Savillo v Greenpoint Landing Assoc, L.L.C.
2011 NY Slip Op 31950(U)
June 6, 2011
Sup Ct, NY County
Docket Number: 114418/07
Judge: Emily Jane Goodman
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[* 1]

SCANNED ON 6/13/2011

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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 114418/2007

SAVILLO, DANIEL J.

VS.

GREENPOINT LANDING

SEQUENCE NUMBER : 006

TRIAL DE NOVO

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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 is decided per attached

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

FILED

JUN 13 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/6/11

J.S.C.

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL 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,

-against-

ALL SAFE HEIGHTS CONTRACTING, CORP.

Third-Party Defendant.

---X

FILED
JUN 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

Post trial motion sequence numbers 006 and 007 are consolidated for disposition.[1]

A New York County jury was called upon to place a monetary value on the life of Daniel Savillo as he experienced it, a life which is all but gone. The Court is now asked to do the same. Savillo, a healthy 29 year old construction site carpenter, was injured in a catastrophic fall from

[1]Both sides have exceeded the Uniform Rules page limits and have cited to only limited pages of the trial transcript for the particular arguments raised, instead of submitting the entire record.

an elevated storage rack, and has become an invalid, a man who is paralyzed and cannot use his lower body to engage in any physical, bodily, or sexual functions. This status is not reversible. He cannot urinate without extraction tubes being inserted into his penis several times a day, now and for the next 42 years. He sustained traumatic brain injury, multiple fractures around the skull and ears, leaving him deaf on one side and markedly impaired on the other, a neurogenic bladder, frequent bouts of dizziness, constant back pain, frequent spasms causing his legs to fly up uncontrollably, and painful pressure sores requiring surgical debridement procedures. He is no longer, and will never be, the person he was- - in fact, for almost all purposes, his life and his place in the world are hopelessly diminished.[2]

Thus, the jury comprised of highly educated and professional individuals, working in sophisticated professions such as finance and law, determined that if any sum of money could compensate Plaintiff for his multiple, catastrophic injuries, it would be at the level of $10 million dollars for past pain and suffering and $25 million dollars for future pain and suffering, over a period of 42 years. It would be an abuse of the Court's discretion to devalue this man's life, and to disrespect this jury's determination by granting Defendants' motions. As noted by Justice David Saxe, "[t]he voice of the jury is the voice of the community, and it should not be so cavalierly ignored when deciding whether an award deviates from what would be reasonable compensation" (Paek v City of New York, 28 AD3d 207, 211 [1st Dept 2006]).

Third Party Defendant All-Safe Height Contracting Corp. (All-Safe), Plaintiff's employer, brings this motion to set aside the verdict on pain and suffering, as excessive, and for

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[2]By Decision and Order dated September 8, 2010, Plaintiff was awarded summary judgment under the Labor Law on liability against the property owner, Greenpoint Landing Associates, L.L.C.

reduction of future lost wages as based on speculation. All-Safe further moves to set aside the verdict on the grounds that the Court erred in (a) permitting Plaintiff's counsel to describe accurately the accident itself, in opening, closing and during witnesses examination; (b) in allowing All-Safe's attorney-client privilege to be violated despite conceding that no privileged communications were involved; and (c) denying a mitigation charge regarding vocational rehabilitation. All-Safe further seeks a collateral source hearing and a hearing concerning structuring the judgment.

The property owner, Defendant/Third Party Plaintiff Greenpoint Landing Associates, L.L.C., moves to set aside the verdict as excessive and seeks a new trial on damages.

Plaintiff opposes these motions.

The Damages Were Not Excessive

The damages awarded to Savillo, who was only 29 years old at the time of injury, does not deviate from reasonable compensation. At a young age and highly productive period in his life, Plaintiff sustained multiple, devastating injuries including traumatic brain injury, lower body paraplegia (with no ability to engage in any physical, bodily, or sexual functions), multiple fractures around the skull and ears, leaving him deaf on one side and markedly impaired on the other, a neurogenic bladder, frequent bouts of dizziness, constant back pain, frequent spasms causing his legs to fly up uncontrollably, and painful pressure sores requiring surgical debridement procedures (see Cruz v Long Island Railroad, 22 AD3d 451 [2d Dept 2005] [3 million dollars for past pain and suffering and 9 million dollars for past and future pain and suffering for an employee of the Long Island Railroad of twenty three years for paraplegia, decided six years ago]; Miraglia v H&L Holding Corp., 36 AD3d 456 [1st Dept 2007] [5 million

dollars in past pain and suffering and 5 million dollars for future pain and suffering over 35 years for paraplegia, where plaintiff had sensation and motor abilities between knees and groin and was able to ambulate with a walker or crutches; here Plaintiff has no motor abilities from the umbilicus down, uses a wheelchair, and his life expectancy is 7 years longer]; Ruby v Budget Rent A Car Corp., 23 AD3d 257 [1st Dept 2005] [2 million dollars for past pain and suffering and 8 million dollars for future pain and suffering over 44.4 years for paraplegia, decided six years ago]; Reed v City of New York, 304 AD2d 1 [1st Dept 2003] [2.5 million dollars for past pain and suffering and 2.5 million dollars for future pain and suffering over 30 years for primary injuries of brain damage, skull fractures and damage to left inner ear, decided eight years ago]; Paek v City of New York, 28 AD3d 207, supra [3 million dollars for future pain and suffering over the period of 40 years for brain injury]; Doviak v Lowe's Home Centers, Inc., 63 AD3d 1348 [3d Dept 2009] [1.2 million for past pain and suffering and 3.9 million for future pain and suffering over 32 years for brain damage, fractures, significant loss of hearing in right ear, partial loss of senses of smell and taste, and loss of sight]; Tuitt v Midwood Auto Rental & Leasing Corp., 269 AD2d 525 [2d Dept 2000] [$1,075,000 for past and future pain and suffering for multiple fractures to cervical and thoracic vertebrae; plaintiff recovered, but experienced pain, and for five months wore a halo device inserted into the skull with screws; Savillo's initial surgery to stabilize his spine, involved drilling and insertion of pairs of screws in six different vertebrae, joined by vertical rods and steel cross pieces, and he will never recover]; Sanders v NYCTA, 2011 NY App Div LEXIS 2997 [2d Dept 2011] [$2,250 for past pain and suffering and 6.3 million dollars for future pain and suffering over 30 years for severing of right ear with right ear hearing loss, fractures, amputation of right leg below knee, blindness of right eye and post-

traumatic seizure disorder]; Salter v Deaconess Family Medicine Center, 267 AD2d 976 [4th Dept 1999] [$125,000 for past pain and suffering for second degree burns because for "the three months following the incident, the infant was subject to various treatments, including debridement"]; Reja v Thomas Romo III, 277 AD2d 43 [1st Dept 2000] [$225,000 for past and future pain and suffering for failure to cosmetically reconstruct ear for infant, who was born without an ear]).

Although the above precedent supports an award in the range of 19-20 million dollars when considering the awards for brain injury, paraplegia, hearing loss, fractures and Plaintiff's initial surgery to stabilize his spine, the trial court, which has the unique opportunity to observe the witnesses (Reed v City of New York, 304 AD2d at 7, supra), also considers the age of the appellate court decisions[3] and that, in considering the value of money awards for pain and suffering, "no two cases are the quality and quantity of such damages identical" (Caprara v Chrysler Corp., 52 NY2d 114, 127 [1981]), and that comparison can not be made with mathematical precision (Reed v City of New York, supra). The difficulty with such mathematical precision is evidenced by the fact that this Court attempted to ascertain the appellate value placed on pain and suffering for removal of Savillo's ulcer in his buttock, with evacuation of infected bone and tissue resulting in a lengthy hospital admission and readmission for creation of a skin flap for a prior wound, his constant back pain, and his uncontrollable leg spasms, but found no appellate case quantifying these values. Yet, that these afflictions have not

[3]Although Defendants cite many cases from all departments, some more recent and some more than a decade old, the older cases are less relevant given that ideas of what constitutes an appropriate award for pain and suffering has changed over time, as evidenced by comparing the sampling of cases cited in All-Safe's briefs with the years that the cases were decided, and by the economic changes in the value of currency.

been the subject of any appellate decisions, cannot disqualify them for compensation. Further, although All-Safe complains that the award for pain and suffering is three times what it should be, Savillo's multiple, catastrophic injuries are worth at least three times as much as the amount sustained by the First Department two years ago in a case involving a below the knee amputation of one leg (see Lopez 60 AD3d 529 [1st Dept 2009] [approximately 9.575 million dollars for past and future pain and suffering, prior to reduction for comparative fault]). Plaintiff here has lost the use of both legs, and has other multiple, devastating, irreversible injuries.

Future Lost Wages

Contrary to All-Safe's argument, the jury's findings as to the amount of future lost wages is supported by the evidence and is not based on speculation. All-Safe argues that in accordance with the testimony of its witness, Patrick Gaughan, the award of $3,108,596 in lost union wages should be reduced to $2,117,673, representing non-union wages, because no witness from the carpenters' union testified about the steps and time frame for admission. However, the jury's finding was supported by the handwritten notes of Bernadette O'Connor, the former administrative secretary for All-Safe, written on a Worker's Compensation Statement of Wage Earnings form, stating that as of "Thursday Feb 15 Danny was to go on a union wage" which information was provided to her by the two owners of All-Safe (Ex B to Affirm In Opp).[4] The

[4]Without any support in the record (other than the level of her position), All-Safe maintains that Bernadette O'Conner, the former administrative secretary for All-Safe, did not have speaking authority and had no "duty to submit any information to the Worker's Compensation Board other than the amount the plaintiff had earned while working for All-Safe." The fact that O'Connor filled out this form, required under Workers Compensation Law §14, after discussions with All-Safe's owners, evidences her speaking authority, and All-Safe points to no evidence to the contrary. In fact, O'Connor testified that she knew that the form had to be filled out under state law, testified that it was her duty to prepare such forms in the ordinary course of business and that she prepared the form accurately, based on information provided by

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jury's finding was also supported by the videotaped deposition testimony of All-Safe's owner Martin O'Donovan and employee Brendan McCarroll, indicating, as All-Safe concedes, that Savillo was to become a union member. No testimony from a union representative was necessary regarding the process and the time-frame for entering the union because O'Donovan testified competently on both subjects. Although he was not a union member, he employed union members, and the jury was entitled to credit his testimony that the process for Plaintiff's union admission had already been started by the time Savillo was injured, and that in the absence of the injury, he would have become a member of the union in the typical time frame to accomplish membership (Exh C to Affirm in Opp). McCarroll gave similar testimony (Exh D to Affirm in Opp). The union benefits were not hypothetical (compare Hackworth v WDW Dev., Inc., 224 AD2d 265 [1st Dept 1996]) because there was sufficient evidence to support, with a reasonable certainly (and no contrary evidence), that Savillo would have joined the union (even if O'Connor's handwritten notes had not been admitted into evidence). The jury was entitled to determine a reasonable date of union membership (see Keefe v E & D Specialty Stands, Inc., 272 AD 2d 949 [4th Dept 2000] [court did not err in admitting evidence regarding union wages where plaintiff was not a union member, but had completed all written and physical tests and was notified that would be accepted into an apprenticeship program]; Kirschhoffer v Van Dyke, 173 AD2d 7,10 [3d Dept 1991] [award for future lost earnings was not speculative although it based on the future likelihood that the plaintiff mother, who was qualified to work as a secretary, stated

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All-Safe's owners (Exh B to Affirm in Opp). All-Safe presents no evidence disputing that the owners were the source of the information on the form. The fact that the form did not have a comment or additional information section, does not negate the evidence that it was O'Connor's business duty to fill out this form, and that she did so in the regular course of business.

she intended to return to work when her child was school age).[5]

Statements Regarding How the Accident Occurred

All-Safe complains that Plaintiff's counsel's accurate description of the accident, made in opening, closing and during witnesses' examination, and the Court's not having given a curative instruction resulted in "prejudice" because the trial was solely on damages. All-Safe assets that based on the amount awarded, it was prejudiced by these statements, but submits no evidence connecting the amount of the award to these comments. The argument is waived since counsel objected, but he did not move for a mistrial (see Boyd v MABSTOA, 79 AD3d 412 [1st Dept 2010]; compare Heller v Provenzano, Inc., 257 AD2d 378 [1st Dept 1999] [where the error is so fundamental a new trial may be ordered in absence of a motion]). Further, even if the argument was not waived, All-Safe cannot establish any prejudice, where counsel's statements were brief and a contextual aid for the jury, and where All-Safe's argument is essentially, only a relevancy objection. Had the Court not granted summary judgment on liability, this same jury would have decided both liability and damages, as is often done in Labor Law cases (see Matter of Jack Parker Construction Corp v Williams, 35 AD2d 839 [2d Dept 1070] ["as a general rule, an

[5]All-Safe argues that future lost earnings must be reduced by "amounts already compensated for in the jury's other awards" as a "lost earnings award is intended to replace the money that would be needed to provide for those necessities" (All-Safe Brief at p 27). All-Safe does not identify the "amounts already compensated for" nor cites any evidence to support this argument, which appears to have little, or no, support in the case law. Additionally, All-Safe has not demonstrated that the award for union health insurance and "various" medical costs are duplicative of the award for medical treatment. Again, no evidence is cited. Plaintiff states the economists for both sides "flatly rejected the idea that awards for health care insurance and for the costs of either life care plan might somehow overlap" (Affirm In Opp at 17), and attaches the transcript of Defendant's economist refuting All-Safe's argument, as the economist conceded that health care benefits would not pay for life care needs or "future care costs" (Exh J to Affirm In Opp).

immediate trial of the damage question before the same jury that decided liability is preferred"]). Morever, damages may be awarded for the terror and shock of the incident (see Torelli v City of New York, 176 AD2d 119 [1st Dept 1991]), demonstrating that the jury is entitled to know how the accident occurred.

Mitigation Charge

All-Safe argues that the Court erred in failing to give a mitigation charge regarding vocational rehabilitation. It is on this motion only that All-Safe raises certain testimony from Plaintiff and Plaintiff's expert, Dr. Richard Schuster. At trial, All-Safe sought the charge based on testimony of its witness, Dr. Rose Lynn Sherr. Dr. Sherr testified that she asked Savillo whether he followed through on a vocational rehabilitation recommendation by Dr. Santana, a neuropsychologist (who was referred to Plaintiff by his treating doctor, Dr. Lerner), and testified that she herself gave him information about vocational services in Florida, where Plaintiff has resided since leaving Queens New York, after the accident. However, Dr. Sherr also testified that Savillo replied that he was never told about Dr. Santana's recommendations, and she further conceded that there was no evidence that such information, which she agreed would usually not be provided to the patient, was ever provided to Plaintiff (Exh W to All-Safe's Affirm in Support; Exh J to Affirm in Opp). Accordingly, the charge was not warranted because there was no evidence that Plaintiff was advised by his own doctor about rehabilitation, and there was no reason for Plaintiff to accept advice from a doctor hired by All-Safe for purposes of this litigation (compare Fafard v Ajamian, 60 AD2d 853 [2d Dept 1978] [no mitigation charge was warranted even though the advice was from plaintiff's own doctor, because plaintiff is not under an absolute obligation to follow such advice]). Although All-Safe now refers to testimony from Dr.

Schuster (Plaintiff's vocational expert) regarding providing Savillo with phone numbers for vocational services in Florida, and, Plaintiff's testimony about one non-specific conversation with Dr. Santana, the charge was nevertheless unwarranted given the jury's award of $2,534,749 for future wages. All-Safe states in a letter, dated March 4, 2011 that the jury "clearly rejected the notion of plaintiff returning to gainful employment" by awarding Plaintiff, an individual with minimal education, whose work experience was limited to physical labor, the total future earnings recommended by Plaintiff's expert, Dr. Leiken, without any subtraction for post injury earnings capacity. Thus, there is no evidence that the charge would have resulted in any reduction in the future earnings award.

Violation of the Attorney Client Privilege

All-Safe alleges that Plaintiff violated its attorney-client privilege when Plaintiff's counsel asked O'Conner, the former administrative secretary for All-Safe, general questions regarding whether she had conversations with All-Safe's attorney about the trial subpoena she received, at a time when she was no longer working for All-Safe. All-Safe concedes that no confidences were revealed. As nothing privileged was implicated, no violation occurred and counsel's questions related to the period of time when O'Connor, as a former employee, could not be considered a client, and referred to the subpoena only.

Collateral Source Hearing and 50-B hearing

After exhaustive discovery, motion practice and trial, All-Safe requests a collateral source hearing on Social Security disability benefits and workers' compensation payments. All-Safe also argues that it needs a hearing before the judgment can be structured because it intends to address (a) the discount rate; b) the entitlement to deferral of periodic payments for the three

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deferred damages awards; (c) which items are awards are subject to CPLR 5045(a) versus CPLR 5045(b); and (d) a credit under CPLR 5041(a) for 4% inflation/growth rate in connection with the reduction to present value, as required under CPLR 5041(e). Plaintiff opposes the hearing on the basis that All-Safe failed to provide any evidence of a collateral source that is still ongoing, and on the basis that no evidence establishes that any amount will be paid "with reasonable certainty." Further, Plaintiff argues that because of the lien asserted by the State Insurance Fund, workers' compensation benefits are not a collateral source. Plaintiff notes that under CPLR 4545, workers' compensation benefits are offset, unless there is "a statutory right of reimbursement." Here, however, Plaintiff notes that the State Insurance Fund has asserted a lien against any recovery under Workers Compensation Law §29(1). All-Safe ignores the lien, cites cases offsetting worker's compensation benefits which are not subject to a lien, and maintains that a hearing is needed to determine whether worker's compensation benefits "are reasonably certain to continue and are available as a collateral offset if the lien were waived" (Brief In Supp at 39).

CPLR 4545 provides that a collateral source offset is due where the "future cost or expense will, with reasonable certainty, be replaced or indemnified by a collateral source" and that "plaintiff is legally entitled to the continued receipt of such collateral source." The First Department has interpreted defendant's burden of proof regarding an offset concerning future Social Security disability benefits as a demonstration that it is "highly probable" that a plaintiff will continue to receive those benefits (see, e.g., Malloy v Steller Management, 68 AD3d 668 [1st Dept 2009]; Ruby v Budget Rent A Car Corp., 23 AD3d 257 [1st Dept 2005]).

No collateral source hearing is required as to worker's compensation benefits because it

is undisputed that there is a statutory right of reimbursement.[6] Further, no hearing is required to structure the judgment as the Court can determine the proper structuring of the judgment after the parties' submission of proposed judgments, memorandum of law, and affidavits from economists or other experts (see e.g. Malloy, 68 AD3d 668 supra).

However, contrary to Plaintiff's arguments, an offset for past Social Security disability payments is due for past lost earnings, in light of Plaintiff's Response to Demand for Discovery and Inspection indicating that he received Social Security disability payments since August/September 2008 (Malloy, 68 AD3d at 668). Although it is true that All-Safe never moved to compel further information regarding those payments, and that, generally, discovery of collateral source issues is to be conducted prior to trial, it is also true that Plaintiff's counsel did not supplement his responses to state that Plaintiff was no longer receiving Social Security disability benefits, and, it is a reasonable conclusion that Plaintiff is still in receipt of those benefits (see, e.g., Firmes v Chase Manhattan Automotive Finance Corp., 852 NYS2d 148 [2d Dept 2008] [court erred by not ordering hearing where plaintiff never denied receipt, or future receipt, of collateral source benefits, never updated collateral source disclosure and admitted that Social Security disability proceedings were ongoing]). In lieu of a hearing on this issue, the parties can stipulate as to the amount of the reduction for past Social Security disability payments.

Further, while Plaintiff points out that there was no specific finding on whether Savillo could work in the future, Plaintiff does point out in his brief that his own vocational expert, Dr. Schuster testified that because of the devastating combination of paraplegia and catastrophic

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[6]All-State abandons this argument in its reply papers.

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brain injury there were virtually no employment possibilities and that Dr. Joseph Carfi, Plaintiff's physical medicine and rehabilitation specialist agreed, as well as citing to Plaintiff's brain injury which makes it exceedingly difficult and sometimes impossible to plan or initiate the simplest course of action (Affirm In Opp at 27). Further, All-Safe points to the jury's future damages award, based on the total amount recommended by Plaintiff's expert Dr. Leiken for future earnings, without subtraction for post injury earnings capacity. Although the standard of proof for the jury's determination regarding damages is lower than the standard of proof needed to obtain a collateral source reduction, a hearing is required to determine whether a collateral offset for Social Security disability benefits is due.

It is hereby

ORDERED that this motion pursuant to CPLR 4404 (a) is denied in all respects except as to a collateral source reduction for Social Security disability benefits and hearing as described herein; and it is further

ORDERED that the collateral source hearing shall take place before a Special Referee who shall hear and report; and it is further

ORDERED that Plaintiffs submit a proposed Judgment With Notice of Settlement in compliance with Article 50-B of the CPLR, after consultation with the Defendants and the Court via email as to the date it should be submitted; Defendants may submit objections and a proposed Counter-Judgment within 15 days after receipt of the proposed Judgment; and it is further

ORDERED that Plaintiff serve a copy of this Decision and Order on Defendants with notice of entry, within 10 days of receipt of a copy of same.

This Constitutes the Decision and Order of the Court.

This Constitutes the Decision and Order of the Court.

Dated: June 6, 2011

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

JUN 13 2011

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