SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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JOHN BERMINGHAM,

Plaintiff,

-against-

DECISION/ORDER
Index No. 102409/2011

ATLANTIC CONCRETE CUTTING, BOVIS LEND LEASE LMB, INC., PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM AT THE WORLD TRADE CENTER FOUNDATION, INC.

Defendants.

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MARGARET A. CHAN, J.:

Plaintiff, a union construction laborer, sustained injuries to his shoulder while working at the World Trade Center Memorial construction site on June 22, 2010. A six-day jury trial on liability and damages was held from November 18 to December 1, 2014. The jury returned a verdict in plaintiff's favor and awarded him $300,000 for past and future pain and suffering, and $1,525,000 for past and future lost earnings. Defendants move under CPLR 4404 to set aside the verdict and grant a new trial or in the alternative, for a remittitur. Plaintiff opposes the motion in all respects.

Trial courts have the discretion to set aside the verdict and order a new trial in the interest of justice or on a finding that the verdict was against the weight of the evidence (CPLR § 4404). Factors such as whether the verdict was unduly affected by an attorney's misconduct at trial are considered in a motion to set aside a jury verdict (*see e.g. Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]).

A brief synopsis of plaintiff's injuries is that plaintiff sustained a SLAP tear in his right shoulder that required him to undergo arthroscopic shoulder surgery on March 10, 2011 (Defts' Aff at ¶ 7). Three procedures were performed – repairing the SLAP lesion; a capsular placation; and a subarcomial decompression (Pltf's Aff, p 3). As a result of his right shoulder injury, the then 28-year-old plaintiff could no longer work in the concrete trade in which he was a union construction worker (Pltf's Aff, p 5), but he did lighter work in construction. He also worked in catering at a ski lodge and a food truck and obtained a real estate license (Deft's exh B [trial transcript CD], 11/20/14 TT, p 125).

Defendants' reasons to set aside the verdict are (1) plaintiff's attorney's cumulative misconduct; (2) the verdict was against the weight of the evidence; and (3) erroneous charges. Plaintiff's response to these charges is that defendants failed to move for a mistrial thereby, pursuant to CPLR 4017, they waived their right to seek a reversal of the jury verdict. Plaintiff further argues that defendants did not object to the misconduct they now allege, thus the misconduct issue by plaintiff's attorney is unpreserved for post-trial or appellate review.

(1) Misconduct by opposing counsel:

(i) Irrelevant comments regarding defendants' criminal history and wealth

Defendants claim that the "egregious, reprehensible conduct" by plaintiff's attorney, Howard Sanders, Esq., began with his irrelevant allegations of defendant Bovis Lend Lease, LMB, Inc.'s prior criminal history and questioning the Bovis witness about "'needlessly' harming and endangering other construction workers" (Defts' Mot, Lee Aff at ¶¶ 56-57 citing to exh B, 11/20/14 TT, pp 3-4, 6, 31).

Plaintiff's attorney' initial questions to defendant Bovis' witness informed the jury that "two firefighters died fighting a fire at the Deutsch Bank building" and that Bovis admitted "to three counts of conspiracy to commit mail and wire fraud." Defendants' objections to these questions were sustained, and plaintiff's attorney asked for a sidebar. When the court asked plaintiff's attorney before the jury whether the request for the sidebar was relevant to the immediate issue, his answer, in front of the jury, was that the "[c]riminal conviction of a person or corporation is relevant." A discussion was immediately held in chambers wherein defendants' counsel repeated their objection, adding that "[t]his is frankly outrageous, what he just did, in front of the jury. If he continues this way, it's cause for a mistrial." Upon returning to the courtroom, the jurors were instructed that the prior two questions were stricken from the record and they were to disregard them as well, and the court cautioned plaintiff's attorney "to stay away from issues irrelevant to this case" (11/20/14 TT, pp 3:4-6:17).

Continuing this line, plaintiff's attorney summed up to the jury that

> "[n]ow defendants placed [plaintiff] and his fellow workers in great danger. That's clear. And the potential danger was not only of a severely damaged shoulder, but the danger extended to the entire body of John Bermingham or those of his fellow workers working with him that day at the World Trade Center Memorial Site. These construction workers, especially under the law of the State of New York, deserve the safety that these companies are in a position to assure them. And these companies must make sure that they do not needlessly endanger the community of workers there by violating these clear, clear safety rules" (12/1/14 TT, p 727).

Defendants argue that plaintiff's attorney questions and comments assuming there were other injured construction workers pressed on suggestions that defendants cared more about their wealth than about the construction workers (Lee Aff at ¶ 58 citing TT 720-723, 726-727 and ¶ 62 citing 12/1/14 TT 755-757, 759). Defendants point out that plaintiff's attorney revisited defendants' wealth and chastised their interest in protecting their wealth over their interest protecting their workers – despite repeated sustained objections (*see e.g.*, 12/1/14 TT, pp 755:16-758:2).

(ii) Attacking experts' credibility

Defendants add that aside from maligning them, mainly Bovis, plaintiff's attorney unfairly attacked their experts' credibility during summations and chided defendants for hiring a high-priced economist from Chicago, a doctor who charged $17,000 for an afternoon, and a prestigious law firm and its top lawyer with all its technical equipment and technology staff to set up the courtroom, all to protect their money (Lee Aff at ¶¶ 98-102, 12/1/14 TT, pp 754-756). Defendants argue that plaintiff's use of defendants' wealth to attack their experts' credibility and to create a hostile climate rather than to base his allegations on facts in evidence prejudiced them and deprived them of a fair trial (Lee Aff at ¶ 103).

(iii) Reneging on an agreement about plaintiff's missing witness

Defendants allege that plaintiff's attorney went back on an agreement the parties made. Defendants' trial attorney, Christian Gannon, Esq., had agreed to forego a missing witness charge for Dr. Mark McMahon, and plaintiff's attorney, in turn, agreed to Gannon's use Dr. McMahon's findings on plaintiff's range of motion testing. When Gannon sought to present this evidence to the jury during his summation, plaintiff's attorney objected, thereby depriving defendants of presenting a "substantial point to their defense" (Lee Aff at ¶ 59 citing 12/1/14 TT 710-711 and ¶ 61 citing 12/1/14 TT 754).

(iv) Reneging on an agreement about MRI reports not in evidence

The summation misconduct defendants allege here is plaintiff's attorney's reference to Dr. DeMarco's record regarding a recent repeat MRI of plaintiff's shoulder that was not in evidence and in violation of the best evidence rule. Plaintiff's attorney, knowing defendants' concern about this MRI report, agreed that he would not use it (*id.*, p 746:23-25). However, during his summation, plaintiff's attorney took advantage of defendants' inadvertent failure to redact it from Dr. DeMarco's medical records and informed the jury about the MRI report indicating the presence of arthritis in plaintiff's shoulder.

A sidebar in chambers was immediately held in which defendants' attorney stated: "Your Honor, we made it very clear during the course of putting documents together to go into evidence that we were not stipulating to the July 29, 2014 MRI report. In fact, I didn't ask Dr. Sprecher about it. . . . We asked [Plaintiff's attorney] before he was going to do his summation, are you going to refer to these because they are not in evidence? He said, no, I'm not. Now he is. . . . [He] just gave a finding from this report" (12/1/14 TT, pp 738-739). After some back and forth in chambers about whether this particular report was in evidence or whether it should have been redacted (*id.*, pp 740-746), the court permitted the MRI report to remain in evidence as part of Dr. DeMarco's medical records that was previously admitted into evidence (*id.* p 748). While the MRI report was admitted as part of Dr. DeMarco's records, it was not a report he prepared or was his findings (*id.*, pp 747:15-26, 748:10-11). When Plaintiff's attorney resumed his summation and attempted to continue to use the MRI report, defendants' objections were sustained (*id.*, pp 748:19 – 749:7).

Discussion

It is noted that contrary to plaintiff's contention that defendants failed to object to the allegations of misconduct, the transcript shows otherwise. Indeed, there were arguments held in chambers regarding the alleged misconduct.

The cumulative comments regarding defendants' wealth, particularly Bovis, the Deutsch Bank building fire, and Bovis' criminal activity tainted the jury. These two comments, in the form of rhetorical questions to a Bovis employee, were irrelevant to the case, and they were not made to impeach a witness' credibility, who, at that point, had just been sworn in and was asked only for his name and his employer's name. The comments about the unrelated deaths of fire fighters at the Deutsch Bank building, Bovis' unrelated criminal activities and conviction, its wealth, and the assertion that its interest in protecting its wealth was greater than its interest in protecting construction workers, created undue prejudice that defendants cannot overcome.

Compounding the prejudice is plaintiff's attorney's unsupported allegation that other construction workers were injured at defendants' construction project, an allegation that leaves no recourse for defendants to address. This line of questioning is akin to the unwinnable question of "when did you stop beating your wife?" It places the burden on defendants to negate the assumption that there were other workers who were injured from this construction project. Delving into this line of questioning into an irrelevant matter would not alleviate the prejudice visited upon defendants. The afore-said comments on matters that are not before the jury to consider were made to influence the jurors. This type of trial conduct cannot be condoned (*see Valenzuela v City of New York*, 59 AD3d 40, 44 [1st Dept 2008]). Given this conclusion, whether the comments about the cost of defending this case improperly discredited their witnesses is academic.

Plaintiff's attorney did not honor his agreement regarding plaintiff's expert witness, Dr. Mark McMahon. Initially, plaintiff was not producing Dr. McMahon because his testimony would be cumulative to that of Dr. DeMarco. Defendants pointed out that Dr. McMahon's range of motion evaluation contrasted sharply to that of Dr. DeMarco, and asked for a missing witness charge (11/24/14 TT, pp 362-363). Dr. McMahon reported plaintiff's range of motion at 170 degrees as compared to the normal of 180 degrees, and described it as near-perfect. In contrast, Dr. DeMarco had plaintiff's range of motion to be much more limited when he examined plaintiff five days after Dr. McMahon's evaluation. Defendants' request for a missing witness charge was granted (*id.*, pp 364-365).

The next day, plaintiff informed that he would produce Dr. McMahon. Defendants asked to confine Dr. McMahon's testimony to his two examinations of plaintiff so avoid the cumulative nature of his testimony (11/25/14 TT, p 490). Since both sides were concerned about Dr. McMahon's cumulative testimony, the court suggested that they stipulate to

confining the questioning to range of motion issues. Plaintiff then stated that there was no need for such stipulation as that information was in evidence, at which point, defendants withdrew their request for a missing witness charge (*id.*, p 491). In their summation, defendants attempted to tell the jury about Dr. McMahon's findings of plaintiff's near-perfect range of motion of 170 degrees as compared to Dr. DeMarco's subsequent finding of 90 degrees. Plaintiff objected stating that Dr. McMahon's testimony and documents were not in evidence. The objection was sustained (12/1/14 TT, pp 710-711).

At arguments made post-summations, plaintiff claimed that there was no stipulation for admitting Dr. McMahon's report into evidence (12/2/14 TT, p 783). This claim requires review of the discussion on defendants' request for a missing witness charge. The crux of Dr. McMahon's evidence was the contrast between his range of motion findings and Dr. DeMarco's. Everything else Dr. McMahon would have testified to would have been cumulative. Thus, when the range of motion issue was under discussion, and plaintiff's attorney represented to both the court and defendants' attorneys that "[i]t's already in evidence" (11/25/14 TT, p 491:22), both the court and defendants' attorneys accepted that Dr. McMahon's range of motion findings were in evidence. The fact that it was not until defendants' summation that plaintiff's attorney reveals otherwise prejudices defendants especially when a missing witness charge was not given. Given the exchange between the parties and the court, and the reiteration on the specific information that defendants wanted to present to the jury, which was that plaintiff's own medical expert had conclusions contrary to his own doctor, the jury's verdict on damages was unfairly skewed.

Plaintiff also did not honor the agreement he made with defendants' attorneys regarding a MRI report. When both sides were organizing the documents that would come into evidence, defendants made clear to plaintiff that they would not stipulate to the July 19, 2014 MRI report that was in Dr. DeMarco's medical file (12/1/14 TT, p 739:14-18). Plaintiff's attorney told defendants' attorneys that he would not refer to the MRI report (*id.*, p 739:19-22). However, in his summation, plaintiff's attorney told the jury "[A]lso, Dr. DeMarco notes in his records which are in evidence as well, Defendant's Exhibit F in evidence, that recent repeat MRI shows that there is now arthritis in John's shoulder as well" (*id.*, p 738:17-20). Defendants' attorneys noted that Dr. DeMarco had not testified about osteoarthritis and that Dr. Sprecher had testified that plaintiff did not have osteoarthritis. Plaintiff's attorney's reference to the MRI report was "a back doorway of getting the MRI findings in" (*id.*, pp 745:20-22, 746:4-6). Defendants' objection was overruled due to "technical reasons" (*id.*, p 748:11).

Defendants now assert that the admission of the MRI evidence was erroneous on hearsay and best evidence grounds, as argued by defendants, but it was brought to the jury's attention, nonetheless, during plaintiff's summation. Plaintiff's attorney' use of the MRI reports in his summations blindsided defendants, who then were without recourse to address the evidence. Plaintiff's unchallenged MRI evidence and the absence of evidence contradicting

plaintiff's claim on the severity of his injury are factors that confronted the jury in its assessment of damages. The bad faith exhibited by plaintiff's attorney in this trial cannot be condoned (*see* Rules of Prof. Con., Rule 3.3 [imposing a duty upon attorneys to act in good faith and conduct themselves with probity]) and warrants a new trial.

(2) The verdict is against the weight of the evidence

i. Pain and suffering and loss of enjoyment of life

Defendants argue the medical and other evidence showed that plaintiff, whose SLAP tear injury was resolved, did not warrant the excessive award of $300,000 for pain and suffering and for loss of enjoyment of life ($100,000 up to date of verdict and $200,000 for future up to 40 years). They point to Dr. Sprecher's review of plaintiff's MRI, which he described showed a "very healthy looking shoulder" (12/1/14 TT 595) and Dr. DeMarco's testimony that plaintiff did not need further treatment (12/25/14 TT 475). Significantly, plaintiff, post-accident and post-surgery, was able to lift a garbage can over his head, pushing it into a pick-up truck and breaking its window (11/21/14 TT 196-197). He worked at a ski resort doing various tasks such as lifting children onto the ski-lift chair, shoveling snow, raking leaves as well as landscaping work and had occasion to lift above his head a garbage weighing at least 50 pounds (11/21/14 TT, pp 192, 219; 11/24/14 TT, pp 350, 353-354).

Plaintiff countered that while he did engage in active work, he still had pain, but the pain was tolerable. He had taken cortisone shots, which help reduce the pain. He complained that his pain, however, stopped him from engaging in his cherished outdoor activities such rock climbing and white-water rafting.

(ii) Economic loss

Plaintiff's economist, Dr. Alan Leiken, admittedly did not use any actuarial data compiled by The Segal Group or Richard Gabriel Associates, two independent, specialized firms that annually audit, review, and evaluate the pension plan actuarial evaluations and data published by plaintiff's union, Local 18A and the District Council of Cement and Concrete Workers in New York City, as required by law (Leiken Transcript p 328:12-18). Dr. Leiken based his calculations on his own assumptions. One assumption is plaintiff's earning potential if he continued with college. Leiken relied on plaintiff's vocational rehabilitation expert, Dr. Richard Schuster, who opined that plaintiff would have had an earning potential of $87,000 a year if he returned to college or $30,000 to $35,000 a year without training. Leiken also assumed a 3% annual raise in wages and applied it to plaintiff's income that included overtime wages as a basis to calculate plaintiff's income loss for the remainder of his working life (11/24/14 TT, pp 298; 11/20/14 TT, pp 65:13-20). Another assumption is that plaintiff would work the same amount of hours every year he did in the one year as a cement worker, which included overtime hours. Adding to his consideration plaintiff's social security income, loss in annuity and pension benefits, Leiken determined petitioner's income loss to be $1,083,192 ($364,950 for past income loss + $718,252 for future income loss).

However, while Leiken imputed plaintiff's earning potential with college re-education, plaintiff testified that he was not at all keen about returning to school and that his interest lies in working outdoors. He had considered ecology and botany programs, but decided that jobs in those fields do not pay well with little or no benefits (11/20/14 TT, pp 127:3 – 128: 9). Returning to college is therefore highly speculative to place a steadfast amount of plaintiff's potential earning as a college graduate.

As to Leiken's assumption of an annual 3% raise to the number of hours plaintiff worked in a year, defendants point out that plaintiff has only one year of work history as a cement worker. Defendants' economist, Cory Hofman, considered the pension plan actuarial evaluations and data published by Local 18A and the District Council of Cement and Concrete Workers in New York City, as evaluated by the Segal Group or Richard Gabriel Associates (12/1/14 TT, pp 618:23-619:09, 620:2-12). Hofman reported that the union employees earn pension credits toward their retirement. The most any employee can earn in a year is one credit – working 1000 or more hours that year (*id.*, pp 625:21 – 626:19). The union's data showed that the workers retiring at age 60 or 62 have an average of 15 pension credits (*id.*, p 627:3-7). Taking into consideration the probability of an employee's downtime – work interruption due to illness, unavailability of work, family-related issues, etc. – Hofman calculated that plaintiff would have earned 15 pension credits had he worked to 60 or 62. He opined that Leiken's calculation of 32 pension credits that plaintiff could earned is rare and fails to take into account the downtime during an employee's work life (*id.*, p 628:2-11).

In the one year of employment as a concrete worker, plaintiff worked 1660 hours, of which 600 hours or 33% were overtime (*id.*, p 632:6-11). According to the 2012 data, the average number of work hours was between 1300 and 1400 per year and the highest wage earned by any group was $80,025. As indicated in the 2010 report, the average age of the workers was 40.2 with an average of 7.3 pension credits (*id.*, p 629:8-9). A worker in plaintiff's group made $52,000 on average, 75% less than Dr. Leiken's calculation (*id.*, p 634:11:23).

Hofman prepared two calculations for plaintiff's loss of pension credits – one for a termination in 5 years after the date of the accident for 5 pension credits because, statistically, less than half the group of concrete laborers who are 29 years old will work more than 5 years, and another for a retirement age of 60 or 62 (*id.* pp 630:15-20, 631:14-24). Plaintiff already has two pension credits. Hofman's calculation of plaintiff's loss of 5 pension credits, without additional education, is $595,000; and a loss of 13 pension credits, without additional education, to be $1,420,000 (*id.*, p 636:8-10). Hofman's analysis on plaintiff's lost earning assumes plaintiff can no longer work in construction again, based on plaintiff's claim. On the other hand, if plaintiff can work in construction again, his loss would be zero.

Discussion

"The jury verdict on the issue of damages may be set aside as against the weight of the evidence only if the evidence on that issue so predominated in favor of the plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence" (*Curry v Hudson Val. Hosp. Ctr.*, 104 AD3d 898, 900 [2d Dept 2013], quoting *Carter v New York City Health & Hosps. Corp.*, 47 AD3d 661, 663 [2d Dept 2008]). All in all, plaintiff managed his pain with Tylenol and muscle relaxer medication for a short period of time and with one or two cortisone injections. Plaintiff can apparently lift above his head and toss objects weighing at least 50 pounds. And while plaintiff, a very active outdoors sportsman, could not engage in such activities as rock and ice climbing, white-water paddling, and back country skiing (11/20/14 TT, p131-33), he can still participate in other active sports such as bike racing, flat-water paddling and downhill skiing (*id.*, p 130).

Based on the foregoing, the jury's award of $100,000 for past pain and $200,000 for future pain and suffering, viewed in light most favorable to the prevailing party, is on the generous side (*compare, Caban v City of New York*, 46 AD3d 319 [1st Dept 2007] [awards of $50,000 and $125,000 for past and future pain and suffering, respectively, for labral tears to both shoulders, requiring surgery, was reasonable for plaintiff who was unable to return to work as ironworker or participate in strenuous leisure activities that he enjoyed pre-accident, but able to perform activities of daily living with some difficulties with overhead lifting]; *see also Konfidan v F & F Taxi*, 25 Nat. JVRA 9:20 [Sup Ct, 12th Jud. Dis., Bx Cty, Mar. 23, 2010] [$75,000 for past pain and suffering and $400,000 for future pain and suffering for 2 SLAP tears to dominant shoulder with permanent pain and inability to engage in recreational activities]).

The award for economic loss is unsupported by the evidence as offered by plaintiff's economist, Dr. Leiken. While the jury can disregard or accept an expert's opinion, the expert's testimony cannot be based on speculation (*accord, Grace v New York City Transit Authority*, 123 AD3d 401, 402 [1st Dept 2014]; *Dibble v New York City Tr. Auth.*, 76 AD3d 272 [1st Dept 2010]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 521 [2d Dept 2007], quoting *Quinn v Artcraft Const., Inc.* 203 AD2d 444 [2d Dept 1994]; *Skipper v City of New York*, 186 AD2d 439, 439 [1st Dept 1992]). Dr. Leiken admittedly formed his opinion and calculations based on speculations. He also used Dr. Shuster's figure of $87,000 as an annual salary with retraining to calculate plaintiff's future earning as a concrete worker's earnings, which requires no retraining. In contrast, Cornelius Hofman's analysis was based on plaintiff's claim that he could no longer work in construction.

It is also significant that the jury was given information prejudicial to defendants through the afore-mentioned misconduct of plaintiff's attorney, information that likely influenced the jury in calculating its award. Considering the plaintiff's physical abilities, which the jury heard, and Dr. McMahon's range of motion findings on plaintiff as near-

perfect, which the jury did not hear, the jury's award can only be seen as lopsided and against the weight of the evidence.

(3) Erroneous charges

Defendants argue that the court erred in failing to give a mitigation charge as to pain medication and epidural injections. After summations, defendants renewed their request for a mitigation charge for plaintiff's failure to take pain medication. Defendants' attorney recited PJI 2:325 in support of his argument that plaintiff is required to keep out-of-pocket expenses and loss to a minimum. In denying defendants' request for a mitigation charge, the court stated to defense co-counsel, Simon Lee, "I think you would have a stronger argument if the medication, the pain medication, was not just Tylenol. I know [plaintiff] is asking for a lot of money when $5 of Tylenol would do the job. Maybe you should have brought that out on your close" (12/2/14 TT 786:2-6).

Contrary to defendants' argument, the facts pertaining to how much pain would be alleviated by taking Tylenol was insufficient to warrant a mitigation charge. Indeed, plaintiff testified that he took ibuprofen for at most one week after it was prescribed to him, and that he did not finish the prescription because he did not like taking pharmaceuticals (11/20/14 TT, pp 87:18–88:2; 169:2-5). Plaintiff also testified that he had cortisone injections, which helped with the pain (*id.*, p 217:12-23). Nothing more was adduced from plaintiff about his medication.

Defendants also claim that the court misread the burden of proof instructions – PJI 1:23 and 1:60, and should instead have read PJI 1:27 (exclude sympathy) and PJI 2:325 (mitigation). Defendants make these claims now, but they should have made them during trial. The parties had extensive arguments at the charge conference and after the jury was charged, but no objections were lodged or arguments raised for defendants' claims in this post-trial motion. These errors, if any, were minor. They did not shift the burden of proof. The mitigation charge request was denied after argument as discussed above. The errors, separately or combined, do not warrant a new trial.

Conclusion

Based on the foregoing, defendants' motion for a new trial is granted based on the misconduct by opposing counsel, which prejudiced defendants, and on plaintiff's economist's speculation-driven economic loss calculations. A new trial is ordered unless the parties stipulate in writing within 45 days of the date of entry on this decision to reduce the verdict for to $50,000 for past pain and suffering; $100,000 for future pain and suffering; and $595,000 for economic loss. This constitutes the decision and order of the court.

DATE : 1/11/2017

MARGARET A. CHAN, JSC