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

PRESENT: SHAFER HON. MARILYN SHAFER, JSC PART 8
Justice

ADAMS, WALTER

INDEX NO. 116382/00

MOTION DATE

-v-

MOTION SEQ. NO. 06

GENIA INDUSTRIES, INC. ET AL.

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for a stay

	PAPERS NUMBERED
~~Notice of Motion/~~ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits Bill of Costs, affirmation	4, 5, 6
Replying Affidavits	7, 8, 9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted in part and denied in part in accord with the annexed memorandum.

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Jan. 16, 2009

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

WALTER ADAMS,

Plaintiff,

-against-

GENIE INDUSTRIES, INC., and

Defendant.

INDEX NO. 116382/2000

MOTION DATE _____

MOTION SEQ. NO. 006

The following papers, numbered 1 to 9,[1] were read on this motion, pursuant to CPLR § 2201 to stay execution of plaintiff's proposed judgment pending scheduling of a hearing pursuant to CPLR Article 50B:

	PAPERS NUMBERED
Notice of Settlement – Judgment	1,2
Affirmation – Exhibits	3
Bill of Costs – Affirmation – Exhibits	4,5
Order to Show Cause – Affirmation – Exhibits (withdrawn)	6,7
Affirmation – Exhibits	8
Reply Affirmation – Exhibits	9

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that the defendant's motion, pursuant to CPLR § 2201, to stay execution of plaintiff's proposed judgment pending scheduling of a hearing pursuant to CPLR Article 50B is granted in part and denied in part for the reasons set forth below.

[1] Plaintiff submitted, without authorization, a second reply affirmation. It has not been considered.

Background

The plaintiff, Walter Adams, was a 28 year old construction worker when he was seriously injured and permanently disabled in a 12 foot fall from the platform of a lift on July 29, 1999. The lift was manufactured by defendant, Genie Industries, Inc., and sold to Adams' employer 10 years earlier. Following a jury trial, which found the defendant manufacturer negligent and awarded damages to the plaintiff of over $2 million, both sides submitted post trial motions seeking to set the verdict aside. This Court denied defendant's motion to set the verdict aside and granted the plaintiff's motion to set aside the damages verdict unless the partes stipulated to increase the award: (1) for past pain and suffering from $100,000 to $500,000; and (2) for future pain and suffering from $400,000 to $750,000. This Court's Order was affirmed by the Appellate Division on July 8, 2008. The parties stipulated to the increase in damages.

Plaintiff served a proposed structured judgment with notice of settlement and an attorney's affirmation in support thereof. The proposed judgment provided, in relevant part, that Adams received $229,891.37 in worker's compensation benefits, which sum was taken as a credit by the social service administration against the social service disability income paid to Adams. Adam netted, therefore, $26,146.20 in disability payments from the date of the accident to the date of the verdict, which sum was deducted from the judgment. No information was provided as to Adams' continued receipt of disability payments, if any, and no deduction was made for post-verdict and/or future payments.

Adams argued that defendant was not entitled, as a matter of law, to a collateral source offset for future loss of earnings due to social security disability payments and refused to provide requested authorizations for payments made to Adams and his family. Adams based his position

on defendant's submission, at trial, of expert testimony that Adam was capable of earning, without retraining, as much or more than he had before the accident. Although Adams submitted testimony that he would never be able to work again, he argues that the defendant cannot meet the statutory requirement that it submit proof, by clear and convincing evidence, that he will be entitled to the continued receipt of social security disability payments if they argued that he could return to work. He argues further that payments made to his family are not available to defendant as an offset because they belong to the family members and not to him.

Defendant objected to the proposed judgment's failure to properly account for the statutorily required offset of collateral source benefits from the social security administration and other disability payments to compensate for Adams' past and future earnings. Defendant moved by order to show cause to stay execution of the proposed judgment. The order to show cause was withdrawn upon agreement that the judgment would not be signed prior to consideration of the issues briefed herein.

Discussion

Under the common law, the "collateral source rule," which is a rule of both evidence and damages, precluded reducing a personal injury award by the amount of any compensation received from a source other than the tortfeasor. It was based on the premise that a negligent defendant should not, in fairness, be permitted to reduce its liability by the proceeds of insurance or some other source to which that defendant has not contributed. (*Oden v Chemung County Indus Dev Agency,* 87 NY2d 81 [1995])

Over time, the Legislature has trimmed back the collateral source rule to permit offsets

against plaintiffs' recoveries. In 1986, the Legislature enacted CPLR §4545c which provides, in relevant part:

> In any action brought to recover damages for personal injury ... where plaintiff seeks to recover for the cost of ... loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past and future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, such as insurance (except for life insurance) ..., social security (except those benefits provided under title xviii of the social security act), ... workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff). If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding.... [in] order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement ...
> (*See, Bryant v NYCHHC*, 93 NY2d 592 [1999])

Since the intent of this statute is to eliminate double recoveries, not to provide defendants with a windfall, only those collateral source payments that actually replace a particular category of awarded economic loss may be used to reduce the injured's judgment and a direct correspondence between the item of loss and the type of collateral reimbursement must exist before the required statutory offset may be made. (*Id at* 607)

This Court finds that plaintiff's efforts to resist the requirements of CPLR §4545c, charitably termed "novel" by the defendant, are without merit. The statue explicitly enumerates its exceptions. Social security disability payments and workers' compensation are plainly not excepted. To the contrary, these payments, whether paid to the plaintiff or to his wives and children, are explicitly intended to compensate for lost earnings. There is a direct correspondence between the jury award for past and future lost earnings and these collateral

reimbursements, mandating that they be statutorily offset against plaintiff's recovery. (*Id*)

This Court notes with consternation that we are mere months away from the tenth anniversary of plaintiff's accident. It appears that both sides are responsible for this unconscionable delay. Eager as this Court is to bring the matter to a conclusion, the absence of an accounting of, and offset for, collateral sources of reimbursement past and future renders the proposed judgment defective.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff serve an amended proposed judgment providing for appropriate offsets, in accord with this decision, from the date of the verdict and into the future, within thirty (30) days of the date hereof; and it is further

ORDERED that plaintiff submit, therewith, an accounting, in admissible form, of all payments received by plaintiff and his family from the date of verdict to the date hereof; and it is further

ORDERED that defendant submit a counter proposed order, if any, within fifteen (15) days of service of plaintiff's amended proposed judgment.

This reflects the decision and order of this Court.

Dated: 1/16/09

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Judge Marilyn Shafer
J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION