.2 (e) and 765.4 (a) (11), in that the slope of the ramp was three times as steep as that permitted under

the code, and the shed lacked handrails, as required by the code.

Defendant raises numerous arguments in its post trial motion. The argument that defendant Owner is an out-of-possession owner, and thus not liable to the plaintiff, was raised in defendant's trial motion for a directed verdict, and rejected by this Court in a written decision dated April 3, 2013. Other arguments challenge the court's trial rulings, plaintiff's counsel's conduct at the trial, or the jury's findings.

As a threshold matter, plaintiff argues that the present motion is foreclosed by the failure of the defendant Owner to include a full copy of the trial transcript. It has been held that the failure to include a transcript on a CPLR 4404 motion (as opposed to an appeal from a ruling of a trial court) is not fatal to consideration of the motion. (*See Miller v. City of New York*, 2013 N.Y. Misc. LEXIS 661, 2013 NY Slip Op 30343[U] [Sup. Ct., N.Y. Co.] ["Furthermore, this court is not aware of any provision in the CPLR or binding case law on point that requires a party moving pursuant to CPLR 4404 to include the entire, or a relevant portion of, the transcript in its papers.... the absence of a transcript or any portion thereof from plaintiff's papers in support of her motion is of no import."]) But here, defendant has raised arguments well beyond those germane to a CPLR 4404 motion, challenging evidentiary rulings, statements made on summation, and rulings with respect to the charge and verdict sheet. It is the custom of this Court, adhered to during the present trial, to make a full and complete rulings on the record with respect to all of its trial decisions. Yet the defendant, ostensibly in possession of the entire transcript, has seen fit to include only select pages in support of the motion, which are woefully inadequate to undertake the far-ranging review now sought by the defendant.

The absence of the minutes clearly hampers consideration of the present motion. As the court

stated in *Lupo v. Pro Foods LLC*, 2011 N.Y. Misc. LEXIS 979, 2011 NY Slip Op 30558(U) [Sup Ct NY Co]:

> "Likewise, to the extent that Coppola's motion to set aside the jury verdict is based upon arguments that the court committed reversible legal errors in connection with its rulings, including those on law of the case, spoliation, evidence, expert evidence and/or assumption of the risk, it is denied outright. The motion is defective because it fails to include the transcripts any of the court's decisions being challenged, the context in which those rulings were made and whether the present were preserved for any review. All of this information is contained within the transcribed record, including but not limited to, the charge conference which was fully held on the record. Most, if not all, of the rulings were accompanied by explanations by the court of the basis for its rulings. Coppola's motion on these points is based entirely upon its attorney's recollection of the court's rulings. This is not an acceptable substitute for the official court transcript of the proceedings. Failure to include the court's rulings which are being challenged on this motion, including the underlying decisions which articulated the basis for the rulings, renders the motion inadequate for the court to make an informed decision on the merits of Coppola's present arguments."

Similarly, here, defendant makes far-ranging arguments, way beyond the scope of the "weight of the evidence" review contemplated by CPLR 4404, yet has failed to include a full transcript, which would be necessary for intelligent review. For example, defendant maintains that it was prejudiced by plaintiff's argument in summation that the jury should "punish Corporate America." The few pages of transcript provided to the Court, however, shows only three isolated references to "Corporate America," without any specific objection being made, and no suggestion by plaintiff that the jury "punish" anyone. The Court thus finds that the defendant has failed to meet its burden of establishing error in the numerous arguments raised. The Court will confine its review to that contemplated by CPLR 4404 – the weight of the evidence and the alleged excessiveness of damages. To the extent that the absence of a record has not prevented the Court from considering other arguments, the Court will address those arguments.

Status of Defendant as An "Out-of-Possession" Owner

Defendant argues that the verdict of the jury was inconsistent with its status as an "out-of-possession" owner (more properly, an owner in possession who had allegedly ceded control to a third-party manager). As plaintiff points out, the defendant moved for a directed verdict during the trial on the ground that it was an "out-of-possession" owner, and that non-party Management was charged with the maintenance and operation of the property. The Court issued a comprehensive written decision denying the motion for a directed verdict dated April 3, 2013, concluding that Owner had not surrendered control over the property, so that the owner was not absolved of liability.[1] This Court's decision on the motion for a directed verdict necessarily decided that there was no valid line of reasoning and permissible inferences from the evidence that could support a contrary determination. The present argument is not addressed to the weight of the evidence, but rather, defendant seeks relief which is more properly considered reargument of this Court's ruling on the motion for a directed verdict. The Court declines to grant reargument.

Apportionment As to Non-party

Defendant owner argues that its liability for any non-economic losses should have been apportioned with the non-party contractor who constructed the ramp and shed pursuant to CPLR article 16. While CPLR 1602 (2) (iv) does not bar a defendant from seeking apportionment under article 16 where liability is based on a non-delegable duty, that section does preclude a tortfeasor from seeking apportionment between itself and other joint tortfeasors for whose liability the

[1]See generally, *Vazquez v. Diamondrock Hospitality Co.*, 100 A.D.3d 502, 954 N.Y.S.2d 61 (1st Dept. 2012) (owner of a hotel was potentially liable for an elevator accident, as it had not ceded exclusive control over the hotel to an independent management company).

defendant owner is vicariously liable. (*Faragiano v. Town of Concord*, 96 N.Y.2d 776, 749 N.E.2d 184, 725 N.Y.S.2d 609 [2001]; *Clark v. N-H Farms, Inc.*, 15 A.D.3d 605, 791 N.Y.S.2d 122 [2d Dept. 2005] [no apportionment of fault between the owner of the premises where the injured plaintiff fell and the entity running a carnival on the premises at the time of the accident, because the owner was solely answerable for the breach of a nondelegable duty to provide the public with a reasonably safe premises, including a safe means of ingress and egress].) Here, the Court found in its previous Decision and Order that defendant Owner was not an out-of-possession owner, and as such it could not delegate its duty to maintain the premises in a safe condition to non-party Management. As a property owner charged with a nondelegable duty to keep the premises in repair, the defendant may not seek apportionment with the contractor who constructed the shed.

Court's Refusal to Charge Comparative Negligence

A comparative negligence charge is inappropriate where there are no specific factual allegations to support it, and thus no valid line of reasoning from which the jury could have reasonably concluded that the plaintiff was comparatively negligent. (*Pilgrim v. Wilson Flat, Inc.*, 110 A.D.3d 973, 973 N.Y.S.2d 738 [2d Dept. 2013].) Defendant argues that the plaintiff could have avoided the accident by finding a shovel elsewhere, other than the shed; using a snow blower to clean the property and avoiding going into the shed; using the shovel as a "cane" to brace himself; or using the side door. Certainly, *after the fact*, any method of avoiding an accident might appear reasonable, but the trial testimony establishes that none of these theories was reasonable under the circumstances which existed at the time of the accident. The plaintiff's unrefuted testimony was that the side door to the shed was blocked on the date of the accident. The other theories suggested by

the defendant Owner were not reasonable alternatives to simply walking out of the shed, and were contrary to the reasonable inferences raised by the trial evidence.

Damages

The CPLR 4404 standard for setting aside a verdict as against the weight of the evidence is whether there exists a "valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v Hallmark Cards*, 45 N.Y.2d 493, 499, 382 N.E.2d 1145, 410 N.Y.S.2d 282 [1978]). The facts in this case were sharply contested, with the plaintiff contending that he was permanently disabled from engaging in manual labor, and the defendant questioning whether the plaintiff suffered any injury at all. The jury found that the plaintiff was permanently injured, and awarded damages accordingly.

"[I]n the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict." *(Cholewinski v. Wisnicki*, 21 AD3d 791, 801 N.Y.S.2d 576 [1st Dept 2005].) Moreover, in deciding this motion the evidence supporting the verdict is entitled to every favorable inference. (*Broadie v. St. Francis Hosp.*, 25 A.D.3d 745, 807 N.Y.S.2d 656 [2nd Dept. 2006].) In the present case, although the facts were sharply contested, the jury could rationally find that the plaintiff sustained disc injuries which disabled him from performing manual labor, resulted in permanent pain and would require future surgery. The credibility of the witnesses and the resolution of conflicting proofs are matters properly for determination by a jury (*Louis v Kimmelman*, 8 A.D.3d 206, 779 N.Y.S.2d 478 [1st Dept. 2004]). The jury's verdict, which indicated that plaintiff's testimony and that of his expert medical witness were credited, was based on a fair

interpretation of the evidence (*see Ruiz v City of New York*, 289 A.D.2d 42, 734 N.Y.S.2d 35 [1str Dept. 2001]) and thus cannot be set aside as contrary to the weight of evidence.

Generally, the method of that review is to evaluate whether the appealed award deviates materially from comparable awards. (*Donlon v. City of New York*, 28 A.D.2d 13, 14, 727 N.Y.S.2d 94 [1st Dept. 2001] ["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.") The CPLR 5501© "material deviation"standard is properly applied by a trial court in determining a post-trial motion in the first instance under CPLR 4404. *(Ashton v. Bobruitsky*, 214 A.D.2d 630,631, 625 N.Y.S.2d 585 [2d Dept. 1995].)

The jury made the following award of damages:

Past pain and suffering	$100,000
Past lost wages	$ 80,000
Past medical expenses	$250,000
Future pain and suffering	$500,000
Future lost wages	$400,000
Future medical expenses	$500,000

The future awards were for a period of 31 years.

The Court finds that the award for past and future pain and suffering, totaling $600,000, did not deviate materially from reasonable compensation. The most analogous case involving similar disc injuries, where the plaintiff was able to return to work (unlike the plaintiff herein), the First Department found that a total award of $600,000 for past and future pain and suffering was reasonable compensation. (*Martinez v. Manhattan & Bronx Surface Tr. Operating Auth.*, 23 A.D.3d 302, 806 N.Y.S.2d 470 [1st Dept. 2005] [herniated disc at the L5-S1 level, but plaintiff was never hospitalized and not expected to have surgery, was able to return to his job as a cab diver and

claimed no lost earnings; the $ 750,000 award for future pain and suffering over 39.9 years reduced to $450,000; $150,000 for past pain and suffering undisturbed].) Similarly, a total award of $500,000 for past and future pain and suffering was sustained for similar injuries over a lesser life span than involved here, in a case where surgery was never contemplated. (*Sanabia v. 718 W. 178th St., LLC*, 49 A.D.3d 426, 854 N.Y.S.2d 375 [1st Dept. 2008] [herniated discs of the cervical spine at C-3-C-4 through C-6-C-7, with nerve root impingement and resulting back and neck pain; plaintiff was never hospitalized, and neither had nor was expected to have surgery; $ 400,000 award for future pain and suffering over 20.9 reduced to $300,000; $200,000 award for past pain and suffering not disturbed]; see also, *Zimnoch v Bridge View Palace, LLC*, 69 A.D.3d 928, 893 N.Y.S.2d 253 [2d Dept. 2010] [where plaintiff suffered herniated discs at L4-L5 and at L5-S1, and a bulging disc at L3-L4 as a result of the accident, reducing past pain and suffering from $300,000 to $150,000, and future pain and suffering from $850,000 to $300,000); *Lifshits v. Variety Poly Bags*, 5 A.D.3d 566, 773 N.Y.S.2d 304 [2d Dept. 2004] [where plaintiff suffered herniated disc which caused pain, numbness, and restricted range of motion, ultimately requiring spinal fusion surgery, award of $ 825,000 for future pain and suffering was reduced to $500,000; award of $ 200,000 for past pain and suffering was not excessive]; *Gonzalez v Rosenberg*, 247 A.D.2d 337, 669 N.Y.S.2d 216 [1st Dept. 1998] [sustaining an award of $ 750,000 for past pain and suffering and $ 750,000 for future pain and suffering, where the plaintiff's herniated disc required several operations and left him with permanent pain and limitations]; *Kayes v. Liberati,* 104 A.D.3d 739, 960 N.Y.S.2d 499][2d Dept. 2013] [sustaining $500,000 for past pain and suffering, and $1,500,000 for future pain and suffering, for herniated disc requiring surgery, and inability to work]; *Conlon v. Foley,* 73 A.D.3d 836, 900 N.Y.S.2d 458 [2d Dept. 2010] [finding $800,000 to be reasonable compensation for past and future

pain and suffering for two herniated discs, where plaintiff underwent laminectomy and fusion; plaintiff was able to work full-time as a teacher, care for her children, and perform her customary daily activities]).

With regard to lost wages, defendant argues that the award for past lost wages is excessive, as plaintiff's own treating physician testified that the plaintiff could work at a sedentary job as of the summer of 2009. Defendant calculates the permissible damages for past lost wages as $8,568.00. Defendant failed to submit the transcript of the testimony of Mr. Weinberger, Management's Executive Director, who gave extensive evidence as to plaintiff's lost past wages and future wages, and who, in fact, calculated that the plaintiff's past lost wages amounted to $80,000. In reply, defendant Owner does not dispute that Mr. Weinberger, its own witness, and the Executive Director of plaintiff's employer, himself calculated the amount of $80,000 as to plaintiff's past lost wages.

As to future wages, defendant argues that no award should be made. Plaintiff argues, on the other hand, that given his limited educational background (ninth grade education), and that he has only worked as a manual laborer, and that he obtained his GED and looked for other employment without success, establishes that he is unable to find other employment.

"[L]oss of earnings must be established with reasonable certainty, focusing, in part, on the plaintiff's earning capacity both before and after the accident" (*Harris v City of New York*, 2 AD3d 782, 784, 770 NYS2d 380 [2003], *lv dismissed* 2 NY3d 758, 811 NE2d 35, 778 NYS2d 773 [2004]). Proof of lost earnings must be established with reasonable certainty (*Estate of Ferguson v City of New York*, 73 AD3d 649, 650, 901 NYS2d 609 [1st Dept. 2010]; *Godfrey v. G.E. Capital Auto Lease, Inc.*, 89 A.D.3d 471, 933 N.Y.S.2d 208 [1st Dept. 2011] [in considering whether jury's damages award for lost earnings is inconsistent with the evidence, the jury's conclusions should be

overturned only where they are essentially irrational].)

It is the plaintiff's burden to establish his own loss of "actual" past earnings with "reasonable certainty" by submitting tax returns and/or other relevant documentation. (*Papa v City of New York* ,194 AD2d 527, 598 NYS2d 558 [2d Dept. 1993] [multiplying $ 117,000, amount plaintiff would have earned annually, by 26.5, plaintiff's work-life expectancy, and concluding that a future lost earning award of $ 3,100,500 would not "deviate materially from what would be reasonable compensation"], *lv dismissed* 82 NY2d 918, 632 NE2d 457, 610 NYS2d 146 [1994].) Here, plaintiff called as a witness his former supervisor, who as himself a certified public accountant, and who himself calculated that plaintiff's past lost wages were $80,000 based on his hourly wage and the assumption that he was not able to work. Defendant does not challenge the calculus involved in reaching the $80,000 figure, as indeed, numerous cases have held that past wages and future loss of earnings may properly be established by proof of an hourly wage, and proof of disability over a certain period of time – the rest is merely a mathematical calculation, for which expert testimony is not required. (*Papa, supra; Petrilli v. Federated Dept. Stores, Inc.*, 40 A.D.3d 1339, 838 N.Y.S.2d 673 [3d Dept. 2007] [plaintiff's lost earnings in 2003, 2004, 2005 and 2006 could be reasonably calculated by utilizing his hourly rate for that year and multiplying it by the hours of lost work].)

The more problematical issue here is whether plaintiff is indeed entitled to future wages for his entire working life. While the jury was entitled to find that he was disabled from employment as a manual laborer, plaintiff's medical expert conceded that plaintiff could in fact work at a sedentary job, and could have done so within a short time period after the accident. Thus, an award based on an assumption that plaintiff is precluded from working altogether would be unreasonable. (*See, e.g., Harris v. City of New York*, 2 A.D.3d 782, 770 N.Y.S.2d 380 [2d Dept. 2003] [although

it was undisputed that the plaintiff was unable, at age 29, to continue working as a police officer due to the injury he sustained to his right wrist, he held other employment before becoming a police officer, was a college graduate, and had taken additional college courses following his disability retirement from the police force; the evidence did not support the expert's underlying assumption that the plaintiff's injury precluded him from engaging in any wage-earning activity, the expert's opinion was of no probative value, and the claim for future lost earnings should have been dismissed as speculative]); *Coleman v. City of New York*, 87 A.D.3d 401, 928 N.Y.S.2d 23 [1st Dept. 2011] [trial evidence was insufficient to support the assumption underlying the award, i.e., that plaintiff would be unable to perform any work for the remainder of his life]). Moreover, a plaintiff has a duty to mitigate damages by reasonably seeking and pursuing vocational rehabilitation. (*Berrios v. 735 Ave. of the Ams.*, LLC, 103 A.D.3d 472, 959 N.Y.S.2d 477 [1st Dept. 2013] [jury charge was supported by plaintiff's own physician, who testified that plaintiff was able to work in a sedentary or part-time position]).

In *Johnston v. Colvin* (145 A.D.2d 846, 535 N.Y.S.2d 833 [3d Dept.1988]), plaintiff's orthopedist testified that she was permanently and totally disabled from performing construction work due to a degenerative lumbar disc, following an automobile accident. Plaintiff had testified to earning $ 13.84 per hour in the spring of 1985, and that cost of living raises were annually 3% to 4%. Plaintiff further testified that she had no other employment skills but was willing to engage in job retraining. At the time of trial, plaintiff had a projected work expectancy of 20.2 years. Given these factors, an award of $ 257,000 in future lost earnings was sustained. The award did not reflect the full amount of wages lost per year for plaintiff's work life, which, at 35 hours weekly would have amounted to approximately $465,000, but instead, represented a number less than half that amount,

ostensibly to take into account plaintiff's ability to work in other capacities.

Similarly, in *Flores v. Parkchester Preserv. Co., L.P.* (42 A.D.3d 318, 839 N.Y.S.2d 735 [1st Dept. 2007]), plaintiff, a 24-year-old home health attendant, fractured her elbow when she fell on defendant's property. The jury awarded, inter alia, $ 946,000 for future lost earnings. Although plaintiff's expert economist projected future lost earnings of $ 915,168 over a period of 32.38 years, that projection was based on plaintiff's total inability to work in the future, which was contrary to an admission by plaintiff's vocational rehabilitation expert that plaintiff was not "totally disabled," and probably "lost fifty percent of her work life." Under that scenario, the economist projected that plaintiff's future lost earnings would amount to $ 356,538 if plaintiff received no pay raises, and $ 643,891 if plaintiff received raises of 3 ½%. Given the speculative nature of any raises she might receive, the First Department held that an award of $ 425,000 for future lost earnings would be reasonable under the circumstances.

The plaintiff in this case has a very limited educational background (he has earned a GED), and has never worked at any job other than manual labor, and has been unable to find employment at other sedentary jobs. The Court thus determines that it was not irrational for the jury to award lost wages from the time of the accident to the time of trial. The evidence supports the jury's finding with respect to plaintiff's past lost wages, as plaintiff could not be expected to transition into sedentary employment from the time of the accident up until the time of trial. Nevertheless, the evidence does not rationally support an award of future damages for plaintiff's entire working lifetime, especially given plaintiff's age and conceded ability to engage in sedentary labor. Some reduction in the award of future damages is required to reflect the reality that plaintiff can eventually find employment in other capacities. The Court finds that $200,000 is the highest verdict that can

be sustained in view of the evidence at trial.

As to past medical expenses, defendant argues that no testimony was admitted on this subject. Plaintiff does not contest this, but states that this Court should determine past medical expenses as a matter of law pursuant to CPLR 4545. Here, again, the defendant Owner's failure to provide a full transcript has made appropriate review impossible, as the Court clearly recollects that the plaintiff received treatment paid for through workers' compensation payments. The present submissions by the defendant do not reflect whether or not the Court followed its usual practice of allowing the parties to stipulate to the amount of past medical expenses in the event the jury rendered an award in that regard in favor of the plaintiff. At a minimum, movant should have provided the minutes for the charge conference to clarify why the question as to past medical expenses was included on the verdict sheet. It is apparent that even without the trial transcript (see defendant's papers page 41, para. 52, and plaintiff's opposition page 40), that plaintiff received Workers' Compensation benefits for his medical expenses. What is unclear is whether any evidence was submitted to the jury by way of stipulation or otherwise as the basis for the question on the verdict sheet. As the defendant has not established the relevant facts and circumstances, the Court declines to reduce the award for past medical expenses.

As to future medical expenses, defendant maintains that the only evidence of future medical expenses was the need for a spinal cord stimulator, the cost of which is $65,000, and thus the award in this regard should be reduced from $500,000 to $65,000. While there was some testimony as to future spinal fusion surgery, no costs were set forth. Plaintiff argues that the testimony of continuing need for epidural injections warrants sustaining the award of damages, but there was no proof as to the reasonable frequency and cost of injections. "It is well settled that an award for future medical

expenses may not be based upon mere speculation" (*Faas v State of New York*, 249 A.D.2d 731, 732, 672 N.Y.S.2d 145 [1998]; *see Cramer v Kuhns*, 213 A.D.2d 131, 139, 630 N.Y.S.2d 128 [1995], *lv dismissed* 87 N.Y.2d 860, 662 N.E.2d 793, 639 N.Y.S.2d 312 [1995].) To the extent a jury's award for future medical expenses exceeds the evidence of such expenses submitted at trial, it cannot be sustained (*Hotaling v CSX Transp.*, 5 AD3d 964, 970, 773 NYS2d 755 [2002]; *Petrilli*, 40 A.D.3d 1339, *supra* [award of $ 25,000 for future medical expenses was set aside in absence of competent proof of necessary, anticipated medical costs; testimony of his orthopedic surgeon established that plaintiff was not interested in another surgery and, in any event, surgeon was not convinced that third surgery would be of any help to plaintiff; plaintiff also testified that he was continuing to seek treatment for back pain related to accident, but provided no evidence of scope or necessity of such treatment]). As to future medical expenses, the Court finds that the weight of the evidence supports only an award of $65,000.

Conclusion

The motion is granted in part and denied in part. It is hereby

ORDERED that defendant's motion is granted to the extent of ordering a new trial on damages for (1) future medical expenses and (2) future loss of earnings, unless plaintiff stipulates to a reduced award of $65,000 for future medical expenses, and $200,000 for future lost earnings, within 30 days after service of a copy of this order with notice of entry.

Dated: December 23, 2013

SHARON A.M. AARONS. J.S.C.