Kivat v Kershis
2014 NY Slip Op 31856(U)
July 10, 2014
Supreme Court, Suffolk County
Docket Number: 11299/2008
Judge: Ralph T. Gazzillo

Index No: 11299/2008

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

POST TRIAL DECISION

P R E S E N T :

Hon. RALPH T. GAZZILLO
A.J.S.C.

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Benjamin Kivat,

Plaintiff(s),

- against -

Frank Kershis,

Defendant(s).

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The liability aspect of this matter was tried, non-jury, before the undersigned on April 28th and 30th, 2014. Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the *viva voce* testimony of two (2) witnesses: the plaintiff Benjamin Kivat as well as the defendant, Frank Kershis. Additionally, and pursuant to CPLR § 3117, the plaintiff offered portions of the sworn depositions of three others: Rick Gabriel, Chris Megluvich, and Doctor Phil Page. The defendant did not present any witnesses, instead relying upon cross-examination of the plaintiff's witnesses and additional portions of the depositions.

At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR § 4213 by June 2, 2014; thereafter, upon the attorneys' request and consent, that submission date was adjourned to June 23, 2014. Those memoranda having been received and reviewed, the Court's decision is as follows:

Preliminary, there are a number of background facts which are not in serious dispute and were stipulated and agreed to by the parties at the trial's commencement. Specifically, there is no contest that the plaintiff Benjamin Kivat commenced this action to recover for personal injuries allegedly sustained on August 9, 2007 while he was at receiving physical therapy at 1010 Route 112, Suite 200, Port Jefferson Station, Suffolk County, New York. That location is a facility operated by the defendant Frank Kershis, P.T., P.C. and the defendant Frank Kershis. The injuries allegedly were sustained when a green latex exercise band he was using to perform stretching exercises snapped in half. The band was disposed of soon afterwards. The stretching exercises were treatments for a prior injury sustained in an automobile accident on November 5, 2006.

The complaint's first two causes of action allege negligence on the part of Kershis and Frank Kershis P.T., P.C. (count one) and on the part of Rick Gabriel (a physical therapy assistant) and Rick Gabriel P.T.A., P.C.(count two). The acts and omissions complained of are, essentially, that prior to the incident they failed to properly maintain and inspect the exercise band utilized by the plaintiff. As noted within the record, prior to the trial's commencement, count two - the action against Rick Gabriel and Rick Gabriel P.T.A., P.C. was withdrawn by the plaintiff. Three additional causes of action sounding in products liability and breach of warranties were claimed against the Hygenic Corporation but, for the reasons contained in the order of this Court dated December 21, 2011 (Whelan, J.), were dismissed. Additionally, and by that same order, the plaintiff's application striking the defendants' answer due to their alleged spoilation of the latex band was denied. To capsulize, the only unresolved and surviving cause of action was the first, the simple negligence action against Kershis and Frank Kershis P.T., P.C.

TESTIMONY

What immediately follows is an unassessed and condensed version of the testimony of the various witnesses regarding the relevant and germane facts of this matter as was portrayed, purported and alleged by each.

Benjamin Kivat testified that he was at the defendants' facility and undergoing treatment on the date of his alleged injury. He had begun these treatments in January of 2007, a result of an injury he sustained in an automobile accident the prior November. Initially, he had met the defendant when he was evaluated prior to beginning treatment/therapy. Once begun, his routine was typically warming-up on a rowing machine, followed by use of the belt, then light weights, and then stretching with a technician. This was done three times a week.

He had been referred to the defendant facility by his surgeon, a Dr. Schrank. His therapy/treatments were conducted both before and after a April, 2007 surgery for labraum repair to his left shoulder. Following that surgery, he had been reevaluated by the defendant and what followed was essentially same therapy three times a week and, on occasion, somewhat lighter and with less tension on the belts. Typically, this was in a big open room in where there were other patients, chiropractic tables, and "Thera-Bands" hung on the walls.

At about 11 a.m. on August 9, 2007, he was on the table exercising with a Thera-Band; there were two unidentified other patients in the room. Kershis was not on the premises but he noticed Gabriel on the way out and one other employee, Megluvich. The plaintiff had arrived there at about 10:30 that morning, signed in, used the rowing machine, and stretched his arm with a Thera-Band attached to wall. No one told him what to do; and he manipulated some weights forward and backward, then circular, followed by dumbbells. He was using a green Thera-Band while he was on the table. As was customary, he had gotten the band himself from a storage rack and no one had handed it to him. He proceeded to perform the treatment, on his back with no one watching him. No one had spoken to him about getting his own band, no one had stopped him, and there were no signs prohibiting it.

As to which color band to be used, "they" would tell you what belt to use as time went by. He had begun with yellow, then went next to green. He had never received any instructions as to how to inspect belts and, to his knowledge, that day no one had inspected the one he selected. While he was exercising, an exercise he had been doing for the previous six weeks, no one was observing him and the band snapped in half. When it snapped, neither Gabriel nor Megluvich were on the premises but the latter entered later and iced the injury. The plaintiff told him the band had snapped but doesn't know what happened it.

Other than the band was green, he was unable to describe it, i.e., its thickness, length, or anything else which might indicate that it was different than any other he had used. He also stated he was comfortable using it. He didn't know how long the band had been in use, or how many others had used it. Also, he didn't know if anyone from the defendants' firm had inspected that band prior to his use, or if they had a policy to inspect bands, or if the defendant had been on the premises at the time of the event. He also added that his typical sessions were from 40 minutes to an hour.

Frank Kershis testified that he has been a physical therapist for 19 years and owns the firm. He has been at that location for nine years and is in charge of everything, including the maintenance of equipment. In 2007 he employed Megluvich as a physical therapy aide/assistant. As such, he would have to be supervised by a physical therapist.

The plaintiff had become a patient in January, 2007, after having suffered shoulder and neck injuries in a motor vehicle accident. This relationship ended on August 9th, 2007. The plaintiff had had surgery in April of 2007 and thereafter continued the treatment using a Thera-Band: a thin, long rubber-band-like material used for shoulders. The defendant had been using Thera-Band brand bands for 19 years.

Although from 1995 to 2005 he had worked for other organizations, in August of 2005 he opened his own practice. He had previously heard of a Thera-Band breaking but couldn't recall it happening on his premises. His firm has procedures for inspecting Thera-Bands and observing patients while they performed physical therapy. The usual practice for a patient to be instructed during the first session and, with some patients, every time. They would inspect band before handing it to patient. After each exercise they would usually observe the patient and, typically, make an assessment of the patient. This witness stated that he was not made aware of this incident until the next day[1].

On cross-examination he indicated that the practice was that if a patient had become familiar with the applicable exercises and equipment, they would get their own equipment.

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[1] For the reasons indicated within the record as well as those contained in the above-noted prior decision of this Court (Whelan, J.), inquiry into a Thera-Band manufacturer's written warning was curtailed.

The deposition of Gabriel described the practice's general procedures, but had little in the way of specifics as to the events in question. For example, he was not certain as to how many repetitions of exercise the plaintiff had performed before the incident. Also, he didn't know who gave plaintiff the band, and added that, generally, patients familiar with an exercise would select their own band. He denied giving the band to the plaintiff. If the band was to be given to a patient by an employee, the bands would first be inspected by the employee, who looked for nicks, cuts and its reaction to stretching. As part of a treatment routine, Megluvich would put heat and ice on patients and make certain they were performing exercises properly. The Thera-Bands brand was the only product in the office. He also indicated that the office policy was that the Thera-Bands would be visibly inspected for defects. Lastly, it was noted that Megluvich did not treat patients.

A somewhat similar account of the office's general procedures was contained within Megluvich's deposition. He also noted that the plaintiff had told him that the band had snapped. Megluvich didn't know who might have handed the band to the plaintiff, but the practice was that some patients would take their own. After incident, he picked up but did not examine what was then two bands; later on, he threw them in the garbage. Usually he'd observe patients during exercises but did not recall what exercise the plaintiff was doing when the band snapped. He had been told to make general observations of bands and if they looked old or had rips or slight tears they were to be trashed. He also stated that during almost every shift he would inspect the bands and he would replace bands as often as the needed.

Dr. Phil Page's deposition indicated that he is the director of education and research for Hygenic Corporation, a manufacturer of Thera-Bands. He gave his opinion as to what would cause a band to break: a nick, or a tear, or having been used for a long time, or having been stored improperly, or incorrectly connected, or stretched too far. He also addressed his firm's general practices.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v. Town of Bedford,* 60 NY2d 492 (1983); *Latora v. Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v. Parr Gen. Contr. Co., Inc.,* 102 AD3d 770 (2d Dept

2013); *Hom v. Hom,* 101 AD3d 816 (2d Dept 2012); *Marinoff v. Natty Realty Corp.,* 34 AD3d 765 (2d Dept 2006).

Also worthy of examination is any witness' interest in the litigation. *See e.g.,* 1 NY PJI3d 1:91 *et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact; under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus,* the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *See Deering v. Metcalf,* 74 NY 501 (1878); *see also,* 1 NY PJI3d 1:22. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g. People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d 1:23.

As to the analysis of the legal claims presented, it begins with the action for simple negligence. It is hornbook law and goes without citation that the basic elements necessary to establish negligence are a duty, a breach of that duty by a defendant's act or omission, and damage which result from that breach. The latter element, oftentimes called "proximate cause" is as essential as either of the other two but may be established even in the absence of direct evidence and may be inferred from the underlying facts and circumstances. *Manning v. 6638 18th Ave. Realty Corp.*, 28 AD3d 434 (2d Dept 2006). Beyond argument, and as noted within the plaintiff's Post-trial memorandum, a claimant is not required to exclude every possible cause of an accident; persuasive proof of that which is more likely and reasonable can suffice. *Gayle v. City of New York,* 92 NY2d 936 (1998). However, "'[m]ere speculation as to the cause of [the event], especially where there can be many causes, is fatal to a cause of action.'" *Id.* at 435 (citations omitted). This inquiry-ending result also obtains where the plaintiff is unable to establish the cause. *Lissauer v. Sharrei Halacha, Inc.*, 37 AD3d 427 (2d Dept 2007). Similarly fatal is where the evidence demonstrates that "it is just as likely that the accident could have been caused by some other factor . . . any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation." *Teplitskaya v. 3096 Owners Corp.*, 289 AD2d 477 at 478 (2d Dept 2001) (citations

omitted). Indeed, where there are "several equally plausible explanations for the accident and no competent proof, only speculation, as to the cause of the accident" the action must fail. *Id.*

DETERMINATIONS

The Witnesses

The initial focus of the analysis is upon the witnesses' credibility. In that regard, both were amply and sufficiently credible and their accounts appropriately persuasive. Despite being obviously interested parties neither displayed anything which would indicate that fact had an impact on his candor. Moreover, they were both lay witnesses and testified in a manner as might be expected. That lack of experience notwithstanding, their presentations were acceptable and both withstood cross-examination without any monumental damage.

The examinations of the depositions, of course, is not as focused. The first two were informative, but on the whole not pivotal nor did either or both significantly add to the presentation. As noted below, however, the third has the opposite result. Indeed, although its credibility is not in serious contention, its import merits weighty consideration.

Findings

Focusing on the law and its requirements on the matter at bar's causes of action, and after reviewing the evidence under the light of the law and logic, the undersigned finds as follows:

In simplest terms and as previously indicated and underscored by the above-cited cases, the law applicable to this case requires an adequate and sufficiently convincing demonstration of a duty, a breach of that duty by a defendant's act or omission, and a resulting damage caused by that breach.

Juxtaposing that to the to the proof in this matter, the plaintiff's case fails to demonstrate that he has the knowledge or is able to present acceptable and persuasive proof of what actually happened; in everyday terms, how the defendants may have caused his injury. Indeed, among the few matters that have been satisfactorily demonstrated are that the defendants purchased a band from an independent vendor, they made it available to the plaintiff and other patients, and it broke while he was using it. Without more, however, there is no wrong in that.

Indeed, there is no evidence to support a finding that the belt was defective as no specific defect—latent, or otherwise—has been demonstrated[2]. Similarly, not only is there an open question as whether it was or was not defective, but also there is the unanswered question as to whether such

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[2] It should be noted that there is no proof that anyone had observed a defect in the belt. Additionally the plaintiff's Supplemental Verified Bill of particulars dated 2/21/12 does not allege constructive notice.

defect was (or was not) the causal factor in the chain of events. Additionally, and independent of any defect in the band, there has been no demonstration of any violation of industry or professional duties or practices which might require such bands to be inspected. Moreover, even if, *arguendo,* such inspections were required to be conducted, there is no proof that they were not done, or, if done, that they were improperly performed.

Clearly, that is not to disregard that the evidence implies that there was some direct causal issue central to the condition of the belt. In this regard, there may be easy culprits, "the usual suspects," so to speak, such as whether there was or was not a deficiency in the belt's design, or its manufacture, or its use or its misuse by the plaintiff or the defendant (or anyone else), or in its care and maintenance, or the lack of care and maintenance. But none of these have been satisfactorily and factually demonstrated. In the absence of such facts, neither implication, nor suspicion, nor both will suffice. And in that absence, the law dictates that culpability may not be found.

To capsulize: beyond speculation and conjecture, there is precious little circumstantial evidence and virtually no direct proof of what in fact occurred. Indeed, as is underscored by a portion of the evidence submitted by the plaintiff (the deposition of Dr. Page), there may be myriad reasons for a band to fail, including a nick, a tear, having been in use for a long time, improperly stored, incorrectly connected, *or stretched too far*. Not one of these has been proven, and while perhaps one might in fact have occurred, were it to have been the final one, *viz*, that the plaintiff stretched the band too far, the accident might arguably have been caused by the plaintiff.

Stated otherwise, I'm not persuaded or convinced by a preponderance of the credible evidence that the plaintiff's complaint has been proven. Indeed, I am not satisfied that the law has been satisfied, and after due consideration and reflection, I still remain uncomfortable with any finding that would indicate that the record contains evidence to support a determination that the plaintiff's cause of action—much less the defendants' liability—has been sufficiently proven.

It is, therefore, the determination of the Court that the plaintiff has failed to demonstrate his claim by a preponderance of the credible evidence. As a result, the Court must find for the defendants and dismiss the plaintiff's complaint.

The foregoing constitutes the decision and order of the Court.

Submit judgment on notice.

Dated: 2/10/14

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition

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