

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARTHA (“MOLLY”) OTIS SCHEER,

Plaintiff,

v.

CITY OF HAYWARD, *et al.*,

Defendants.

ORDER

10-cv-447-slc

Plaintiff Martha Otis Scheer sued defendants under 42 U.S.C. §§ 1983 and 1988 for violating her rights under the First and Fourteenth Amendments in adopting, applying and enforcing City of Hayward Music Ordinance #476. After defendants conceded liability on summary judgment, we tried the issue of damages to a jury in Eau Claire on January 9, 2012. The jury awarded Otis \$400,000 in compensatory damages and \$1,400 in punitive damages. Now before the court is defendants’ motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) or in the alternative, motion for a new trial or remittitur under Rule 59(a). Dkts. 110 and 111. Also before the court is defendants’ motion to stay execution of judgment. Dkt. 113. Otis’s motion for attorney’s fees will be addressed in a separate order. Dkt. 110.

As discussed below, I am denying defendants’ Rule 50 and 59 motions. Although the jury’s award of compensatory damages is quite large, defendants have not shown that the jury’s verdict lacks sufficient evidentiary support, lacks a rational connection to the evidence or otherwise is excessive or unreasonable. I am denying as moot defendants’ motion to stay execution of judgment.

OPINION

I. Judgment as Matter of Law

The court presented the jury with one question about compensatory damages which the jury answered as follows:

Question No. 1: What amount of money, if any, will fairly and reasonably compensate Plaintiff Martha Otis Scheer for the losses she incurred as a result of the enactment of the City of Hayward's Outdoor Music Ordinance No. 476 and the denial of a permit?

Answer: \$400,000

In addition, the jury found that each individual defendant's conduct in denying Otis a permit was a malicious, callous or reckless disregard for Otis's constitutional rights. As for its award of punitive damages, the jury wrote in the same verdict for each of the seven individual defendants: "\$200 and a sincere apology." (The court declined to order the apologies since this constituted equitable relief that exceeded the jury's purview).

From the general verdict on compensatory damages, defendants surmise that the jury awarded the full amount that Otis requested in pecuniary damages—about \$89,000 in lost Wine Bar revenue, \$165,000 in lost rent and \$34,000 in remodeling costs—leaving approximately \$112,000 in non-pecuniary or emotional damages.¹

At the close of Otis's case, defendants moved for judgment as a matter of law under Rule 50(a), arguing that Otis failed to present evidence from which a reasonable jury could conclude that she was entitled to punitive damages. I denied that motion. Defendants have renewed

¹ Specifically, Otis argued for \$89,700.48 in lost Wine Bar revenue, \$165,466 in lost rent, \$33,955.35 in remodeling costs and no specific amount in emotional damages. *See* Trial Exh. 3.

their motion pursuant to Rule 50(b) and also argue that Otis failed to present sufficient evidence that she suffered any actual damages as a result of the city's enactment and enforcement of the ordinance.

In deciding a Rule 50(b) motion, “the question is not whether the jury believed the right people, but only whether it was presented with a legally sufficient amount of evidence from which it could reasonably derive its verdict.” *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 924 (7th Cir. 2000). “But, there must have been more than a ‘mere scintilla’ of evidence to support the verdict.” *Id.* The court fundamentally employs the same standard as that used in deciding a motion for summary judgment, viewing the evidence in the light most favorable to the winning party. *Id.*; *David v. Caterpillar*, 324 F.3d 851 (7th Cir. 2003). The court may not assess the credibility or persuasiveness of witnesses. *Massey*, 226 F.3d at 924. If the moving party demonstrates that “the jury's findings, presumed or express, are not supported by substantial evidence, or if they were, that the legal conclusions implied from the jury's verdict cannot in law be supported by those findings,” the verdict should be set aside. *Celeritas Techs., Ltd. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1358 (Fed. Cir. 1998).

As a starting point, I note that although both parties asked for an itemized special verdict on compensatory damages, *see* dkt. 70 (plaintiff) and dkt. 80 (defendants), they did not persuade the court that it was necessary to require such detail from the jury in this case, so the court used a general verdict for compensatory damages without significant resistance from the parties. Now defendants are challenging the jury's verdict not only generally, but also category-by-category, claiming the evidence as to each category cannot support the amount of damages the jury may well have awarded in that category. Plaintiff responds in kind, claiming that the evidence sufficed in each category to support the amount of damages she was claiming. In light of the

jury's general verdict, this is something of an artificial exercise since none of us can be sure which evidence the jury accepted and which it rejected in making its award, and this court may not indulge in speculation about the jury's thought process. *See, e.g., Deloughery v. City of Chicago*, 422 F.3d 611, 619 (7th Cir. 2005). Even so, it seems that defendants should be allowed to build their case for a new trial or remittitur brick-by-brick, so the court will follow the party's lead and respond to each of defendant's arguments in turn.

A. Compensatory Damages

Defendants assert that Otis failed to present legally sufficient evidence of a causal link between the enforcement of the city's ordinance and her claimed compensatory damages for renovations, lost revenue, lost rent and emotional distress. They argue that the cause of these damages was not the ordinance, which was never enforced against the Wine Bar, but rather Otis's "unfounded, unreasonable belief that the outdoor music ordinance was actually a noise ordinance that would regulate indoor music if it was audible outdoors." Dkt. 112 at 4. In support, defendants point out that the ordinance on its face applies only to outdoor music, something that even Otis's business partner, Susan McDonald, correctly understood.

The fundamental flaw in defendants' argument is that on summary judgment, they conceded that the city's music ordinance was overly broad and vague and lacked objective criteria for granting permits. By its very nature, an ordinance that is void for vagueness necessitates that individuals of "common intelligence . . . guess at its meaning." *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). "As a matter of due process, 'no one may be required at peril of life, liberty or property to speculate as to the meaning of . . . statutes. All

are entitled to be informed as to what the statute commands or forbids.” *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (citations omitted).

Defendants criticize Otis for making changes to her business and taking other preventative measures as a result of her subjective fear that she *might* be prosecuted under the ordinance. However, as Otis points out, the Court of Appeals for the Seventh Circuit has held that “constitutional violations may arise from the ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of first amendment rights.” *Penny Saver*, 905 F.2d at 154 (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). Therefore, Otis, is not prevented from seeking judicial review just because defendants never enforced the ordinance against her. “[W]e do not require a plaintiff to expose himself to liability before bringing suit.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007); *see also Ezell v. City of Chicago*, 651 F.3d 684, 695-96 (7th Cir. 2011) (internal citations omitted) (pre-enforcement challenges to statute are proper because very existence of statute implies threat to prosecute). Rather, the question is whether a “credible threat” existed that the city would take the challenged action against the plaintiff. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *see also Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-99 (1979) (“When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.”) (internal quotations omitted).²

² Although defendants do not specifically argue that Otis failed to apply for a permit until 2010, I note that the Supreme Court has made clear that the “decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.” *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958).

As Otis notes, the facts in *Penny Saver* are instructive in this case. *Penny Saver*, a newspaper, challenged the constitutionality of an ordinance prohibiting realtors from soliciting owners or renters to sell, rent or list their dwelling for sale or rent, if the owner or occupant had notified the village clerk that he or she did not wish to be solicited. *Penny Saver*, 905 F.2d at 152. The newspaper adduced evidence that one realtor had been prosecuted under the ordinance but found not guilty and that the village administrator encouraged citizens to file complaints if they believed that the ordinance had been violated. *Id.* According to *Penny Saver*, rather than risk prosecution under the ordinance, realtors chose not to place any advertisements in the newspaper. Therefore, *Penny Saver* sought the amount of advertising revenues it lost as a result of the “chilled speech.” *Id.* at 154-55. In response (and similar to defendants in the instant case), the Village of Hazel Crest argued that any damages suffered were the result of a subjective “chill” on the part of the advertisers and were not caused directly by the village. *Id.* at 155. The court of appeals rejected that argument, determining that *Penny Saver* was injured every time an advertiser refrained from advertising because of the ordinance and that the advertiser’s fears constituted objective concerns over the vague ordinance. *Id.*

In the instant case, Otis testified at trial that as a result of the vague wording of the ordinance, she felt compelled to make sure that music at the Wine Bar was not played or heard outside. The ordinance reads that “any establishment or private party wishing to host any type of event outside that requires the playing of music after 10:00 p.m. shall obtain permission from the City Council prior to hosting the outside event.” Otis testified that because the word “music” was not qualified, she believed that any music, regardless of its actual physical location, that was associated with an outdoor event was prohibited after 10pm. She stated that during a city council meeting about the ordinance, one member told her that “There’s nothing vague

about this ordinance. It says no music after ten o'clock without a permit.” Dkt. 99 at 42. In addition, Otis testified that council members disrespected and ignored her at several meetings when she tried to discuss the overly broad scope of the proposed ordinance and tried to suggest that the City adopt a constitutionally reasonable ordinance. As a result of this chilly reception and the breadth of the City’s ordinance, Otis concluded that she faced a genuine risk of tickets and fines for any music that even was *audible* in the outdoor seating area of her bar, even if the music was presented indoors.

Otis testified that her belief was bolstered by the fact that during the summer of 2007, just prior to the enactment of the ordinance, a police officer came the bar and told her to stop playing music because there had been a noise complaint. A few months later, after the ordinance was passed, six police officers showed up at the bar’s packed outdoor courtyard during an outdoor presentation of the popular “belly bar.”³ This unexpected wave of blue caused the crowd of middle-aged professionals to panic and leave. Otis turned down her outdoor speakers down and then stopped the music altogether. Otis told the jury that she thought that she had “just been set up by the City Council.” Dkt. 99 at 47. On another night, someone filed a noise complaint against the Wine Bar while Otis had music playing indoors.

Part of the *gestalt* of this situation was Otis’s view that the city was using its music ordinance as payback against her for previous run-ins with the mayor and city counsel. Otis explained to the jury that she thought it would be nice to add an artistic acid wash stain to the sidewalk in front of her business. Otis obtained permission from the city’s then-public works director to stain the sidewalk; after she did so, city council members became “very, very

³ Belly dancing by young women in the outdoor courtyard, accompanied by recorded music augmented by live percussion. See dkt. 99 at 36-37.

agitated”and accused her of vandalism (by then there was a new public works director). Otis testified that she was never allowed to tell her side of the story to the council because the mayor kept removing her from the council meeting agenda without notice, and that the city then withheld her liquor license until she paid about \$800 to have the sidewalk replaced. *See* dkt. 99 at 24-31. From this, Otis deduced a cause-and-effect relationship:

We come in and, you know, they hold my liquor license hostage over the whole sidewalk issue. You know, within, what, two months, there’s a music ordinance in play. I go in and object to that. I’m told by the Police Chief “It’s not about you.

But once again, I stood in front of a council and I felt I was actually being a good citizen and that I would be willing to talk to them about how it’s done. I was shut down again and then I was told, “Don’t worry. It’s not about you.” And then it’s exactly about me. It’s exactly about our bar. And if six cops show up to a bar, it’s commercial death, it’s commercial death for business.

Dkt. 99 at 47.

In short, according to Otis’s version of events, she was a pariah to the city council and council members were looking for ways to get her in trouble. According to Otis, after the council peremptorily dismissed her concerns about the proposed music ordinance, the writing was on the wall: if she allowed music to be played at her establishment after 10:00 at night, she was in real danger of tickets, fines and other sanctions.

Of course, defendants had a completely different perception of these same events and they presented their version at trial. Defendants extensively cross-examined Otis about her perceptions and her conduct. They presented impeaching contradictory evidence and they vigorously argued lack of causation and connection in their closing argument.

The jury chose to believe Otis. Indeed, the jury found Otis's perception of events and the effects on her and her businesses sufficiently credible to merit the jury ordering a personal apology to her from the mayor and city council members named as personal defendants. Viewing the evidence in the light most favorable to Otis, I cannot find as a matter of law that her concerns with the ordinance were purely subjective. There was sufficient evidence from which the jury could conclude that had Otis continued operating her business in the same manner, she faced a credible threat of prosecution under the ordinance. It is therefore reasonable to conclude that the losses that Otis suffered were a direct result of this chilling effect. Because defendants have failed to meet their high burden, their motion will be denied.

B. Punitive Damages

Defendants argue that because the ordinance had a very minor effect on the Wine Bar and its operations by requiring the belly bar to end only one hour earlier than planned, there is no rational basis to believe that enforcing the ordinance was malicious or intended to injure Otis. However, as Otis points out, the court instructed the jury that:

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, you may award punitive damages even if the plaintiff can show no damages or other injury as a result of a defendant's actions.

Dkt. 93 at 4. Because defendants did not object to the instruction, they have waived their argument. *Bogan v. Stroud*, 958 F.2d 180, 182-83 (7th Cir. 1992) (finding same and noting that a party cannot challenge jury instruction that it failed to object to before jury retired). However, even if defendants had not waived their argument, the Court of Appeals for the Seventh Circuit

has permitted juries in § 1983 cases to award punitive damages even when no compensatory damages were awarded. See *Golden v. City of Chicago*, 2009 WL 3152359, *5 (N.D. Ill. Sept. 28, 2009) (citing *Calhoun v. DeTella*, 319 F.3d 936, 943 (7th Cir. 2003); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998); *Sahagian v. Dickey*, 827 F.2d 90, 100 (7th Cir. 1987); *McKinley v. Trattles*, 732 F.2d 1320, 1326 (7th Cir. 1984)).

Apart from their general comment that “there is no rational basis to believe the enactment or enforcement were malicious or intended to injure Plaintiff,” defendants say nothing about how the evidence fails to support the punitive damages verdict. Therefore, to the extent that defendants are arguing that there was insufficient evidence from which the jury could conclude that the individual council member defendants acted in reckless disregard of Otis’s rights, this argument is unpersuasive. Defendants are simply repeating their characterization of the evidence, which the jury soundly rejected.

The jury clearly accepted Otis’s characterization of events, which was sufficiently supported by the evidence. As Otis points out, even though Otis’s attorney informed defendants that the ordinance and the city’s permit process were unconstitutional, none of the defendants followed up by asking the city attorney or Otis for further information when she was applying for a permit. Even though permits for other businesses had been approved without discussion, defendants denied Otis’s permit without hearing from Otis at all. Defendant Johnson admitted that he denied the permit because of things he had read and heard about Otis. These facts, coupled with what the jury could have viewed as a long history of animosity toward Otis and her business (outlined above), are sufficient to support the jury’s conclusion that defendants acted in reckless disregard of Otis’s rights. The fact that the jury, on its own, indicated that each defendant should offer “a sincere apology” to Otis bolsters the conclusion that the jury found

the defendants' conduct toward Otis to be malicious, reckless, or in callous disregard of her constitutional rights.

II. Motion for New Trial

When considering a motion for a new trial or remittitur pursuant to Fed. R. Civ. P 59(a), the court must determine whether the verdict is against the weight of the evidence, the damages are excessive, or, for other reasons, the trial was not fair to the moving party. *Whitehead v. Bond*, 680 F.3d 919, 927-28 (7th Cir. 2012); *Pickett v. Sheridan Health Care Center*, 610 F.3d 434, 440 (7th Cir. 2010) (internal citations omitted); *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004) (internal citations omitted). In deciding a motion for a new trial on damages, the proper inquiry is whether the award is “monstrously excessive,” there is any rational connection between the award and the evidence and the award is roughly comparable to those made in similar cases. *Thompson v. Memorial Hosp. of Carbondale*, 625 F.3d 394, 408 (7th Cir. 2010); *Farfaras v. Citizens Bank and Trust of Chicago*, 433 F.3d 558, 566 (7th Cir. 2006). “A new trial should be granted, however, ‘only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.’” *Whitehead*, 680 F.3d at 928 (quoting *Clarett v. Roberts*, 657 F.3d 664, 674 (7th Cir. 2011)). As long as there is “a reasonable basis exists in the record to support the verdict, viewing the evidence in the light most favorable to the prevailing party, and leaving issues of credibility and weight of evidence to the jury,” the verdict should stand. *Kapelanski*, 390 F.3d at 530.

Defendants have challenged the compensatory damages verdict on several grounds, with some having more traction than others. There is room to view the \$400,000 verdict as a high number, but it does not “cry out to be overturned” or “shock the conscience.” As explained

below, there is a reasonable basis in the record to support the jury's findings with respect to Otis's claimed lost revenue, lost rent and emotional distress.

A. Lost Revenue

Defendants argue that Otis's claim of lost revenue (\$89,000) ignores the fact that Otis operated a partnership with Susan McDonald and that, at most, Otis should be entitled to only half the award. Indeed, assert the defendants, there is no evidence that Otis would have received *any* of this claimed revenue because she testified that she had never received any in the past.

Defendants cite no legal authority for their offset argument. *See Clarett*, 657 F.3d at 674 (“We have repeatedly held that undeveloped arguments are considered waived.”). As Otis points out, defendants were free to challenge Otis's calculations *in limine* or on cross-examination and argue them specifically to the jury, but they failed to do so. As a result, the jury heard testimony from both McDonald and Otis and saw documents regarding the partnership, including Otis's testimony that she reinvested all of the revenues from the wine bar back into the business. From these facts, the jury reasonably could have concluded that the lost revenues from the Wine Bar would have been reinvested in the business and not divided among Otis and McDonald. Finally, McDonald's rights *vis-a-vis* those of Otis depend on the agreement reached between those individuals, which was not the subject of this lawsuit. Without evidence to the contrary, it was reasonable for the jury to conclude that Otis was entitled to the full amount of the bar's lost revenue.

Defendants next argue that Otis did not set forth a reasonable basis for calculating her lost revenue, excluding the bar's average receipts for nights with live music between September 2006 and June 2007. In other words, they criticize Otis for using receipts from July, August and

September 2007, the bar's three strongest months, and excluding the bar's poorer performing months. Otis responds that as with their previous challenge, defendants did not raise this issue in a motion *in limine*, on cross examination or in their closing argument at trial and failed to produce their own evidence challenging the basis of Otis's calculations. Without contradictory evidence, the jury was entitled to conclude that the July through September figures were representative of all months in which outdoor seating occurred at the bar.

Defendants assert that because the Wine Bar made significant changes to its operations in May 2008 by opening seven days per week, comparing receipts from before and after that time is meaningless. According to defendants, the changes caused revenue to be dispersed over more business hours. It is unclear what defendants are arguing. Do they contend that Otis's nightly revenues on any given night were reduced because she opened the bar on more nights? If so, they have not provided any basis for this contention. In any event, it would be illogical to infer that the expanded hours would cause patrons who frequented the bar on weekend nights to stop their weekend visits and choose to go to the bar during the week. As Otis notes, she limited her calculations to only those nights when live music was played, not the additional nights. For example, after initially arguing otherwise, defendants recognize in their reply brief that Otis did not include Wednesday "open mic" nights as a live music night.

Equally unsupported and unpersuasive is defendants' argument that as of June 2009, the Wine Bar was an entirely new business because McDonald no longer was involved with it. Defendants rely on the Seventh Circuit decision in *TAS Distrib. Co., Inc. v. Cummins Engine Co., Inc.*, 491 F.3d 625, 633, to argue that the "new business rule" bars recovery for lost profits of a new business as too uncertain and remote to permit recovery. But as Otis points out, *TAS* is inapposite because it involved the application of Illinois state law in a contract case. *See id.*

(citing Illinois case law for general rule that “expected profits of a new commercial business are considered too uncertain, specific and remote to permit recovery”). In any event, the evidence adduced at trial showed that Otis ran the Wine Bar, not McDonald, and that the business’s main draw was Otis’s music. The fact that Otis revamped the business plan in late 2008 and 2009 did not make the Wine Bar a “new” business or commercial undertaking. Otis also did not base her calculations on expected profits for 2008 and 2009; she used her actual revenue for those years.

B. Lost Rent

Defendants argue that Otis’s calculations of her lost rent are flawed because she incorrectly claimed that she lost the use of her retail space, courtyard and the original Wine Bar and the “danger stage”⁴ after September 28, 2007. Defendants point out that the Wine Bar continued to use all three spaces after the ordinance was enacted and paid rent, at least through September 2008. Otis responds that this argument is based on the faulty premise that she claimed lost rent beginning in 2007 and incorrect assumptions about how she used the spaces after she lost her tenants. As Otis points out, in making their argument, defendants rely on “Exhibit #4,” which was never entered into evidence at trial.

Contrary to defendants’ assertions, Otis did not claim lost rent dating back to October 2007. Evidence adduced at trial shows that McDonald paid Otis \$2,100 a month in rent for the Pavilion, which occupied the front 40% of Otis’s building. The Wine Bar paid \$3,400 a

⁴ So named because of the danger it posed to those who played on it: the “stage” was a narrow ledge about eight feet above the bar floor without a guardrail and accessible only by clambering through an interior window. Musicians who played from this perch dubbed themselves “The Danger Band.”

month in rent for the back 60% of the building. Otis testified that the Wine Bar stopped paying rent in October 2008 and the Pavilion stopped paying rent in January 2009. Trial Exhibit #3, which *was* entered into evidence, shows that Otis claimed lost rent starting in October 2008 for the Wine Bar and in January 2009 for the Pavilion. Further, beginning in June 2009, Otis began using a small portion of the front retail space formerly belonging to the Pavilion to sell some inventory that she had purchased. Otis testified that she was claiming lost rent only for the portion of the Pavilion that she was not using for herself between January 2009 to June 2011. This fact also is confirmed by Trial Exhibit #3.

Defendants also argue that Otis lost rent on the two spaces only as a result of her own choice to operate her own businesses there instead of seeking out a third party tenant. However, Otis testified at trial that she tried to rent out the back 60% of her building but was unsuccessful in finding a tenant. Her first five attempts to obtain financing to continue the business on her own also failed. Otis testified that she finally was able to secure another liquor license by the summer of 2009. However, when she went to apply for a music permit in 2010, she was denied the permit, which limited what she was able to do with the Wine Bar space. According to Otis, revenues were too low to pay the rent until the summer of 2011.

From the evidence of record, the jury reasonably could conclude that Otis was entitled to lost rent for the back space from October 2008 through June 2011 and for the portion of the front space that she was not using from June 2009 through June 2011. Although it would have been possible for the jury to have concluded that Otis should have done more to mitigate her lost rent, they chose to credit Otis's account of the difficulties she faced in the aftermath of the ordinance. It is not this court's job to supplant the jury's judgment with its own. *Whitehead*, 680 F.3d at 928 (court cannot grant new trial just because it believes jury got it wrong).

Finally, defendants briefly state in a footnote in their supporting brief that any “loss of usefulness” of the Wine Bar space was already part of the Wine Bar’s lost revenue calculation. *See* dkt. 112 at 10, n.2. In their reply brief, they take issue with the fact that there was a “total overlap between [Otis’s] lost Wine Bar revenue calculation and her lost rent calculation.” Essentially, defendants seem to be concerned that Otis double-dipped at trial and received the same damages twice from the jury. Defendants’ terse argument is too little too late. Although the footnote at least seems to front this issue (if I am interpreting the footnote, standing alone, correctly), defendants did not raise this issue in any meaningful way that would have allowed Otis to address it more directly in her response regarding the challenge to her calculation of her rent losses (*see* dkt. 117 at 12-16). This constitutes waiver. *Citizens Against Ruining the Environment v. E.P.A.*, 535 F.3d 670, 675-76 (7th Cir. 2008). In their reply brief, defendants clarify their argument, *see* dkt. 119 at 9-10, pointing out that if Otis considers herself to be both landlord and tenant, then she is not entitled to an award of both her lost revenue from the Wine Bar and her lost rent from the wine bar as its landlord. It would have been helpful to hear what response Otis had to this specific argument, but by the time defendants fleshed out their point, briefing was over.

Even if this court were to consider defendants’ argument on its merits, it still is not sufficiently developed for the court to conclude that a remittitur is necessary, let alone a new trial. *See Long v. Teachers’ Retirement System of Illinois*, 585 344, 349 (7th Cir. 2009) (unsupported and undeveloped arguments are waived; a party may waive an argument by disputing a district court’s ruling in a footnote or a one-sentence assertion that lacks citation to record evidence). In their post-trial briefs, as at trial, defendants never actually crunch any rent payment/receipt

numbers, perhaps because their view is absolutist: Otis suffered no loss of rental income (as well as no loss of revenue from her businesses, and no compensable emotional distress).

There certainly would have been room to argue that it would be double-counting for the jury to award Otis lost rent as a landlord based on the failure of the Wine Bar to pay its rent and also to award Otis all of her claimed lost gross revenue from the Wine Bar if some of that revenue would have been used to pay the rent. At trial, the jury heard from Otis and her former business partner, McDonald, about the intertwined business interests in Otis's building—keep in mind, there also was an on-and-off, rent-paying retail operation at the front of the building—and how, over the relevant time period, gaps in operation, gaps in revenue and gaps in rent payment came and went, with McDonald and Otis offering differing opinions about why. To the extent that Otis presented evidence proving lost rent that would not have been paid out of the lost revenues of the Wine Bar, it would have been within the jury's discretion to award this lost rent as damages.

Conversely, lost rent that would have come out of the Wine Bar's lost revenue should not be awarded twice. Defendants, by counsel, made this very argument to the jury in their closing argument (*see* dkt. 98 at 27) in addition to their general argument that Otis had proved no damages whatsoever: no lost rent, no lost revenues, no remodeling costs, no emotional distress. At the close of the arguments, the court instructed the jury that it was plaintiff's burden to prove any compensatory damages by a preponderance of the evidence, that the jury must base its answer on evidence that reasonably supported its determination of damages under all the circumstances of the case and that the jury should award as damages the amount that the jury found fairly and reasonable compensated plaintiff for her injuries. *See* dkt. 93 at 2. Because we presume that juries follow instructions, *see Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 643 (7th

Cir. 2011)(a case in which the court gave an instruction to the jury that *invited* double recovery, *id.* at 640-42), because defendants brought this exact double-counting possibility to the jury's attention and because there is nothing to suggest that jury actually did double-count lost rent from the Wine Bar, there is no basis for the court now to conclude that the jury did double-count.

Further, as a practical matter, in their post-trial attack on Otis's claim for lost rent, defendants have provided no specific numbers, no specific citations to the exhibits or the testimony and no calculations that might show how much of a remittitur they might want on this point.⁵ Rather, their point is that this is just one of many flaws in the jury's verdict that militate toward judgment as a matter of law or a new trial. Viewed from this perspective, defendants' argument loses force. Then it becomes just a variation on defendants' recurring theme that the jury reached the wrong conclusion. Duly noted. This is not a basis to quash the verdict or order a new trial. The court is left to look at the verdict as a whole, and as already noted, although the jury's award of compensatory damages is high, I cannot conclude that on these facts it was so far afield as to have resulted in a miscarriage of justice.

C. Emotional Distress

Defendants ask the court to reduce the emotional damages award, which they surmise amounts to approximately \$112,000 (based on their assumption that the jury awarded Otis every dollar she claimed in business-related damages then subtracting the total from \$400,000).

⁵ Even defendant's proposed special verdict form would not have shed light on their concern over double-counted lost rent because the four categories defendants wanted the jury to consider were: "a. Loss of business revenue; b. Internal building remodeling expenses; c. Loss of reputation; d. Humiliation and emotional distress." Dkt. 80 at 1.

Defendants claim that a reduction is necessary because Otis never received any medical attention for her emotional distress. They assert that the main cause of Otis's claimed distress was the police raid, which involved no arrests, citations, violence or confrontations.

Given the general damages verdict, we don't know how much money the jury actually awarded in non-pecuniary damages, but it's fair to surmise that it was at least \$112,000; it may well have been more. Even so, defendants have not shown that there is no rational connection between the award and the evidence or that the award is not roughly comparable to those made in similar cases. *See Thompson*, 625 F.3d at 408 (citing *Deloughery v. City of Chicago*, 422 F.3d 611, 621 (7th Cir. 2005)) (Seventh Circuit has upheld six-figure awards for non-pecuniary loss even when plaintiff did not seek professional assistance).

As with many of their other challenges, defendants have not developed their argument with respect to remittitur in any meaningful way. The only case that defendants cite in support of their argument is *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1229 (7th Cir. 1995), in which the Seventh Circuit agreed that an award of \$21,000 was "too much for a moment's pang of distress at being fired, even distress enough to make a grown man cry who believes—and we do not mean to criticize such a belief—that crying is shameful in a man." The court determined that Avitia's stress was relatively short-lived because he had found another job within three months. *Id.* The court of appeals found that a remittitur of \$10,500 was necessary to keep the award "within the limits of the rational." *Id.* at 1230.

Unlike the situation in *Avitia*, Otis's distress was not limited to a one-time incident. Otis testified that she suffered long-term stress and anxiety as a result of her repeated conflicts with intransigent city officials, the loss of her live music venue, the implosion of her business partnership and friendship with McDonald and all of the resultant financial woes. Otis testified

that over the year and a half that she suffered this distress, she lost weight, had trouble sleeping, felt bad about herself and suffered hair loss. Although I did not act as a fact-finder at trial, I heard every witness testify and saw every witness's demeanor. Given how Otis presented, it would not surprise me if the jury concluded that she was a sensitive musician who was naive about the machinations of small-town politics and business, which caused her to suffer long-term genuine emotional distress from words and conduct that might have bounced off of McDonald, a savvy businesswoman with thicker skin.⁶ Perforce, there was ample evidence for the jury to conclude that Otis had endured ongoing, personally debilitating distress. *See Deloughery*, 422 F.3d at 615 (upholding \$175,000 award where plaintiff did not seek professional help after being denied promotion but testified to her devastation, described obstacles she had overcome and explained impact of decision on herself and her family).

Considering all of the evidence presented at trial, the general deference owed to the jury's decision, defendants' failure to identify comparable cases with lower emotional damages awards and the short-shrift that defendants gave their overall argument, I conclude that defendants have failed to show that the award in this case is so far outside of the realm of reason as to be "monstrously excessive." An award exceeding \$100,000 is within the limits of rationality under these circumstances.

⁶ An example of Otis's palpable sensitivity is how she chafed during cross-examination at routine, politely-asked leading questions, *see* dkt. 99 at 103-04 and 110-12. Perhaps a different jury would have found Otis to be irritatingly hypersensitive and therefore not entitled to one thin dime for lacking the backbone to stand up to the Hayward City Council, but *this* jury determined that Otis was the victim and defendants were the bullies. That was the jury's call to make, and there is sufficient evidence in the record to uphold this call.

CONCLUSION

At trial, both sides presented all the witnesses and testimony they deemed relevant, offered exhibits, cross examined opposing witnesses, argued their theories and suggested appropriate outcomes to the jury. As is clear from the size of their award, the jury vigorously disagreed with defendants' assertion that Otis suffered no damages whatsoever. \$400,000 is a sizeable verdict, but it is neither excessive nor unreasonable once the jury accepted Otis's version of events and rejected defendants' version. Contrary to defendants' repeated assertions to the contrary, there is sufficient evidentiary support for this verdict. Clearly, the jury *could* have reached a different verdict on this evidence, but it is pointless for the defendants to argue that it *should* have. The defendants had their day in court, the jury found their conduct wanting and there is no basis in fact or law for this court now to relieve defendants from the jury's verdict.

ORDER

IT IS ORDERED that defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), dkt. 110, and alternative motion for a new trial or remittitur pursuant to Rule 59(a), dkt. 111, are DENIED. Defendants' motion to stay execution of judgment, dkt. 113, is DENIED as moot.

Entered this 23rd day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge