SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x 20436/2015E

JESSIE MAY MOSLEY,

Plaintiff,

ORDER WITH
NOTICE OF ENTRY

-against-

E.H.J. LLC and NUNEZ DEPOT HARDWARE,

Defendants.

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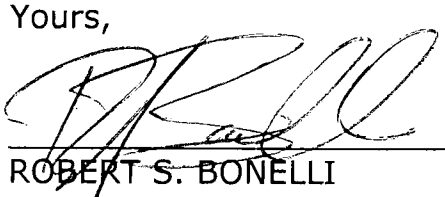
PLEASE TAKE NOTICE, that attached hereto is a true and accurate copy of the Order of the Honorable Ruben Franco dated September 25, 2017 and entered in the Clerk's Office of the within Court on September 27, 2017.

Dated: New York, New York
September 27, 2017

Yours,



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

JESSIE MAY MOSLEY,

Plaintiff,

-against-

E.H.J. LLC and NUNEZ DEPOT HARDWARE,

Defendants.

Index No. 20436/2015E

MEMORANDUM DECISION/ORDER

HON. RUBEN FRANCO

On the morning of August 15, 2014, the then nearly-70-year-old (now 73) plaintiff visited defendants' hardware store to have a house key made. Upon exiting the store, she fell on the sidewalk and fractured her ankle and exacerbated a back condition. On May 15, 2015, a jury awarded her the amount of $350,000 for past pain and suffering, and $1.3 million for future pain and suffering. The defendants now move, pursuant to CPLR § 4404, *inter alia*, to set aside the verdict on liability as against the weight of the evidence; to set aside the verdict for past and future pain and suffering unless plaintiff accepts damages in a lesser amount to be determined by the court; and, to set aside the verdict and for a new trial on the ground that the court erroneously admitted in evidence a lumbar MRI Report and allowed plaintiff's expert to testify to its content.

It is undisputed that Ms. Mosley suffered a fractured ankle, and that her pre-existing severe spinal stenosis worsened. However, how these injuries occurred, exactly where they occurred, who is responsible, and in the case of her back, when it occurred — are matters that were hotly contested during the trial. Defendant Nuñez attempted to cast doubt on Ms. Mosley's claim that she fell in front of his business by testifying that Ms. Mosley never appeared in his store to inform him or any of his employees, of the fall. Moreover, defense counsel endeavored to show that Ms. Mosley did not know what caused her to fall, and that if she fell in front of defendants' business, it was in a location other than on the defect in the sidewalk. Defense

counsel supported this contention by proffering that Ms. Mosley was not certain of exactly where she fell because, on her way home after the accident, she told a friend that she fell in front of a drug store, and also, because it was not until three weeks after the incident that she returned to defendants' business to survey the front of the location, whereupon, she concluded that the defective sidewalk in front of the business, must have caused her to fall.

The jury weighed the evidence, and the credibility of Ms. Mosley, as well that of defendant Nuñez, and chose to accept Ms. Mosley's version regarding how and where she fell. The court finds that the jury reached its conclusion based on a fair interpretation of the evidence (see Williams v. City of New York, 109 AD3d 744 [1st Dept 2013]. The First Department has made it clear that a jury verdict should be set aside as against the weight of the evidence, "only where it seems palpably wrong and it can be plainly seen that the preponderance is so great that the jury could not have reached their conclusion upon any fair interpretation of the evidence" (see Bernstein v. Red Apple Supermarkets, 227 AD2d 264, 265 [1st Dept 1966], quoting Cornier v. Spagna, 101 AD2d 141, 149). The jury also found that by failing to repair the defective sidewalk in front of their business, where it found that Ms. Mosley fell, defendants were responsible for the injuries that she suffered.

Upon a review of the record, the court cannot conclude that the evidence presented by defendants weighed so heavily in their favor, that the verdict could not have been reached on any fair interpretation of the evidence (see Grassi v. Ulrich, 87 NY2d 954 [1996]; Lolik v. Big V Supermarkets, Inc., 86 NY2d 744 [1995]). And, viewing the evidence, as the court must, in the light most favorable to plaintiff, the prevailing party (see Yass v. Liverman, 233 AD2d 110 [1st Dept 1996]), the court declines to disturb the jury's verdict on the issue of liability.

Defendants ask the court to set aside the verdict and order a new trial because, they assert,

the court erroneously admitted in evidence an MRI report and permitted plaintiff's expert to give testimony on the content of the report, in rendering his opinion as to plaintiff's injuries. Defendants posit that such testimony was hearsay in that the person who prepared the report was not available for cross examination. In the cases that defendants cite to support their position, the X-rays or MRIs were not in evidence (Kovacev v. Ferreira Bros. Contracting, 9 AD3d 253 [1st Dept 2004]; Wagman v. Bradshaw, 292 AD2d 84 [2nd Dept 2002]); Hambsch v. New York City Transit Authority, 63 NY2d 723 [1984]). Here, the MRI films and the report of the radiologist were both admitted in evidence because the court determined that they complied in all respects with the requirements of CPLR § 3122-a. Defendants' objection relates to testimony provided by Dr. Gabriel Dassa, plaintiff's medical expert, regarding the report of radiologist, Dr. Meltzer, of an MRI of plaintiff's lumbar spine taken in November, 2014.

Hearsay testimony presented by an expert is admissible for the purpose of permitting the expert to set forth the basis of his or her opinion, so long as the hearsay material is reliable and it is not the principal basis for the expert's opinion (see People v. Wlasiuk, 32 AD3d 674 [3rd Dept 2006]; Borden v. Brady, 92 AD2d 983 [3rd Dept 1983]). The case of Wagman v. Bradshaw, 292 AD2d 84 [2nd Dept 2002]), provides guidance on this matter, and helps this court to conclude that of great import to its determination of this issue, is the fact that Dr. Dassa examined the plaintiff and reviewed her medical records, and thus, made it apparent that he did not rely solely on the report to arrive at his conclusion regarding plaintiff's spinal stenosis. Additionally, the report was comprehensive and detailed regarding the images, as well as in its findings. Moreover, Dr. Dassa studied the actual MRI film and confirmed his independent finding of spinal stenosis, rendering Dr. Meltzer's report reliable since he too diagnosed a severe stenosis. Indeed, Dr. Dassa employed the MRI film to locate for the jurors, plaintiff's condition. The court concludes

that it was proper for Dr. Dassa to make reference during his testimony to the report.

Ms. Mosley is retired and did not require surgery nor hospitalization as a result of the injuries sustained from this accident. None of her treating physicians testified at the trial. The evidence showed that she suffered a fracture of the cuboid bone of the left ankle which, according to Dr. Dassa, caused her to develop traumatic arthritis in the ankle joint. Dr. Dassa, who was not the treating physician and examined Ms. Mosley once, two years after the incident and for the purpose of this litigation, testified that although the fracture is healed, the injury to the ankle, particularly the traumatic arthritis, is permanent, and that if the pain to the left ankle becomes intractable, he would recommend fusion surgery. After the accident, Ms. Mosley was treated for her ankle by a Dr. Dermskian; the first time was on August 20, 2014, and the last time was in November, 2014. She had to wear a special boot for a period of time and attended six sessions of physical therapy. Dr. Dermskian did not recommend surgery. Ms. Mosley has not received treatment for her ankle since November, 2014.

The evidence also showed that Ms. Mosley suffered from severe spinal stenosis prior to the instant accident of August 15, 2014, and an MRI taken on November 29, 2014, indicated that the stenosis slightly worsened. She had been experiencing back pain for several years prior to the accident, and she received a number of epidural injections for this condition. Dr. Dassa testified that if Ms. Mosley's back condition remains stable, due to her age and medical condition, he recommends conservative treatment, not surgery. Ms. Mosley testified that the pain in her lower back radiates down to her leg, causing an imbalance, and necessitating that she use a cane to help her walk.

Ms. Mosley testified that as result of the injuries that she suffered, she has not been able to clean her apartment as often as she would clean it prior to the accident. Moreover, she is

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