

Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN**
Justice

IA PART 15

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SALIH KARASU and ANA DE LUCCA KARASU,

Plaintiff(s),

Index No.: 4428/16
Motion Date: 8/18/22
Seq. No.: 8
Teams: 9:15 A.M.

-against-

SECURITY AUTO SALES, INC., SECURITY
DCJR, INC., and 345 MERRICK ROAD, LLC,

Defendant(s).

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The following numbered papers read on this motion by defendants to set aside the damages verdict and enter judgment in defendant’s favor as a matter of law, or setting the matter down for a new trial.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 3 - 15
Answering Affidavits-Exhibits.....	EF 16 - 20

Upon the foregoing cited papers, and after Microsoft Teams conference, it is ordered that defendants’ motion pursuant to CPLR 4404(a)(1) for an Order: (1) setting aside the jury’s verdict in favor of the plaintiff with respect to plaintiffs’ claims for (a) future medical expenses, (b) future lost earnings; and (c) future loss of Social Security retirement income benefits and dismissing these claims or, in the alternative, directing a new trial on the issues of damages unless plaintiff stipulates to a substantial reduction of the jury’s awards; and (2) setting aside the jury’s verdict in favor of plaintiff with respect to plaintiff’s claims for the remaining items of damages, including (a) past lost earnings; (b) past and future pain and suffering; and (c) past lost services and directing a new trial on the issue of damages unless plaintiff stipulates to a substantial reduction of the jury’s awards for these items of damages; (3) setting aside the jury’s verdict altogether and directing a new trial on the issue of damages; and (4) staying entry of judgment pending the hearing and determination of this motion, is determined as follows:

Background

In this Labor Law §240(1) action arising from plaintiff Salih Karasu's ("Karasu") fall from a ladder, plaintiffs were awarded summary judgment on the issue of Defendants' §240(1) liability. Thereafter, the parties proceeded to a trial on damages in March 2022. The trial culminated in a jury verdict awarding plaintiffs damages as follows:

Past Lost Earnings	\$335,395
Past Pain and Suffering	\$1,000,000
Future Medical and Physical Therapy Expenses (14 years)	\$1,500,000
Future Lost Earnings (10 Years)	\$892,424
Future Pain and Suffering (10 years)	\$1,000,000
Future Social Security Retirement Benefits (14 Years)	\$277,318
Loss of Services/Consortium	\$125,000
Total	\$5,130,137

FACTS AT TRIAL

Plaintiff's Testimony

Karasu was employed as a commercial roofing mechanic for non-party Four Seasons Roofing, Inc. ("Four Seasons"). On March 26, 2015, he was working on a project at defendant Security Auto Sales ("Security") located at 345 Merrick Road in Amityville when he fell from a ladder approximately 8-10 feet in the air, landing on and fracturing his right ankle. The next day, on March 27, 2015, Karasu's orthopedic surgeon, Dr. John Acampa, placed an external fixator on Karasu's right leg, which remained in place for approximately three weeks. During that time, plaintiff was not able to bear weight on his right leg. The fracture caused him a great deal of pain, particularly when he was trying to sleep. He was able to ambulate with the assistance of a walker but was predominantly bed-ridden.

On April 15, 2015, plaintiff went back to the hospital to have the external fixator removed. In addition, an open reduction internal fixation was performed, with hardware inserted into Karasu's ankle. Following this procedure, Karasu spent three days in the hospital before being discharged home. When he left the hospital, he was wearing a boot, using a walker, and was prescribed pain medication. After about five months, in or about August 2015, he progressed from a walker to crutches while still wearing the boot. In or about October 2015, he progressed from crutches to a cane. In or about December 2015, he was able to remove the boot from his foot and no longer use any ambulatory device. Sometime in 2017, he began to drive independently.

From 2015 to 2017, plaintiff regularly treated with, Dr. Acampa, progressing over that time from weekly visits to monthly visits to visits every three months. Karasu also received physical therapy during this time, progressing from three times a week down to twice a week. In July of 2017, Karasu went back into the hospital to have the internal hardware removed. When he was discharged from the hospital after this procedure, he again used a walker before transitioning to crutches and then a cane, but this time, the process occurred more quickly and he was able to no longer use ambulatory devices after three months.

Karasu stated that he was not able to work for more than two years after the accident and testified that he was miserable from the stress, particularly regarding his finances since he was unable to work. Karasu testified that it was not until nine months after the accident that he was able to do basic household chores and that from 2015 until 2017, he could only walk with pain. He also had a limp which improved after the hardware was removed from his ankle in 2017. Karasu also stated that from 2015 to 2017, he was in pain 80-90% of the time, even when he took the Oxycodone that Dr. Acampa had prescribed him. Karasu further testified that even at the time of trial, he was unable to walk long distances and could only walk short distances because he needed to stop and rest. Climbing staircases is still painful, and he tries to avoid it.

Dr. Acampa did recommend to Karasu that he could undergo an ankle fusion, which would likely lessen his pain; however, the doctor could not promise the pain would go away completely and also cautioned that the fusion would limit Karasu's range of motion in his ankle. Karasu elected not to undergo the fusion surgery because he felt that the risks outweighed the potential reward. Karasu did testify that in or about April 2018, he stopped physical therapy because he had plateaued in his treatment. In addition, Karasu testified that he had stopped seeing Dr. Acampa, his orthopedist.

Karasu's Employment and Economic Circumstances

Karasu testified that he was working as a commercial roofer for Four Seasons when the accident occurred. He had begun working for the company approximately 8 months prior to the accident in July 2014. From January 1, 2015 through March 26, 2015, the date of the accident, Karasu earned \$13,000. From the date of the accident until sometime in 2017, Karasu did not work. In 2017, he worked part time in a friend's auto repair shop. In 2018, he began working for Sunrise Medical Laboratories as a driver, picking up specimens from doctors' offices and bringing them to the company's facility. Plaintiff would drive to the doctor's offices, walk inside, pick up the specimens, and bring them back to the Sunrise Medical facility. Plaintiff initially began working less than 20 hours per week at Sunrise in 2019, but gradually increased his hours. For 2019, he earned just under \$13,000.

In 2020, Karasu earned \$17,240 at Sunrise. In addition, he had taken a course in computer programming at Nassau Community College, and parlayed that into a job working as a software programmer for a company called Seztech Fire Design where he earned \$11,000. All total, Karasu earned over \$28,000 in 2020.

In 2021, Karasu began working seven days a week at Sunrise, earning nearly \$62,000 from that company. Karasu continued working at Sunrise in 2022 and presented no testimony indicating he would not earn the same amount in 2022 that he earned in 2021.

Testimony of Plaintiff's Medical Expert

Dr. Ali Guy, a physiatrist, testified to plaintiff's medical condition at the time of trial. This testimony included, among other things, the cost and frequency of Karasu's future care. Dr. Guy opined that Karasu would need to treat with an orthopedic surgeon 3 to 4 times per year at a cost of \$150 to \$200 per session. Dr. Guy further testified that Karasu would need to be treated by a physiatrist 6 times a year at a cost of \$150 to \$200 per session and that Karasu would need physical therapy once per week at \$150 per session.

Testimony of Plaintiff's Economic Expert

Dr. Debra Dwyer, an economist, testified at trial concerning Karasu's earning potential. Dr. Dwyer prepared three reports concerning Karasu's work future, dated October 18, 2019, February 25, 2020, and February 24, 2022 respectively. Initially, Dr. Dwyer's October 2019 report assumed that plaintiff would never work again. Dr. Dwyer also assumed that Karasu would have earned \$60,327 in 2015 if he had not been injured. Dr.

Dwyer prepared the 2020 report, acknowledging that Karasu had returned to work but that he would not make more than \$36,000 in any year and that he would work until age 62. Dr. Dwyer prepared the third and final report following 2021, when plaintiff earned \$62,000 that year. Dr. Dwyer, in amending her report, assumed that plaintiff would only earn this income until age 62, when he would stop working. Dr. Dwyer concluded that plaintiff's total lost earnings exceeded \$1.2 million, consisting of \$335,935 for past lost earnings and \$892,424 for future lost earnings. Dr. Dwyer further concluded that because Karasu's future earnings would cease when he turned 62, he was entitled to damages reflecting lost Social Security retirement income in the amount of \$277,318 which he would otherwise have collected had he worked until age 67.

The Instant Motion

Defendants challenge every aspect of the jury's damages award in several key respects. Concerning Karasu's future medical expenses, Defendants argue that: (1) Karasu's psychiatrist, Dr. Guy, should have been precluded from testifying concerning the frequency and costs for Karasu's future medical care because plaintiffs did not disclose he would be testifying on this topic in his expert witness disclosure; (2) Dr. Guy's opinion was ultimately without a proper basis in the evidence because Karasu himself testified he no longer treats with any physician, sees any physical therapist, and has never consulted with a psychiatrist; and (3) the jury's award concerning future medical expenses was against the weight of the evidence in that it appears to award expenses over Karasu's life expectancy of 30 years when the award states it is for 14 years.

Turning to the award for future lost earnings and Social Security retirement income, defendants argue that the testimony of plaintiffs' expert, Dr. Debra Dwyer, was against the weight of the evidence in that it failed to properly consider: (1) the income Karasu earned in 2021, which exceeded what he was earning as a roofer; and (2) failed to consider the fact that Karasu had qualifications, both as an accountant in his native Turkey and through the course he took at Nassau Community College which allowed him to obtain work as a software programmer, which might afford him an sedentary career with higher earning potential. Defendants further argue that based on this failure, Dr. Dwyer's social security income projections, with its conclusion that Karasu would be forced to retire at 62 because of the nature of his injury, are incorrect.

On the issue of Karasu's past and future pain and suffering, defendants argue that the jury's award of \$2 million was excessive and not in line with what current case law has deemed reasonable, which defendants contend is around \$500,000.

CPLR 4404(a) provides that a trial court may, in its discretion, set aside a jury verdict as a matter of law and direct judgment in favor of the moving party or order a new trial where, among other things, the Court concludes that the verdict is against the weight of the evidence. To do so, the Court must be convinced that the verdict is not supported by any fair interpretation of the evidence, meaning that this court must determine, as a matter of law, that “there was no valid line of reasoning or permissible inferences that could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented, and no rational basis by which the jury could find in favor of the non-moving party” (*Wasserberg v Menorah Center for Rehabilitation and Nursing Care*, 197 AD3d 1130, 1131 [2d Dept 2022]). In its consideration of such a motion the trial court “must afford the party opposing the motion every inference which may properly be drawn from the facts presented and the facts must be considered in a light most favorable to the non-movant.” (*Id.*).

Here, the Court concludes that the evidence and testimony concerning Karasu’s future medical expenses and lost income was speculative, at best. As a threshold matter, the Court rejects defendants’ contention that Dr. Guy was not permitted to opine on plaintiff’s future medical expenses. The cost of future medical care is referenced in Dr. Guy’s expert report and set forth in plaintiffs’ bill of particulars and was clearly placed at issue during the trial.

Despite this conclusion, however, Dr. Guy’s opinion at trial was contradicted by the record evidence. As noted, *supra*, Karasu testified that he had stopped physical therapy because it no longer provided him with any benefit and that he was no longer consulting with his orthopedist. Moreover, while Dr. Guy stated that Karasu would be consulting with a psychiatrist in the future, there is not a scintilla of evidence in the record that Karasu ever consulted one in the past or was consulting one at the time of trial. Plaintiffs, curiously, seem not to object to a reduction in future medical/therapy costs, however, insofar as they state, in their papers opposing defendants’ motion that “[w]e disagree with defendants’ calculation of the maximum recovery allowable for future medical/therapy costs and defer to the Court for any appropriate adjustment in that category of damage.” (Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion, p. 29).

Given plaintiffs’ apparent concession, the Court has determined that the jury’s award of \$1,500,000 for future medical expenses over a period of fourteen years is against the weight of the evidence adduced at trial. As noted by defendants, the evidence of Karasu’s future medical expenses adduced at trial were that he would require 4 visits a year with an orthopedic surgeon at a cost of \$200 per visit; 52 sessions with a physical therapist

at a cost of \$150 per session, and six visits with a physiatrist per year at a cost of \$200 per visit. According to defendants' calculation, assuming that Karasu lived a normal life expectancy of 30 additional years, these expenses would total \$294,000. Defendants rightfully argue, however, that the jury concluded that Karasu would only incur future medical and therapy expenses over a period of 14 years, which would result in an award of \$137,200. Thus, the award of future medical expenses is reduced to \$137,200.

Turning to Karasu's future lost earnings and social security income, the Court is again persuaded that the jury's awards of \$892,424 for Karasu's lost income over a period of ten years and \$277,318 for lost future social security earnings is against the weight of the evidence. Here, it seems clear that the jury erred in writing its verdict on the verdict sheet. In awarding the plaintiffs \$892,424 for Karasu's lost income, it awarded plaintiffs the entire amount of Karasu's lost earnings as calculated by Dr. Dwyer, not the amount for the 10 years of lost earnings they actually appear to have intended to award Plaintiffs. As noted by defendants in their opposition papers, the actual amount of Karasu's lost income for ten years totals \$133,838. Accordingly, the award for future lost earnings is reduced to this amount.

Similarly, the jury's award to plaintiffs for lost Social Security Retirement Income in the amount of \$277,318 was against the weight of the evidence. In the first instance, the jury's award of lost Social Security Retirement Income was based on losses over 14 years, whereas its award for lost income was based on 10 years. As noted by defendants, the loss in Social Security retirement income must reflect the reduction of that income as affected by the lost earnings over 10 years. Plaintiffs, in their opposition papers, state that they "disagree" with Defendants' calculation of future lost wages and social security benefits and "defer to the Court's discretion for any reasonable adjustment." (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion, p. 32). Given that the award for lost earnings was reduced to 15% of what Karasu's future lost earning would be as awarded by the jury, the Court is persuaded that this amount should also be reduced to 15% of the total awarded by the jury, or \$41,598.

The Court perceives no basis for setting aside the verdict with respect to the awards for past and future pain and suffering. These awards do not deviate materially from what is reasonable compensation (*see* CPLR 5501[c]).

In sum, the jury's verdict awarding damages is modified by the Court as follows:

Past Lost Earnings	\$335,395
Past Pain and Suffering	\$1,000,000
Future Medical and Physical Therapy Expenses (14 years)	\$137,200
Future Lost Earnings (10 Years)	\$133,838
Future Pain and Suffering (10 years)	\$1,000,000
Future Social Security Retirement Benefits (14 Years)	\$41,598
Loss of Services/Consortium	\$125,000
Total	\$2,773,031

Accordingly, it is hereby

ORDERED, that defendants' motion pursuant to CPLR 4404(a)(1) is **GRANTED** to the extent set forth herein and otherwise **DENIED**.

This constitutes the decision and order of this Court.

Dated: December 21, 2022

ENTERED

Dec 28 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE



DICCIA T. PINEDA-KIRWAN, J.S.C.