

<b>Savillo v Greenpoint Landing Assoc., L.L.C.</b>
2010 NY Slip Op 33348(U)
November 29, 2010
Supreme Court, New York County
Docket Number: 114418/07
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GOODMAN  
Justice

PART 17

DANIEL SAVILLO

- v -

GREENPOINT LANDING ASSOCIATES

INDEX NO. 114418/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 5

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

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

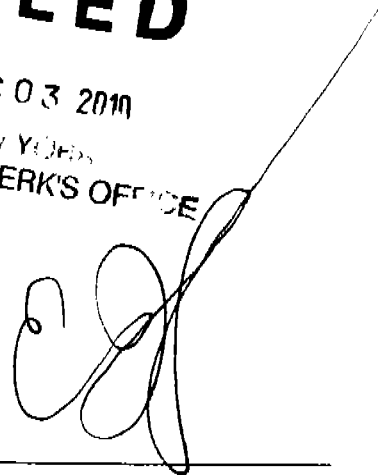
Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided per

attached

**FILED**

DEC 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE



Dated: 11/29/10

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

**EMILY JANE GOODMAN** J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
DANIEL J. SAVILLO,

Plaintiff,

-against-

Index No. 114418/07

GREENPOINT LANDING ASSOCIATES, L.L.C., and  
GREENPOINT STORAGE TERMINAL, L.L.C.,

Defendants.

-----X

GREENPOINT LANDING ASSOCIATES, L.L.C., and  
GREENPOINT STORAGE TERMINAL, L.L.C.,

Third-Party Plaintiffs,

Third-Party Index  
No. 590014/08

-against-

ALL SAFE HEIGHTS CONTRACTING, CORP.,

Third-Party Defendant.

-----X

Emily Jane Goodman, J.S.C.:

Plaintiff, who is now a paraplegic with traumatic brain injury (TBI)<sup>1</sup>, as a result of a 12-15 foot fall, moves for an Order, in limine, precluding any mention of, reference to, or introduction of, any evidence relating to plaintiff's alleged use of alcohol or illicit drugs, where in reply, plaintiff has discontinued his claim pursuant to Labor Law §241(6)<sup>2</sup> and where

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<sup>1</sup>All Safe Heights Contracting Corp. concedes these injuries in opposition to the motion (although not the nature of the traumatic brain injury).

<sup>2</sup>The Court grants permission for withdrawal of the Labor Law §241(6) claim.

the sole issue for trial is damages (see Decision and Order, dated September 7, 2010 granting, in relevant part, summary judgment in favor of plaintiff on liability, under Labor Law §240(1)).

The motion is opposed by plaintiff's former employer, third-party defendant All-Safe Height Contracting Corp., s/h/a All Safe Heights Contracting, Corp. (All-Safe) on the basis that such evidence is admissible on the issue of plaintiff's failure to mitigate his damages, and because it would be prejudicial to allow plaintiff to withdraw his Labor Law §241(6) claim, as All-Safe has already engaged experts; neither party disputes that competent evidence of alcohol consumption is relevant to comparative fault under Labor Law §241(6)).<sup>3</sup>

The motion is granted. There is no prejudice in permitting plaintiff to withdraw his Labor Law §241(6) claim, and All-Safe points to no case, or statute, supporting its contention that, in essence, it had the right to assume that merely because a plaintiff asserts a cause of action, it will be litigated at trial. In fact, as All-Safe's counsel must know, it is common practice in Labor Law cases to discontinue claims under Labor Law §241(6), as unnecessary, after summary judgment is granted on

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<sup>3</sup>Plaintiff was also granted summary judgment against Greenpoint Landing Associates, L.L.C. (Greenpoint) on liability under Labor Law §240(1). Greenpoint was granted summary judgment against All-Safe on its claim for common-law indemnification, as it was held liable to plaintiff solely on the basis of its status as property owner.

liability under Labor Law §240 (1). All-Safe has also not demonstrated that the experts that it hired would not have been hired in any event, and that the same defense would not have been mounted, where All-Safe previously argued that summary judgment should not be granted under Labor Law §240(1) because plaintiff's alcohol consumption was the sole proximate cause of the accident.

Contrary to All-Safe's position, there is no competent evidence to support a mitigation charge to the jury. The opinion of All-Safe's expert, Rose Lynn Sherr, Phd., a neuropsychologist, that "continued" use of "substantial"<sup>4</sup> amounts of alcohol "might" negatively affect plaintiff's prognosis, which lack of improvement might also be attributed to "idiosyncratic recovery" is inadmissible as it is too speculative and equivocal, and lacks any degree of medical certainty. Not only does Sherr fail to state the quantities of alcohol and the periods of time needed to have this effect, but she fails to state (1) that plaintiff's alleged alcohol use in fact effected his recovery; and (2) that

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<sup>4</sup>The Sherr report states "[d]uring our interview, he denied use of illicit drugs. He stated that he drinks 'socially' quite frequently; three times a week and on week-ends." Plaintiff has denied making any statement to Sherr regarding drinking after the accident, although he admitted making statements to her regarding "social" drinking, before the accident. It is not clear whether Sherr is referring to the time period pre or post accident. Sherr also refers to a personal and family history of alcohol abuse, but there is no attribution for this statement. Assuming the statement of the uncle, reflected in a hospital record two weeks after the accident, was relied upon by Sherr, All-Safe has not explained how that statement would be admissible, as an exception to the hearsay rule.

the effect can be quantified to some degree of certainty (see Matott v Ward, 48 NY2d 455 [1979] [although specific words are not required, the medical expert's opinion must convey assurance that it is not based on supposition or speculation]; Duffen v State, 245 AD2d 653 [3d Dept 1997] [where the expert testified that skipping medication "may or may not" have resulted in dizziness, the judgment was reversed as the testimony was too speculative]).

The bare-bones affidavit of George V DiGiacinto, a neurosurgeon, who examined plaintiff on May 1, 2009, and reviewed the Sherr report, does not alter the Court's determination. He states that "[a]fter a traumatic brain injury, the way in which the brain metabolizes alcohol changes, A traumatic brain injury increases the effect of alcohol consumption." However, the increased effect of alcohol is not the issue here, but rather, quantifying the negative impact on recovery as it relates to TBI. Although he goes on to conclude "[i]t is my opinion, with a reasonable degree of medical certainty, that alcohol consumption by an individual recovering from a traumatic brain injury negatively impacts the rate and extent of recovery" his opinion is unrelated to plaintiff, and even assuming truth to the general statement that, a non-specific amount of alcohol effects the rate of recovery, there is absolutely no testimony quantifying the amount of this effect on the rate of recovery.

Also fatal to All-Safe's arguments is the lack of any evidence indicating that plaintiff was informed that he was advised to limit or discontinue drinking in connection with his recovery from TBI. Although Sherr states in her report that it is "common professional advice to persons with TBI that they substantially limit or discontinue consumption of alcohol" All-Safe has cited no evidence whatsoever that such advice was actually given to plaintiff. As the charge on mitigation provides that a injured person is not permitted to recover for injuries "that could have been avoided by using means which a reasonably prudent person would have used" (see PJI 2:325), and as no evidence has been submitted indicating that any medical advice was given to plaintiff regarding alcohol and its effect on recovery, there is no basis for a mitigation charge. Accordingly, to allow commentary on plaintiff's alleged use of alcohol or drugs in a trial on damages only, has no basis, and would potentially serve only to distract, inflame and prejudice the jury.

It is hereby

ORDERED that the motion for an Order in limine is granted and All-Safe (or any other party) is precluding from any mention of, reference to, or introduction of, any evidence relating to plaintiff's alleged use of alcohol or illicit drugs.<sup>5</sup>

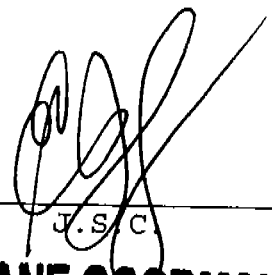
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<sup>5</sup>No argument was made to support a mitigation charge as illicit drugs.

This Constitutes the Decision and Order of the Court.

Dated: November 29, 2010

ENTER:



J.S.C

**EMILY JANE GOODMAN**

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