

Meza v Dutch Vortex LLC
2025 NY Slip Op 35266(U)
March 20, 2025
Supreme Court, New York County
Docket Number: Index No. 160934/2020
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57M

Justice

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JONATHAN GUSTAVO MENDEZ MEZA,

INDEX NO. 160934/2020

Plaintiff,

- v -

Decision on In Limine Motions

DUTCH VORTEX LLC,37-11 30TH STREET HOLDINGS
LLC,SD BUILDERS AND CONSTRUCTION LLC,

Defendants.

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Pursuant to a decision and order dated June 5, 2024, the Court awarded Plaintiff summary judgment as to liability. A Damages Trial in this action is scheduled to commence on May 5th with jury selection. The parties have made a number of *in limine* motions which are consolidated herein and determined as set forth below.

Defendant’s Motion “To Ensure a Fair Voir Dire” & Jury Trial

Plaintiff argues that this motion is essentially a canned brief submitted by defense counsel in other actions. This would appear to be borne out by the Court’s review of the decision in *Harnarine v D Lia Realty LLC* 78 Misc3d 952 (2023) where the motion was denied by the court.

The Court grants this motion only to the extent of holding that counsel for all parties are expected to conduct themselves within the confines of the law during *voir dire* and the trial.

Defendant's Motion to Preclude Plaintiff's Counsel From Suggesting An Unreasonable Amount and Related Relief Is Denied

This motion is denied. Pursuant to CPLR §4016(b) counsel is entitled to refer in his closing remarks to a specific dollar amount that he believes to be appropriate compensation. Counsel is also permitted to make fair comments on evidence in the record.

Again, the Court assumes that attorneys for all parties will comport themselves within the confines of the law.

Plaintiff's Motion to Preclude Reference to Allegations From The Civil Rico Action Is Granted and Defendant's Motion to Permit Cross-Examination Of Dr. Gerling on The Allegations in That Suit Is Denied

The Court finds that the prejudice associated with introducing references to the federal lawsuit or allowing cross-examination on unproven allegations in the now dismissed action far outweighs any probative value.

Plaintiff's Motion to Preclude Reference to Who Paid Plaintiff's Medical Bills Is Granted

CPLR §4545 allows for evidence of collateral source payments to prevent double recovery. The Court agrees with Plaintiff that such evidence, which is appropriately submitted only to the Court and not the jury, would be properly offered at a post-trial collateral source hearing, but not at trial. To the extent that Defendant intends its opposition to be a request for post-note discovery of collateral source payments, that request is denied at this juncture, without prejudice to renewal after the trial and prior to any collateral source hearing. To the extent that Defendant seeks post note discovery of any third-party litigation funding that request is also denied. Such funding is not relevant to the issues before this Court, notwithstanding the alleged impact that any such funding may have on a potential settlement of this action.

Plaintiff's Motion to Preclude Reference to Plaintiff's Immigration Status

The parties agree that Plaintiff's immigration status does not preclude his recovery for lost wages. However, Defendants argue that to impeach Plaintiff's credibility, they should be entitled to submit evidence of illegal conduct by Plaintiff. Specifically, Plaintiff testified at his deposition that he unlawfully obtained a fake social security card and a fake permanent residency card, so that he could obtain employment. Plaintiff testified he purchased these documents in 2019 for \$120.00. This conduct was close in time to the alleged accident and should be allowed to be considered by the jury in assessing the credibility of the Plaintiff.

It is clear that if Plaintiff had been convicted of the acknowledged criminal conduct Defendant would be entitled to seek to impeach on the basis of said convictions pursuant to CPLR 4513 and subject to the Court's discretion. Even without a conviction case law allows evidence of dishonesty in assessing a witnesses credibility *see eg McNeill v LaSalle Partners* 52 AD3d 407 (1st Dept 2008).

Additionally, CPLR 3117(a)(2) provides in pertinent part:

... the deposition testimony of a party ... may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence

Therefore, the Court finds that Defendant may read into the record this deposition testimony and/or otherwise inquire as to this limited issue. However, if Defendant chooses to raise this issue, the Court will allow Plaintiff to request a charge be given to the jury in closing which may address that the jury may only consider such conduct in evaluating Plaintiff's credibility, that as a matter of law it in no way precludes him from seeking recovery for lost wages, and that the law

puts the onus on Defendant to verify any such documentation submitted by a prospective employee.

Defendant's Motion to Preclude Plaintiff from Claiming Lost Wages And Preclude The Testimony of Plaintiff's Economist at Trial Is Denied as Untimely

On November 21, 2024, this Court issued a pre-trial order directing that any motions *in limine* be served and filed by December 31, 2024. This motion which was essentially an addendum to opposition to one of Plaintiff's *in limine* motions was not filed until late January 2025 and is therefore denied as untimely. Thus, no order of preclusion will be granted.

However, Plaintiff acknowledges in his opposition that any lost wages claims must be supported by "relevant documentation." Presumably then such documentation would need to be in evidence for the Economist to testify regarding the amount of projected lost wages and in order to submit the issue to the jury.

Defendant's Motion to Preclude Plaintiff's Expert from Testifying at Trial is Granted only as to the Testimony regarding Future Costs & Necessity for Medical Treatments

The admission of expert opinion is a matter which rests within the discretion of the trial court, "[g]enerally, an 'expert' should be permitted to offer an opinion on an issue which involves 'professional or scientific knowledge or skill not within the range of ordinary training or intelligence'" (*Dufel v Green*, 84 NY2d 795, 797-798; *Dulin v Maher*, 200 AD2d 707), which both aids the jury and is relevant (*see, De Long v County of Erie*, 60 NY2d 296; *Franco v Muro*, 224 AD2d 579). *Reale v. Herco, Inc.*, 231 A.D.2d 619, 620 (1996).

Plaintiff goes to great lengths to characterize Dr. Guy as a treating physician in addition to an expert. This argument is somewhat disingenuous as Dr. Guy's first "evaluation" of

Plaintiff took place on January 29, 2025, eight months after the note of issue was filed in this action and over four years after the alleged injury was suffered.

Additionally, the only medical records Dr. Guy reviewed are dated between December 2020 and December 2022. Either Plaintiff received no treatment between December 2022 and Dr. Guy's evaluation in 2025 or Dr. Guy's opinion is not fully informed. In the latter case his opinion would not be reliable, in the former case Dr. Guy has failed to explain why Plaintiff went from needing no treatment between 2022 and 2025 to requiring the significant on going projected future treatment to which Dr. Guy opines.

The Court finds that the area of Dr. Guy's report that opines on the need for future treatment and the costs of that future treatment is speculative and conclusory. Dr. Guy does not state what the costs provided in his report are based on. He acknowledges that the projected future costs are not in any way based on the type of care that Plaintiff has elected to receive in the five years since the accident but on an "optimal level of care." He does not support his recommendation that the patient will need weekly physical therapy for the rest of his life. As far as the projected pain management required for the future there is absolutely no explanation as to why they are required for the rest of Plaintiff's life. Some of the projected future treatments are acknowledged by Dr. Guy as being speculative. For example, Item # 7 on page 4 of his report.

Additionally, many of the projected costs have a wide range because Dr. Guy is not sure what will be required. For example, for pain management Dr. Guy opines that in addition to having 3 cervical epidural injection per year, three sets of block injections per year, two sets of ablation procedures annually, and 12 trigger point injections annually, Plaintiff will require pain medication cost \$3000 -\$6000 annually "depending on medication, dosage and frequency" as the

dosages may vary from time to time. Future surgeries which may or may not be necessary are estimated to run between \$60,000 to \$100,000 each.

Dr. Guy is neither a pain management specialist nor a life care planner, the report he provides is entirely conclusory, and his projections are unsupported.

As such Dr. Guy may testify as a treating physician to the treatment he has provided, and any diagnoses he has made based on the treatment and his review of medical records but shall be precluded from offering expert testimony on future medical costs and life care planning.

Plaintiff's Motion to Preclude Jeffrey Passick from testifying is Denied Without Prejudice

Plaintiff appeared for an orthopedic independent medical exam on December 19, 2023. To date Defendants have not provided Plaintiff with a report from said examination. Defendants offer no satisfactory explanation for this. Defendants merely assert that at the time of the examination Dr. Passick did not have a complete set of Plaintiff's medical records to review. In their memorandum of law dated January 21, 2025, Defendants state defendants have provided Dr. Passick with a complete set of the plaintiff's medical records and await Dr. Passick's report.

Months later said report has yet to be provided.

The Court finds that this ongoing unexplained failure can only be described as willful and contumacious.

Defendant was repeatedly directed to provide the report in the PC orders. Additionally, 22 NYCRR §202.17(c) provides that copies of the reports of the medical providers making examinations pursuant to this section shall be served on all other parties within 45 days after completion of the examination.


However, Plaintiff's counsel was aware prior to filing the note of issue that he was not in receipt of the report and nevertheless filed a note of issue stating all discovery was complete,

including that all required medical reports had been exchanged, thereby waiving the right to seek relief pursuant to CPLR §3126 [*Escourse v. City of New York*, 27 A.D.3d 319, 320 (1st Dept. 2006)].

22 NYCRR §202.17(g) and 22 NYCRR §202.17(h) require that a party intending to offer the testimony of an examining physician must serve the medical report upon all parties at least 30 days prior to trial, which would also comport with the requirements of CPLR §3101(d).

In the event that Defendants fail to serve and file the report by April 4, 2025, Plaintiff may renew his motion.¹

This constitutes the decision and order of the Court.


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DATE: 3/20/2025

SABRINA KRAUS, JSC

Check One: Case Disposed Non-Final Disposition
Check if Appropriate: Other (Specify _____)

¹ The Court and Plaintiff were advised by Defendants’ counsel on March 20, 2025 via email that counsel is now in possession of the report and will be providing the Court and Plaintiff with a copy forthwith.