

**Olszewski v Park Terrace Gardens, Inc.**

2004 NY Slip Op 30143(U)

January 6, 2004

Supreme Court, New York County

Docket Number: 0101783/1999

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

*Hon. Nicholas Figueroa*  
PART 46

PRESENT: HON. NICHOLAS FIGUEROA  
Justice

*De la Cruz, + 501-1*

v

*Part 7 New York State Const.*

INDEX NO. 01783-11

MOTION DATE 1/3/04

MOTION SEQ. NO. 05

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*to accompany decision  
in order*

SCANNED  
JAN 07 2004

*102*

Dated: January 6, 2004

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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TADEUSZ OLSZEWSKI, ZOFIA OLSZEWSKA  
and JERRY GIELDOWSKI,

Index No. 101783/99

Plaintiffs,

- against -

PARK TERRACE GARDENS, INC., INSIGNIA  
RESIDENTIAL GROUP, TNC. and DJM  
CONTRACTING CORP.,

Defendants

**DECISION  
AND ORDER**

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PARK TERRACE GARDENS, INC., INSIGNIA  
RESIDENTIAL GROUP, INC. and DJM  
CONTRACTING CORP.,

Index Nos. 100393/99  
591671/99

Third-party Plaintiffs,

- against -

PLAZA RESTORATION, INC.,

Third-Party Defendants.

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Nicholas Figueroa, Justice:

Third-party defendant, Plaza Restoration, Inc. (Plaza), moves for summary judgment dismissing the third-party complaints based on common law indemnification of Park Terrace Gardens, Inc., Insignia Residential Group, Inc., and DJM Contracting Corp. (third-parties)

A jury trial resulted in a verdict on December 18, 2002 in favor of the worker, plaintiff Olszewski, which did not include a grave injury finding. Among other findings, the jury awarded plaintiff Olszcwski \$90,000 and \$200,000 for past and future lost earnings,

respectively.

Following the jury's verdict, the First Department reversed a pre-trial order which had been entered July 10, 2001 (Hon. Marilyn Schafer) dismissing all claims against Plaza for common law identification (*Olszewski v. Park Terrace, Inc.*, 306 A.D.2d 128). The appellate court's decision reinstated the common law indemnification claim, holding that it was error for the lower court to rely exclusively on plaintiffs bill of particulars in determining the existence of grave injury. Following that order, this court ordered an additional trial on the sole issue of whether plaintiff Tadeusz Olszcwski had suffered a grave injury (Workers' Compensation Law §11).

Plaza now alleges that plaintiff Olszewski's cognitive injuries are treatable, and not disabling. Therefore, it argues that Olszewski's cognitive injuries do not qualify as a grave injury, within the statute's meaning. Relying on trial testimony by a vocational expert, Joyce Spinello, Plaza contends that Olszewski is employable as a cashier or "in the field of security", and that with training, he would have even more employment options. Plaza also relies on the trial testimony of Dr. Richard Radna, a neurosurgeon, who testified that Olszewski did not exhibit any obvious cognitive defects.

In addition to the trial testimony, Plaza submits an affidavit by a neurologist, Brian Hainline, who also testified at trial. Dr. Hainline's affidavit is similar to the testimony he gave at trial. Third-party plaintiffs have not submitted an affidavit countering the Hainline affidavit. Based on his physical examination Dr. Hainline opines Olszewski's "subjective complaints regarding memory and word retrieval do not constitute a permanent and total disability. They are not permanent since they can be completely resolved over time with appropriate treatment.

In my view, his stated memory loss was intertwined with aspects of depression. Consequently, it is my opinion with reasonable medical certainty that a regimen of short, focused and regular psychiatric treatment will allow him to fully regain his memory and resolve his depress.”

Dr. Hainline further opines, “I have therefore concluded with reasonable medical certainty that plaintiffs brain injury did not result in permanent total disability and does not preclude plaintiff from gainful employment.”

Plaza next argues that the trial testimony revealed that Olszewski can walk without the assistance of a cane. can cook, converse, shower and dress himself. For instance, he uses public transportation to visit his health care providers.

In opposing the motion, third-parties argue that the First Department’s reversal of Justice Shafer’s order gives them the right to a trial on the grave injury question. Arguing that its decision is the law of the case, third-party plaintiffs argue that the First Department mandated that this court must conduct a trial on the grave injury issue. They assert that the First Department’s order reversing Justice Shafer’s decision, and thereby denying summary judgment, “is necessarily tantamount to a finding that material triable issues of fact exist, precluding summary relief..”

Third-parties next contend that this motion is barred as a successive summary judgment motion, and that because its first motion was denied, Plaza may not seek the same relief on a second summary judgment motion.

Third-parties also argue that were this court to determine the grave injury question on the merits, the jury findings at trial would preclude summary judgment. They argue that the damages award for future use of a wheel chair show that Olszewski permanently lost the use of a

leg: and, that the award of damages for past and future lost earnings shows that he is incapable of work. As a result of the later condition, the third-parties argue that Olszewski's injury qualify as a permanent, total disability, citing the Third Department decision, *Way v. George Grantling Chemung Contracting Corp.*, 289 A.D.2d 790).

Plaza, on the other hand, argues that the controlling case for determining whether a brain injury constitutes grave injury is the First Department's, *Barbieri v. Mount Sinai Hospital*, 264 A.D.2d 1). which does not make unemployability a test for a qualifying cognitive impairment.

The court rejects the third-parties' argument that it may not entertain this motion.

The Appellate Division reversed Justice Shafer's order because she relied solely on the bill of particulars in making her determination. The Appellate Division did not reach the merits of the grave injury question. The sequence of events in this case establish sufficient cause for this court to entertain this motion(see *La Freniere v. Capital District Transportation Authority*, 105 A.D.2d 517).

The facts on which grave injury may be determined have not been established at trial. Plaza now relies on those facts. as well as the Hainline trial evidence.

**At** the outset, the court rejects the argument that the award of expenses for a wheel chair demonstrates that Olszewski lost the permanent use of his leg. To hold otherwise, this court would have to "resort to forced or unnatural interpretations" of Workers' Compensation Law §11 (*Meis v. Elo Organization*, 97 N.Y.2d 714). The fact that Olszewski will require a wheelchair is not the equivalent of concluding that his legs are useless. The crucial question is whether Olszewski's unemployability means that he has a grave injury. In order to determine that question: the court must decide which of the two cases; *Barbieri v. Mount Sinai Hospital*, *id.* or

*Way v. Grading, id.*, controls. The court rejects the *Way* analysis (*Rubeis v. Aqua Club, Inc.*, 305 A.D.2d 656).

The First Department emphasized that a brain injury caused by an external physical force is grave if it results in *permanent total disability* (264 A.D.2d *id.* at 5) (emphasis in the original). Rejecting the grave injury claim, that court noted that the injured worker in question had periods of disorientation, some dementia, but retained his short-term memory, and that he was physically independent and ambulatory. They also took into account that during his examination, the worker seemed cognitively logical and goal oriented; however, he had “apparent slowness of speech and some distractibility.”

The court in *Way v. Grantling*, (289 A.D.2d at 793): found that proof of inability to engage in any competitive employment barred summary judgment (*id.*). The First Department, however, did not treat unemployability as a grave injury criterion.

Because this court finds that unemployability is not a relevant factor, it finds that Olszewski did not, as a consequence of his injuries, suffer a grave injury. His injuries are almost identical to those in *Barbieri v. Mount Sinai, id.*

The court of Appeals in *Meis v. Elo Organization, LLC*, 97 N.Y.2d 714, relying on *Castro v. United Container Machine Groups*, 96 N.Y.2d 398, held that injuries qualifying as grave should be narrowly defined. Were this court to use re-employability as a factor, it would give Workers’ Compensation Law § 11 an impermissibly broad reading by adding unemployability to the statutory criteria.

As the parties opposing summary judgment have failed to demonstrate that Olszewski suffered a grave injury, Plaza Restoration, Inc., is entitled to summary judgment. Therefore, is it

ORDERED that the motion for summary judgment by third-party defendant Plaza Restoration, Inc., is granted, and it is further

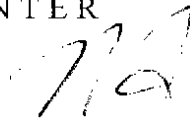
ORDERED that the third-party complaints are dismissed, and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that any party may restore the various motions and cross motions, previously marked off the calendar, to the calendar.

This constitutes the decision and order of the court.

Dated: January 6, 2004

ENTER

A handwritten signature in black ink, appearing to be "J.S.C.", written over a horizontal line.

J.S.C.