

Chelli v Banle Associates LLC

2003 NY Slip Op 30067(U)

April 25, 2003

Supreme Court, Queens County

Docket Number: 0000841/0841

Judge: Frederick D. R. Sampson

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**DUPLICATE ORIGINAL
M E M O R A N D U M**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART TT31

-----X
JORGE CHELLI,

Plaintiff(s),

-against-

BANLE ASSOCIATES LLC,

Defendant(s).

-----X
BANLE ASSOCIATES LLC,

Third Party Plaintiff(s),

-against-

P.N.M. ELEVATOR CORP,

Third Party Defendant(s).

-----X

HON. FREDERICK D.R. SAMPSON

BY: **SAMPSON, J.**

INDEX NO.: 841/01

DATED: April 25, 2003

The plaintiff herein who was injured while employed by P.N.M. Elevator Corp. when he was struck in the head by an iron beam, was awarded a total of 4.5. million dollar for pain and suffering upon a jury verdict rendered on January 27, 2003.

By motion argued on March 25, 2003, defendant and third party plaintiff seeks an order pursuant to CPLR 4404, setting aside the jury's unfavorable determination upon its third party

action, finding that plaintiff did not sustain a “grave injury” as defined by Workers Compensation Law sec 11; and a further order vacating and setting aside the plaintiffs award for “pain and suffering” as being excessive.

Workers' Compensation Law section 11 provides in pertinent part that:

“An employer shall not be liable for contribution for injuries sustained by an employee acting within the scope of his employment for such employer unless such third person proves through competent medical evidence that such employee sustained a grave injury....”

Grave injury is defined under this provision as “... permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers or an acquired injury to the brain caused by an external physical force resulting in permanent total disability..”

BANLE ASSOCIATES LLC (herein referred to as BANLE) claims as error, the failure of the trial Court to determine as a matter of law, whether plaintiff sustained a grave injury, as opposed to this being presented as a factual question for the jury's determination.

At the outset, BANLE never sought a non jury trial of its third party action. During the pre trial stage of this action, it sought summary judgment on the issue whether plaintiff sustained “grave injury”. By order and decision dated November 22, 2002, its application was denied by the court, upon a finding that factual issues exist as to the question presented. No reargument or renewal of the motion was sought; nor was an appeal taken. BANLE in paragraph five of its reply affirmation concedes that it was not aggrieved by the Courts decision; and does not dispute the determination that factual issues are presented as to whether plaintiff sustained a “grave injury”.

Further, the conflicting medical testimony adduced at trial raises factual questions which required resolution by the trier of the fact. Additional error is alleged by BANLE being required

on one hand to minimize plaintiff's injuries on the main action and on the other hand, being required to establish before the same jury that plaintiff sustained a "grave injury".

This claimed error was created by BANLE's own failed trial strategies. It was BANLE who commenced the third party action sounding in contribution and indemnification. The third party plaintiff could certainly have avoided this tactical problem by commencing a separate action subsequent to a determination of liability. Prior to the start of trial BANLE opposed P.N.M.'s motion for severance and did not object to presenting the "grave injury" issue to the jury.

In advancing its position that plaintiff sustain a "grave injury as a matter law, BANLE argues a test advanced by the Appellate Division Third Department (*Way v Grantling* 289 AD2d 790) which established an employability standard, a standard which has not been adopted by Appellate Division Second Department (see *Carella v Reilly & Associates* 297 AD2d 326 citing *Meis v ELO Organization LLC* 97 NY2d 714).

As to BANLE's claim of error in the courts charge relating to "grave injury", this Court simply notes that it has followed Court of Appeals (*Meis v Elo Organization LLC supra*; *Carella v Reilly and Associates [Second Department] supra*) as to the statutory definition (*Worker's Compensation Law section 11*) by advising the jury that the terms used have their normal meaning.

Since the words used in defining "grave injury" have their normal meaning, the terms used were within the purview of the jurors common knowledge. There was no need for any Court intervention.

Lastly, BANLE argues that the jury's award for pain and suffering was excessive. The jury's award of damages, finds ample support in the record. Further defendant's own

arguments where it claims that plaintiff sustained a grave injury defeat its claims concerning the purported excessive award of damage for pain and suffering.

For all the reasons set forth, the application of defendant and third party plaintiff BANLE is denied.

This constitutes the Order and Decision of the Court.

Copy mailed to plaintiff _____

Defendant _____

Third Party Defendant _____

Third Party Plaintiff _____

J.S.C.