

Amarantinis v Emma

2008 NY Slip Op 30489(U)

February 13, 2008

Supreme Court, Nassau County

Docket Number: 5604-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN

J. S. C.

NICHOLAS AMARANTINIS,

Plaintiff,

- against -

MICHELE EMMA,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 5604/05

Motion Sequence No. 004, 005,
006

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2, 3</u>
Answering Affidavits	<u>4, 5</u>
Replying Affidavits	<u>6</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves (Motion Sequence #4) for an order pursuant to CPLR 4545 setting down a collateral source hearing on a date and time to be determined by the Court to determine the amount to be deducted from the jury verdict award pursuant to Insurance Law § 5100 *et. seq.* The defendant also moves (Motion Sequence #5) for an order vacating the restraining notices and orders served against the bank accounts of the defendant as reflected by the copies of such restraining notices annexed to the moving papers, and for an order vacating the judgment against the defendant in its entirety by reason of its invalidity, as a matter of law. The plaintiff cross moves (Motion Sequence #6) for an order pursuant to CPLR 4404, 2221 (d) and (e) setting aside so much of the jury verdict that awarded nothing for past and future pain and suffering. The underlying personal injury action was tried before

a jury which returned its verdict on the issue of damages on October 5, 2007, consisting of future damages from the date of the verdict, \$40,000.00 for future medical expenses, and \$10,000.00 for future medication expenses.

The defense attorney, Richard W. Miller, Esq., from the office of Robert P. Tusa, Esq., states, in a supporting affirmation dated October 15, 2007, the items in the jury verdict are included under basic economic loss as defined in Insurance Law § 5102 (a) (1). The defense attorney contends, as a matter of law, the first \$50,000.00 of basic economic loss is not recoverable. The defense attorney argues the jury verdict must be reduced by the balance of the total remaining of the first \$50,000.00, and to date the defense attorney is informed there is remaining excess of \$46,000.00 in unused basic economic loss. The defense attorney asserts a collateral source hearing is required, so the Court can hear evidence about the exact amount of remaining unused basic economic loss, and the Court can make the appropriate deduction from the jury award.

Another defense attorney, Marshall D. Sweetbaum, Sweetbaum & Sweetbaum, states, in supporting affirmation dated October 31, 2007, restraining notices or orders were served by the opposing side upon Citibank pertaining to three Citibank accounts numbered 57008056, 022437784, and 57008046 in its branch on Veteran's Memorial Highway, Hauppauge, New York. The defense attorney states he was informed of this circumstance by the defendant's husband who advised the defense counsel these bank accounts two of which are jointly held with his wife were restrained by means a restraining notice served upon Citibank. The defense attorney asserts this action caused a great hardship to the defendant

and the husband because their money is directly deposited for mortgage payments and other vital payments. The defense attorney points out the entire judgment is fully covered by liability insurance with Allstate Insurance, and there is no possibility the plaintiff would not be paid, so there is no need for any execution to be levied against the defendant. The defense attorney avers a collateral hearing is in appropriate here because there is no necessity to determine what if anything may have been paid to the plaintiff as a collateral source since the underlying matter deals exclusively with no fault issues. The defense attorney points out, under Insurance Law Article 5100, economic loss may not be recovered in any automobile related personal injury action unless it exceeds \$50,000.00, and the plaintiff here is bound by this legal constraint, since the award did not exceed that amount. The defense attorney argues the jury award must be vacated, and the judgment upon which it is based must be vacated and set aside.

The plaintiff's attorney states, in an affirmation dated November 13, 2007, in opposition to the defense motion, and in support of the plaintiff's cross motion, though the jury found the plaintiff suffered a serious injury and awarded \$50,000.00 for future medical expenses, the jury awarded nothing for past and future pain and suffering. The plaintiff's attorney submits this inconsistency represents juror confusion, and it is against the weight of the evidence, so the jury verdict should be set aside since there was no award for past nor future pain and suffering, and a new trial should be granted on the issue of past and future pain and suffering. The plaintiff's attorney asserts no collateral hearing is indicated, and the jury award for future medical expenses should not be reduced since all of the expenses were

future expenses not ascertainable within one year of the date of the accident. The plaintiff's attorney points to the defense examination of the plaintiff's medical expert, case law and the pattern jury instructions, specifically PJI § 285A in support of the plaintiff's contentions.

The plaintiff's attorney states, in another affirmation dated November 15, 2007, in partial opposition to the defense motion for an order removing the restraining notices and orders served upon Citibank, and in opposition to the motion for an order vacating the judgment, the plaintiff does not oppose removing the restraining notices and orders served upon Citibank pertaining to the three Citibank accounts numbered 57008056, 022437784, and 57008046 in its branch on Veteran's Memorial Highway, Hauppauge, New York. The plaintiff's attorney states the plaintiff strongly opposes the motion for an order vacating the judgment which was properly submitted and entered based upon the jury verdict in favor of the plaintiff. The plaintiff's attorney maintains there was nothing improper about the entry of the judgment, so vacating it would be improper. The plaintiff's attorney asserts the defense motion to vacate the judgment contains essentially the same arguments the defendant made in support of the motion for a collateral source hearing which is also without merit. The plaintiff's attorney distinguishes the case law cited by the defense for support of the defendant's contentions.

The defense attorney, Joel A. Sweetbaum, Sweetbaum & Sweetbaum, submits, in an affirmation dated November 16, 2007, in reply to the plaintiff's opposition to the defense motion, and in opposition to the plaintiff's cross motion, the jury award for future expenses should be vacated entirely since the award constitutes basic economic loss. The defense

attorney counters the plaintiff's assertions about the defense examination of the plaintiff's medical expert, case law and the pattern jury instructions, specifically PJI § 285A.. The defense attorney asserts the plaintiff has not plead and proved, as a matter of law, economic loss greater than basic economic loss. The defense attorney points out the jury did not specifically state the medication and medical expense awarded could not be ascertainable within the one year period following the accident notwithstanding counsel's statement regarding the doctor's testimony, so \$50,000.00 should be vacated from the jury award. The defense attorney avers, based upon all of the evidence, the jury was entitled to render its award finding the plaintiff did not have any past nor future pain and suffering, so there is no basis for medical since one cannot recover medical expenses when not suffering any future pain. The defense attorney argues the jury verdict the plaintiff did not sustain a permanent consequential limitation of use of a body member, and the plaintiff was not disabled for the first 90 out of the 180 days immediately following the accident is consistent with the jury's verdict of nothing for past and future pain and suffering.

The plaintiff's attorney states, in a reply affirmation dated November 19, 2007, in further support of the plaintiff's motion, and in further opposition to the defense motion, contrary to the defense assertion, the plaintiff did show the medical expenses awarded by the jury were not ascertainable within one year of the accident. The plaintiff's attorney points to the plaintiff's medical expert and case law authority in support of the plaintiff's contentions. The plaintiff's attorney challenges the defense assertions, and states there in no merit to the defense argument the jury did not find serious, and there was no evidence of juror confusion.

This Court has carefully reviewed and considered all of the parties's papers on these motions and cross motion. The Court finds, as a matter of law, there is no need for a collateral source hearing nor a new trial on the issues of past and future pain and suffering. The parties agree the restraining notices and orders served against the bank accounts of the defendant and her husband should be vacated.

New York's no-fault insurance law expressly provides that basic economic loss incurred as a result of the use or operation of a motor vehicle is not recoverable in a personal injury action (*see* Insurance Law § 5104 [a]). Basic economic loss is defined as including the first \$50,000 of medical expenses (*see* Insurance Law § 5102 [a] [1]). The Supreme Court properly granted the defendant's post-verdict motion to set aside the jury's award of \$33,259.48 for the plaintiff's past medical expenses and properly entered judgment accordingly (*see Tsamasiros v. Hughes*, 5 A.D.3d 377, 772 N.Y.S.2d 525; *Lloyd v. Russo*, 273 A.D.2d 359, 360, 709 N.Y.S.2d 589; *Ellis v. Johnson Motor Lines*, 198 A.D.2d 258, 259, 603 N.Y.S.2d 523). *Aparicio v. Fazio*, 32 A.D.3d 447, 448, 820 N.Y.S.2d 307 [2nd Dept., 2006].

As a matter of law, the jury award for loss of earnings and hospital expenses must be reduced to zero, because the first \$50,000 in medical expenses and lost earnings constitutes basic economic loss, which is not recoverable (*see*, Insurance Law § 5102 [a] [1], [2]; *see also*, *Shalom v Sahani*, 137 AD2d 454) *Ellis v. Johnson Motor Lines, Inc.*, 198 A.D.2d 258, 259, 603 N.Y.S.2d 523 [2nd Dept., 1993].

Following our review of the record, we find that, since this was a personal injury action between two persons who were covered under Insurance Law § 5102 (a) (1) and § 5104 (a), the jury award of \$56,500 for the past and future medical expenses must be reduced by \$50,000, as the first \$50,000 in medical expenses constitute basic economic loss, which is not recoverable (*see*, *Hughes v. Ryder Truck Rental*, 125 AD2d 177, 178 [1st Dept 1986], lv denied 69 NY2d 609 [1987]) *Shalom v. Nahani*, 137 A.D.2d 454, 524 N.Y.S.2d 714 [2nd Dept., 1988].

Accordingly, the motion (Motion Sequence #4) for a collateral source hearing is denied, the motion (Motion Sequence #5) to vacate the restraining notices and orders served

against the bank accounts of the defendant and her husband as reflected by the copies of such restraining notices annexed to the moving papers, and for an order vacating the judgment against the defendant, as a matter of law, is granted, and the plaintiff's cross motion (Motion Sequence #6) for an order pursuant to CPLR 4404, 2221 (d) and (e) setting aside so much of the jury verdict that awarded nothing for past and future pain and suffering is denied.

So ordered.

Dated: **February 13, 2008**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

FEB 19 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**