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LIDIYA NETANELOVA,

Decision and Order

Plaintiff,

INDEX No. 2127/99

- against -

ROBERTO GENOVES and CLAIRE SYLVAN
GENOVES,

Defendants.

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JEFFREY D. LEBOWITZ, J.:

Plaintiff, Lidiya Netanelova, sustained injuries to her left knee and lower back when she was struck by defendant's motor vehicle. At the liability portion of the trial, the jury found the defendants one hundred percent responsible for the subject accident. At the conclusion of the damages portion of the trial, the jury awarded the plaintiff Sixty Two Thousand Five Hundred dollars (\$62,500) for past pain and suffering and Four Hundred Thousand dollars (\$400,000) for future pain and suffering.¹ Defendants now move this Court to set aside the jury's verdict on damages or in the alternative to reduce said verdict based on the ground that the jury award is excessive and deviates materially from reasonable compensation for the plaintiff's injuries.

Testimony established that on November 4, 1998, while the defendant, Claire Sylvan Genoves, was slowly backing out of her driveway, she struck the plaintiff in the back knocking her to the ground. Plaintiff's left knee came into contact with the ground. At the time of the accident, the plaintiff was forty years old and a home maker. She was taken to the hospital via ambulance and was treated in the emergency room. Two weeks later, the plaintiff sought medical treatment. An MRI was performed which revealed a small tear on the medial meniscus of the plaintiff's left knee. Subsequently, the plaintiff underwent six months of physical therapy.

The plaintiff called Dr. Silverman as a witness. Dr. Silverman testified that x-rays revealed that arthritis had developed in the knee. He further testified that the plaintiff needs arthroscopic surgery and may need a total knee replacement in the future. At the time of trial, the plaintiff stated that she is less mobile since the accident and as a result she has gained twenty pounds. At the time of the accident plaintiff weighed 280 lbs and at the time of trial the plaintiff weighed 300 lbs.

Here, with respect to the issue of past pain and suffering, plaintiff described tremendous pain

¹Award for future pain and suffering was for plaintiff's thirty eight year life expectancy.

in her left knee which prevented her from “walking at all” for the two weeks which preceded the accident, as well as, pain in her lower back. Plaintiff testified that the pain in the left knee had been continuous from the date of the accident up to the time of trial. In addition, the plaintiff stated that she suffered from “flashbacks” of the accidents which made her irritable and prevented her from sleeping. As a result of these injuries, she underwent physical therapy for her back and her left knee for approximately six months and treated with a psychotherapist for approximately for one year. According to the plaintiff, her back “got better” with the physical therapy and the “flashbacks” were resolved with psychotherapy.

With respect to future pain and suffering, the plaintiff states that she continues to have pain in her left knee which makes it difficult to walk, bend, climb stairs, clean her home and take care of her four children. However, she only takes Tylenol for the pain in her knee and although it may be difficult she is still able to engage in her pre-accident household chores including being able to cook, clean, food shop and do the laundry. Moreover, the plaintiff is not currently receiving any type of treatment or therapy which may cause her pain and suffering in the future. Although there was testimony regarding the possibility of one or more surgeries in the future, the plaintiff made it clear in her direct examination that she is afraid of surgery.

At issue is whether the jury’s verdict on damages is against the weight of the evidence. *See* CPLR § 4404(a). “While the amount of damages to be awarded for personal injuries is primarily a question for the jury, the award may be set aside when it deviates materially from what would be reasonable compensation.” Van Ness v. New York City Transit Authority, 288 A.D.2d 374, 734 N.Y.S.2d 73 2d Dep’t 2001) (quoting Walsh v. King Plaza Replacement Serv., 239 A.D.2d 408, 658 N.Y.S.2d 345 (2d Dep’t 1997); *see* CPLR 5501(c).

In reviewing the evidence in the context of comparable cases, the Court finds that the jury verdict on damages for past pain and suffering does not materially differ from what would be reasonable compensation.

However, the Court does find that the jury award for future pain and suffering materially exceeds what would be reasonable compensation under the evidence adduced at trial.

In Frascarelli v. Port Authority of New York and New Jersey, 269 A.D.2d 422, 702 N.Y.S.2d 889 (2d Dep’t 2000), the trial Court found the jury’s verdict on damages, to wit, \$300,000 for past pain and suffering and \$400,000 for future pain and suffering to be excessive. In *Frascarelli*, *supra*, the plaintiff suffered a torn medial meniscus which was removed with arthroscopic surgery. He experienced muscle atrophy, had difficulty squatting, experienced pain when walking more than

45 minutes and faced the possibility of arthritis of the knee. The Court therein set aside the verdict unless the parties stipulated to a reduced award for past pain and suffering of \$225,000 and future pain of \$225,000. On review, the Appellate Division set aside the verdict with respect to the award for future pain and suffering as still excessive unless the parties stipulated to a further reduction of \$150,000. Id.

In Parros v. 1500 Realty, 226 A.D.2d 607, 641 N.Y.S.2d 372 (2d Dep't 1996), the plaintiff sustained a torn cruciate ligament and torn lateral menisci requiring the use of a knee brace and arthroscopic surgery. Despite testimony by plaintiff's expert that surgery could not repair the cruciate ligament and that plaintiff was totally disabled, the second depart set aside the jury verdict on damages as excess unless the parties stipulated to a reduction of the damage award for past pain and suffering from \$158,00 to \$100,000 and for future pain and suffering from \$375,000 to \$200,000.

In Burton v. New York City Housing Authority, 191 A.D.2d 669, 595 N.Y.S.2d 80 (2d Dep't 1993), the court held that the jury award of damages in the amount of \$525,000 for pain and suffering was excessive where plaintiff, a 26 year old male, ruptured his meniscus and underwent reconstructive surgery. A subsequent arthroscopic examination revealed severe deterioration which in the opinion of the medical expert required a total knee replacement. The Court set aside said verdict unless the parties agreed to reduce the award for damages to \$262,500.

In the instant matter, the Court finds that the evidence does not support the jury's award of \$400,000 for future pain and suffering. Here the plaintiff sustained a small tear on the medial meniscus of her left knee which she received approximately six months of physical therapy. Any psychological problems or back injuries were resolved prior to the time of trial. Although the plaintiff complains of pain associated with arthritis in her knee, she only takes over the counter pain medication (Tylenol) and even though it is with some difficulty she can still do most of her household chores.

Plaintiff contends that the jury's verdict award for pain and suffering was not excessive because the case at bar should be compared to cases that require a total knee replacement. The Court disagrees with plaintiff's contention based on her own witness, Dr. Silverman. Dr. Silverman testified that the plaintiff may need in the future a knee replacement surgery. Furthermore, he stated that what he would recommend to the plaintiff (at the time of trial) would be to have arthroscopic surgery. In response to the Court's inquiry, Dr Silverman testified that he would not recommend knee replacement surgery at this time. Record at 71.

The cases cited by the plaintiff in support of her contention are plainly distinguishable. See Van Ness, *supra*, plaintiff, who was 30 years old, sustained a tear of the medial meniscus and underwent two arthroscopic surgeries. The second surgery revealed plaintiff had grade three chondromalacia and pieces of cartilage hanging down from underneath knee cap. Doctor who performed second surgery determined plaintiff might require a future surgery and possible knee replacement. In Cruz v. Manhattan and Bronx Surface Transit Operating Authority, 259 A.D.2d 432, 687 N.Y.S.2d 350 (1st Dep't 1999), plaintiff, who was 30 years old, underwent three arthroscopic surgeries to the knee but continued to have pain in the knee warranting a possible total knee replacement. Similarly, Osoria v. Marlo Equities, Inc., 255 A.D.2d 132, 679 N.Y.S.2d 612 (1st Dep't 1998), plaintiff, who was 61 years old, sustained a comminuted fracture of the right knee. She was casted for one month, used crutches for six months and underwent arthroscopic surgery which did not relieve the pain. And lastly Burton, *supra*, wherein plaintiff underwent reconstructive surgery and a subsequent arthroscopic examination which revealed severe deterioration which in the opinion of the medical expert required a total knee replacement.

In the case at bar, the plaintiff, forty years old at the time of the accident, sustained a small tear on the medial meniscus of her left knee and subsequently began to develop arthritis in that knee. Plaintiff, however, has not undergone any surgical procedures and has in fact expressed a fear of surgery. The pain which plaintiff testified at the time of the accident as "tremendous" has abated to the point that she relies on over the counter pain relief. Moreover, she has been able to return to many of her daily chores albeit with some pain. The cases cited by the plaintiff involve individuals that have suffered more significant injuries and have undergone surgical procedures which were not successful, indicative that total knee replacements might be the only viable medical alternatives. Here the evidence is no more than speculative that the plaintiff faces the prospect of a total knee replacement.

The Court therefore directs a new trial on the issue of damages, unless within thirty days after service upon the plaintiff of a copy of this decision and order with notice of entry, the plaintiff, Lidiya Natanelova stipulates to reduce the award for future pain and suffering to \$137, 500. Urquhart v. New York City Transit Authority, 221 A.D.2d 336, 633 N.Y.S.2d 206 (2d Dep't 1995); Castellano v. City of New York, 183 A.D.2d 800, 584 N.Y.S.2d 114 (2d Dep't 1992).

This constitutes the decision and order of the Court.

Dated: June 20, 2002

