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| Frank v Rock Scaffolding Corp. |
| 2016 NY Slip Op 33005(U) |
| January 21, 2016 |
| Supreme Court, Queens County |
| Docket Number: 700293/2014 |
| Judge: Salvatore J. Modica |
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At Part 37 of the Supreme Court held
in and for the County of Queens at the
Courthouse located at 88-11 Sutphin
Boulevard, Jamaica, New York, 11435
on the 21st day of January, 2016

Present: Hon. Salvatore J. Modica
Acting Justice of the Supreme Court

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MITCHELL FRANK,

Index Number: 700293/2014

Plaintiff,

-against-

ORDER GRANTING
DAMAGES AFTER
INQUEST

ROCK SCAFFOLDING CORP., AND 109-10
QUEENS BLVD, OWNER LLC, 109-05 72ND
REALTY LLC, and DITMAS MANAGEMENT CORP.,

Defendants.

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FILED
JAN 26 2016
COUNTY CLERK
QUEENS COUNTY

The plaintiff, Mitchell Frank, commenced this lawsuit against the defendants to recover for injuries that he allegedly suffered on March 12, 2012, as a result of the negligence of the defendants. The defendants, Rock Scaffolding Corporation (Rock Scaffolding) and 109-05 72nd Realty LLC (109-05), failed to appear in this case and the plaintiff, in turn, moved for default judgments against these two defendants. See CPLR 3215(a). In a decision and order, dated January 13, 2015, and filed on January 16, 2015, a Judge of this Court granted the plaintiff's motion for default judgments against the defendants, Rock Scaffolding and 109-05.¹ That order further directed that, "[u]pon proof of filing a copy of this order with the note of issue and statement of

¹ Pursuant to a stipulation of discontinuance between the plaintiff and defendant, Ditmas Management Corp., dated and filed on July 29, 2014, the case against Ditmas was dismissed with prejudice. The case against defendant, 109-10 Queens Blvd., LLC., was also dismissed with prejudiced based upon a stipulation of discontinuance, dated July 14, 2014, and filed on August 7, 2014.

readiness and upon compliance with all the rules of this court this action shall be placed on the trial calendar for inquest for the assessment of damages..." The Court finds that there has been compliance with those aspects of the order.²

On January 11, 2016, this case was administratively referred to this Court for an inquest. Erik Lieber, Esq., appeared for the plaintiff. Neither the defendant nor an attorney for the defendant appeared at that inquest. An inquest was then conducted by this Court on the record. A certified copy of the plaintiff's medical records were placed into evidence as Plaintiff's Exhibit 1. No other witnesses testified at the inquest; no further evidence was admitted. At the conclusion of that hearing, the plaintiff, through his attorney, demanded that he be awarded \$150,000.00 for pain and suffering, both past and future. That request is denied. The plaintiff is awarded damages in the sum of \$50,000.00, plus interest and costs.

Based on the affidavit of the plaintiff, Mitchell Frank, dated July 18, 2014, which is attached to his motion for the default judgments that he filed against the defendants, Rock Scaffolding and 109-05, the instant cause of action arose as a result of an incident that occurred on October 6, 2014. On that day, the plaintiff injured his left ankle after tripping on a sidewalk located at 109-45 72nd Avenue, Queens County. According to the verified complaint, Rock Scaffolding erected scaffolding and netting above the sidewalk at the subject location. Although the scaffolding and netting were apparently intended to keep the sidewalk free of debris, tree limbs and debris accumulated therein, creating a dangerous and unsafe condition to pedestrian who traveled through this location. The plaintiff specifically alleges that the defendants were aware of this dangerous and defective condition prior to March 5, 2012. While walking on the sidewalk of this location on March 5th, the plaintiff tripped over one of the tree limbs that had fallen at that location and injured his left ankle.

Following this incident, the plaintiff sought immediate treatment from Dr. Bernstein. During his examination of the plaintiff, Dr. Bernstein observed that the plaintiff's left ankle was very swollen and he was in pain. Dr. Bernstein had an X-ray taken of the plaintiff's left ankle; it revealed that he had sustained a fracture of the lateral malleolus and a sprain of the deltoid ligament. The plaintiff's ankle was initially placed in a walking boot and Dr. Bernstein continued to monitor him for several months. The plaintiff, however, did not require surgery. On March 26, 2012, the plaintiff's ankle was placed in an air cast, which he wore until May 8, 2012. Although the plaintiff's ankle was very swollen for several weeks following the incident and he experienced pain during this time period, by May 12th, the ankle exhibited only mild swelling. Based

² The Court that issued the default judgment in this case already decided that the plaintiff's claim is meritorious within the meaning of CPLR 3215(f). See also *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003); see also *Jacobsen v S & F Serv. Ctr. Co., Inc.*, 131 AD3d 450 (2nd Dept. 2015); *Paulus v Christopher Vacirca, Inc.*, 128 AD3d 118, 121-22 (2nd Dept. 2015); CPLR 3215 (f). For this reason, this Court cannot revisit this issue.

on the medical records, the plaintiff was able to "walk independently" as of April 11, 2012.

The Court notes that an MRI examination done on November 27, 2011, which was four months prior to the fall, reveals disc herniations at L3- L4 and L4-L5. This was apparently the result of degenerative disc disease. The medical records do not establish that the pre-existing injury to the plaintiff's back was, in any way, aggravated by the fall.

In this case, the plaintiff sustained a fracture in his left ankle, which took two months to heal. The Court assumes that the plaintiff was obviously in some degree of pain following this incident. The medical records, however, do not reveal the degree of pain that he was in or the amount of time that he was in pain. It is well-established that, at an inquest, a "plaintiff is required to establish the extent of the damages that he sustained." *Godwins v Coggins*, 280 AD2d 582, 582-83 (2nd Dept. 2001); *see also Syrkett v Burden*, 176 AD2d 938 (2nd Dept. 1991); *Paulson v Kotsilimbas*, 124 AD2d 513 (1st Dept. 1986); *Wine Antiques v St. Paul Fire & Mar. Ins. Co.*, 40 AD2d 657 (1st Dept. 1972), *affd* 34 NY2d 781 (1974). On this record, the plaintiff did not sustain his burden of establishing that he be awarded damages in the amount of \$150,000.00. In sum, based upon the evidence presented at the inquest, such an award is excessive and unwarranted. *See Reynolds v. Merit Oil of New York, Inc.*, 167 AD2d 521 (2nd Dept. 1990) ("Damages award of \$355,000 for pain and suffering incurred by 40-year-old man who fractured two bones in left foot in fall at gasoline service station was excessive, and would be reduced to \$40,000, where man was never hospitalized for injuries, missed no work, and was limited in activities he could perform for period of only two to three months following accident."). In this case, the plaintiff, who was 59 years old at the time of the incident, fractured and sprained his ankle. He wore a cast for no more than two months and he neither required surgery nor hospitalization. In addition, he was able to walk independently, that is without the need of a cane or crutches, within a month of the injury. *See Brandwein v. New York City Transit Authority*, 14 AD3d 396 (1st Dept. 2005). Based upon the medical records, it appears that he has made a full recovery. In any event, the plaintiff did not offer any proof to the contrary. *Compare De Lany v. State*, 256 AD2d 1135 (4th Dept. 1998). Under these circumstances, the Court finds that an award of \$50,000.00 is fair and reasonable. *See Albanese v Przybylowicz*, 116 AD3d 1216 (3rd Dept. 2014). *See Vogel v Cichy*, 53 AD3d 877 (3rd Dept. 2008).

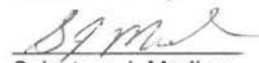
Accordingly, the plaintiff is awarded \$50,000.00 for past pain and suffering in this case. This award shall include interest at the rate of 9%, to be computed as of March 5, 2012, the date that the plaintiff's cause of action arose. *See CPLR 5001; see also CPLR 5004*. The plaintiff is also awarded costs in his case, to be computed by the Clerk of the Court.

The plaintiff is directed to submit a proposed order to this Court in accordance with this decision and order.

This constitutes the decision and order of th is Court.

ENTER ORDER ON NOTICE

Dated: January 21, 2016


Salvatore J. Modica

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