Riera v New York City Hous. Auth.
2026 NY Slip Op 31062(U)
February 6, 2026
Supreme Court, New York County
Docket Number: Index No. 159927/2021
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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JAIME P. RIERA,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 159927/2021

MOTION DATE 01/14/2026

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 212, 213, 214, 215, 216, 217, 218, 219, 220

were read on this motion to PRECLUDE.

Edelman & Edelman, P.C., New York, NY (Martin W. Edelman, Paul H. Maloney, and Cameron Thompson of counsel), for plaintiff.
Mauro Lilling Naparty LLP, Woodbury, NY (Adam J. Bobkin of counsel), for defendant.

Gerald Lebovits, J.:

In this Scaffold Law action, a jury trial is currently being conducted on the issue of plaintiff's damages. Plaintiff has moved under CPLR 4545 to preclude defendant from asking questions at trial (whether through cross-examining plaintiff's witnesses or eliciting testimony from defendant's witnesses) on whether plaintiff may mitigate his medical-cost damages through insurance coverage. (*See* NYSCEF No. 196 at 1.) Plaintiff has also moved to strike defendant's CPLR 4545 collateral-source affirmative defense altogether. The branch of the motion to preclude is granted. The branch of the motion to strike the affirmative defense is denied.

DISCUSSION

CPLR 4545 provides that when plaintiff "seeks to recover for the cost of medical care . . . custodial care or rehabilitation services," the court may consider evidence that "any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a statutory right of reimbursement." If "*the court finds* that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source*, it shall reduce the amount of the award* by such finding," except with respect to specified insurance-premium costs." (CPLR 4545 [emphases added].) The statute specifies that the court shall make any such collateral-source reduction *after* the jury renders a verdict; and that plaintiff "may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery." (*Id.*)

1. Plaintiff seeks to preclude one of defendant's expert witnesses, Susan Combs, from offering testimony at trial that many of plaintiff's claimed future medical expenses could be replaced by insurance coverage under a plan procured through the Affordable Care Act. (*See* NYSCEF No. 196 at 1.) Plaintiff contends that this anticipated testimony would "concern[] the availability, affordability and purported offsetting effect of ACA coverage—i.e., classic collateral source material" that should be considered by the court after a verdict, not by the jury during trial. (NYSCEF No. 197 at ¶¶ 21-22.) This court agrees.

Defendant offers several arguments why testimony about insurance coverage may properly be heard by the jury. None persuade.

2. Defendant asserts that because "the ACA plan proposed is not one that he purchased or will purchase himself, but one NYCHA will procure and fund," that proposed "ACA plan is not a source collateral to, or independent of, NYCHA" for purposes of the *common-law* collateral source rule. (NYSCEF No. 212 at 4-5.) But that common-law rule has been superseded by CPLR 4545. And CPLR 4545's applicability does not turn on whether the payment source at issue is, or is not, independent of the defendant.[1]

3. Defendant claims that because the anticipated testimony of one of plaintiff's expert witnesses, Kimberly Kushner, is that plaintiff will need the help of a case manager "to assist with care coordination and implementation of physician and therapist recommendations," plaintiff has opened the door to cross-examination of Kushner (and testimony from Combs) on collateral-source topics. (NYSCEF No. 212 at 7, quoting NYSCEF No. 213 at 21 [Kushner expert disclosure].) This court disagrees that the door has been (or will be) opened.

Defendant's position is that because one of the things case managers do is find sources of cost savings for their clients, such as insurance coverage and other collateral sources, defendant should be able to cross-examine Kushner before the jury about whether the medical costs that she forecasts are realistic. (*Id.* at 8-9.) This position, though, is little more than an argument that plaintiff's claimed medical-cost damages are too high because a substantial increment of those damages will be replaced by a collateral source. As discussed above, that argument is one to be made to the court after verdict, not to the jury before verdict. And the sole case that defendant provides to support its door-opening theory, the Appellate Division's decision in *Havas v Victory Paper Stock Co.*, involved circumstances in which plaintiff's counsel expressly referenced collateral sources in his opening, and elicited testimony on direct about other collateral sources. (*See* 90 AD2d 864, 865 [3d Dept 1982].) Here, on the other hand, any identification of collateral sources would require drawing inferences from parts of Kushner's anticipated testimony combined with extra-record information relied on by defendant—not from the testimony itself. That is a materially different scenario.

[1] Defendant does not contend that CPLR 4545 carried over any common-law independent-payment-source requirement to apply the collateral-source rule. And the cases defendant cites to support its independent-source argument either precede CPLR 4545 or describe the common-law rule as it existed before CPLR 4545. (*See* NYSCEF No. 212 at 5-6.)

4. In support of its motion, plaintiff identifies expert witnesses who, if called, would likely testify that plaintiff's entitlement to workers'-compensation benefits would preclude obtaining insurance under the Affordable Care Act. (*See* NYSCEF No. 197 at 4-6.) In opposition, defendant argues that in light of these expert opinions, Kushner should be precluded from offering testimony about medical costs that exceed the workers' compensation fee schedule. (NYSCEF No. 212 at 13-16.) This argument is without merit.

It is undisputed that after the entry of judgment in this action, the Workers' Compensation system will cease making payments to plaintiff for medical costs until the total amount of the payments that plaintiff would otherwise receive exceeds his net damages recovery in this action.[2] (*See* Workers' Compensation Law (WCL) § 29 [4]; *Burns v Varriale*, 9 NY3d 207, 213-215 [2007].) Plaintiff argues that this halt in payments (sometimes referred to as a payment "holiday") does not oust his workers'-compensation coverage itself—and therefore that other sources of insurance (such as an Affordable Care Act plan) will remain unavailable to him. (*See* NYSCEF No. 197 at ¶¶ 25-29; NYSCEF No. 241 at ¶¶ 10, 14.) Defendant points to plaintiff's acknowledgement that Workers' Compensation will stop paying him benefits during the period of the WCL § 29 (4) benefits "holiday"; and defendant suggests that plaintiff will be able to obtain other forms of health insurance (such as an Affordable Care Act plan). (*See* NYSCEF No. 242 at ¶¶ 17-20.) But defendant does not specifically contend that during the benefits holiday Workers' Compensation will cease to be plaintiff's primary payor as a *coverage* matter, such that other insurance-payors could take its place.

Under *either* understanding of the effect of WCL § 29 (4), though, there is no merit to defendant's position that Kusher's testimony about future medical costs should either be precluded or subject to cross-examination before the jury. If plaintiff is correct that he will be responsible to pay health-care costs at market rates out of his recovery in this action (because workers'-compensation payments will cease under WCL § 29 [4] without being replaced by other sources of insurance), defendant's proffered basis for preclusion or cross-examination falls away. If defendant is correct that plaintiff will be able to reduce his future medical costs by obtaining other insurance during the § 29 (4) workers-compensation holiday, those reductions would constitute collateral sources that may be considered only after the jury has reached a verdict.[3]

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[2] The sole exception to this rule applicable here is a lump-sum payment following the entry of judgment, made under WCL § 29 (1). The amount of that payment is derived from (i) the amount of the workers'-compensation carrier's lien on plaintiff's recovery in this action (based on benefits already paid) plus the present value of the future estimated benefits that would otherwise be paid, multiplied by (ii) "the percentage of litigation expenses claimant incurred compared to claimant's total recovery." (*Burns*, 9 NY3d at 215 n 4, citing *Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 135 [1983].)

[3] This court is unpersuaded by defendant's argument that it should be permitted to cross-examine Kushner on any discrepancy between the amounts billed by medical providers and the amounts that plaintiff will ultimately have to pay, "as the law clearly limits [plaintiff's] recovery to the actual costs of his care." (NYSCEF No. 242 at ¶ 12.) The cases cited by defendant in support of this argument address circumstances in which billed amounts were written off altogether by the treating providers—not circumstances in which billed amounts were owed but covered through

5. As noted above (*see* n 2, *supra*), plaintiff will be entitled to receive a workers'-compensation payment under WCL § 29 (1) for the carrier's equitable share of the litigation costs incurred in obtaining plaintiff's net recovery in this action. Plaintiff does not dispute that this payment, at least, will constitute a collateral source governed by CPLR 4545. (*See* NYSCEF No. 241 at ¶ 19.) At a minimum, therefore, a post-verdict collateral-source hearing will be required to determine the amount of the payment. The branch of plaintiff's motion seeking to strike altogether defendant's collateral-source defense is denied.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking to preclude defendant from referencing at trial, "by question, testimony, exhibit or argument," ways in which plaintiff could mitigate his damages through collateral sources is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking to strike defendant's third affirmative defense, asserting a right to a post-verdict setoff under CPLR 4545, is denied.

2/6/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

collateral sources like insurance. (*See id.*, citing *Rendon v White Castle Sys., Inc.*, 241 AD3d 1373, 1377-1378 [2d Dept 2025], and *Kastick v U-Haul Co. of W. Mich.*, 292 AD2d 797, 798 [4th Depth 2002].)