SHORT FORM ORDER

INDEX No. 063854/2014
CAL No. 201601797MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11-9-18
SUBMIT DATE 1-24-19
Mot. Seq. # 03 - MD
04 - MD

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JASON VANDEWATER,

Plaintiff,

- against -

DAVID BUCHIN, M.D., JOANNE VITALE, R.P.A., CORY A. MUSCARA, M.D., CORY A. MUSCARA, M.D., P.C., CORY A. MUSCARA, M.D., P.C. d/b/a FAMILY MEDICINE ASSOCIATES OF WEST BABYLON, HUNTINGTON HOSPITAL and NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendants.

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Upon the following papers numbered 1-50; read on this motion to set aside verdict; Order to Show Cause and supporting papers 1 - 27 (#3); 28 - 29 (#4); ~~Notice of Cross Motion and supporting papers ___~~; Answering Affidavits and supporting papers 30 - 41 (#3 & 4); Replying Affidavits and supporting papers 42 - 48 (#3); 49 - 50 (#4); ~~Other ___; (and after hearing counsel in support and opposed to the motion~~).

In this action to recover damages for medical malpractice, defendants David Buchin, M.D., Huntington Hospital and North Shore - Long Island Jewish Health System, Inc., move for an order pursuant to CPLR 4401, 4404(A) and 5501(c) vacating the jury verdict and granting a new trial:

A. On the grounds that the verdict was against the weight of the evidence; and/or

B. Due to prejudicial and improper comments made by counsel for the plaintiff during his summation; and/or

C. On the issue of damages or in the alternative a substantial remittitur of the damages award on the grounds that the jury verdict of $8,000,000.00 for pain and suffering deviates materially from what would be reasonable compensation for the plaintiff's injuries.

Defendants Cory A. Muscara, M.D., Cory A. Muscara, M.D., P.C., d/b/a Family Medicine Associates of West Babylon separately move for an order:

A. Pursuant to CPLR 4404(A) setting aside the jury verdict on the grounds that the plaintiff did not prove a *prima facie* case that Dr. Muscara departed from good and accepted medical practice in his treatment of the plaintiff by not conducting a differential diagnosis on September 10, 2013; or

B. Setting aside the verdict and ordering a new trial on the grounds that no credible interpretation of the trial evidence met the burden of establishing that Dr. Muscara departed from good and accepted medical treatment in his treatment of the plaintiff by not conducting a proper differential diagnosis on September 10, 2013; or

C. Setting aside the verdict on the grounds that counsel for the plaintiff proffered a theory in his closing argument that had not been pleaded, was unsupported by the evidence, and was premised, in part, upon untrue and misleading information with respect to Dr. Muscara; or

D. Reducing the damages verdict or ordering a new trial on the issue of damages.

The plaintiff has opposed these motions in all respects.

OVERVIEW

On August 12, 2013, Dr. Buchin performed a gastric sleeve gastrectomy on the plaintiff. Following the surgery, the plaintiff developed complications. He was evaluated post operatively by Dr. Buchin and was treated by Dr. Muscara, (his primary care physician), but his condition worsened. On October 13, 2013, the plaintiff reported to P.A. Vitale, (who worked with Dr. Buchin), by telephone, that he was experiencing fever, chills and sweats. The plaintiff was directed to go to Huntington Hospital where a CT scan was performed revealing a gastric perforation. On October 18, 2013, Dr. Buchin performed surgery to repair the gastric perforation. Thereafter, the plaintiff had what could be characterized as a "difficult" recovery period.

good and accepted medical practice in the treatment of the plaintiff by not properly responding to his telephone call on October 7, 2013; and (C) Dr. Muscara departed from good and accepted medical practice in his treatment of the plaintiff by not conducting a proper differential diagnosis on September 10, 2013. The jury assessed Dr. Buchin 90% at fault and Dr. Muscara 10% at fault.

The jury awarded the plaintiff $8,000,000.00 for pain and suffering, including loss of enjoyment of life from August 22, 2013, until October of 2014.

THE DEFENDANTS' MOTIONS TO SET ASIDE THE VERDICT

Dr. Buchin argues that the evidence adduced at trial demonstrated that the plaintiff did not exhibit any symptomology suggestive of a hole or gastric leak during his post operative visits to Dr. Buchin's office. Further, the plaintiff's expert, Dr. Fischella, repeatedly contradicted himself as to when the gastric hole developed. In addition, during the time the plaintiff had the gastric leak he reported to Dr. Buchin that he felt the healthiest that he had ever been.

Dr. Buchin opines that there was no rational process by which the jury could have found against him. Moreover, the verdict was against the weight of the evidence as the plaintiff's evidence was inconsistent, contradictory and belied by proof set forth at trial.

Dr. Muscara argues that the verdict against him should be set aside since the plaintiff failed to adduce the elements of a *prima facie* case sounding in medical malpractice. Dr. Muscara claims that the plaintiff's family practice expert, Dr. Carol Rupe proffered conclusory and unsubstantiated testimony regarding departures in the differential diagnosis and causation which do not meet the criteria under New York law.

Further, according to the plaintiff's bariatric expert, Dr. Fisichella, the plaintiff was asymptomatic until October 13, 2013, thereby disputing the existence of the signs, symptoms and findings that Dr. Rupe testified should have led to a differential diagnosis of a perforated viscus on September 10, 2013. Thus, no rational interpretation of the evidence could lead to the conclusion that Dr. Muscara departed from accepted medical practice in his differential diagnosis on September 10, 2013, or that such departure was a substantial factor in causing injury to the plaintiff.

In opposition, the plaintiff contends that the jury verdict was based upon evidence which was both legally sufficient to establish a cause of action in medical malpractice and in accord with the weight of the evidence.

> "A motion to set aside a jury verdict and for judgment as a matter of law will be granted only if there is no valid line of reasoning and permissible inferences which could possible lead a rational jury to the conclusion reached on the basis of the evidence presented at

> plaintiff's injury (*see Mazella v Beals*, 27 NY3d 694, 705 [2016]; *James v Wormuth*, 21 NY3d 540, 545 [2013]).
>
> A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*see Killon v Parrotta*, 28 NY3d at 107-108; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert (*see Russo v Levat*, 143 AD3d 966, 968 [2016]; *Hatzis v Buchbinder*, 112 AD3d 890, 891 [2013]; *Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588 [2011])."

(*Hollingsworth v Mercy Medical Center*, 161 AD3d 831, 832-833 [2d Dept. 2018]).

Here, the jury could have rationally concluded that Dr. Buchin and Dr. Muscara departed from good and accepted medical practice in their treatment of the plaintiff and that those departures were a substantial factor in causing injury to him.

Accordingly, those branches of the defendants' motions which seek to set aside the verdict are in all respects denied.

SUMMATION ERROR

Dr. Buchin moves for a new trial on the grounds that a new medical theory, unsubstantiated by the evidence, was proffered by the plaintiff for the first time in summation based upon evidence not raised by his own experts. Dr. Buchin claims that in his summation counsel for the plaintiff mischaracterized the evidence of the defendant's surgical expert to advance a new theory which was improperly submitted to the jury for their consideration. Dr. Buchin further notes that counsel for the plaintiff made numerous prejudicial comments in his summation that warrant a new trial due to their "overwhelmingly" prejudicial nature and cumulative effect on the jury's ability to fairly make a determination in the case.

Dr. Muscara argues that the verdict should be set aside on the grounds that counsel for the plaintiff "summed up" on a new theory not pleaded in the case, unsupported by the evidence, and premised, in part, on untrue and misleading information.

In opposition, the plaintiff contends that the defendants have waived this claim because they failed to move for a mistrial until after the jury had begun deliberating. Further, the plaintiff argues that the challenged remarks were either fair comment on the evidence or were stricken from the record with a curative were either fair comment on the evidence or were stricken from the record with a curative instruction from the Court. The plaintiff also asserts that he did not advance a new theory in summation.

"When misconduct of counsel *** summation so violates the rights of the other party to

> will not be condoned (*Escobar v Seatrain Lines*, 175 A.D.2d 741, 744, quoting *Kohlmann v City of New York*, 8 A.D.2d 598)"

(*Steidel v County of Nassau*, 182 A.D.2d 809, 814 [2d Dept. 1992]).

The Court has reviewed the summation and it cannot be gainsaid that there were comments by counsel for the plaintiff that were inappropriate and uncalled for. However, objections by defense counsels were sustained, remarks were stricken and curative instructions were given to the jury. Under the circumstances, the Court concludes the summation comments in issue were unlikely to have effected the outcome (*see, e.g., Pareja v City of New York*, 49 AD3d 470 [2008]). The defendants' claims that counsel for the plaintiff advanced a new theory of liability in his summation are without merit.

Therefore, those branches of defendants' motions which seek set aside the verdict based upon summation error are in all respects denied.

THE DAMAGES VERDICT

Dr. Buchin and Dr. Muscara argue, in sum, that the $8,000,000.00 damages verdict is excessive and it should be reduced by the Court or there should be a new trial on the issue of damages.

The plaintiff claims that the $8,000,000.00 damages award is not excessive.

As previously stated the jury awarded the plaintiff $8,000,000.00 for pain and suffering, including loss of enjoyment of life from August 22, 2013, until October of 2014. No future damages were claimed by the plaintiff. It is significant to note that although not obligated to, (PJI 2:277A), counsel for the plaintiff did not suggest a specific monetary amount to the jury which he believed to be appropriate compensation for the plaintiff's damages. In addition, during deliberations the jury requested a reinstruction on the law pertaining to damages.

> "The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation (*Nayberg v Nassau County*, 149 AD3d 761, 762 [2017] [internal quotation marks omitted]; *see* CPLR 5501 [c]; *Graves v New York City Tr. Auth.*, 81 AD3d 589, 589 [2011]; *Chery v Souffrant*, 71 AD3d 715, 716 [2010]). The reasonableness of compensation must be measured against relevant precedent of comparable cases (*Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2014] [internal quotation marks omitted]; *see Kaves v Liberati*, 104 AD3d 739, 741

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