

**Crespi v O'Malley**

2016 NY Slip Op 33117(U)

June 21, 2016

Supreme Court, Queens County

Docket Number: 700971/2014

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 21<sup>st</sup> day of June, 2016

**FILED**  
JUN 23 2016  
COUNTY CLERK  
QUEENS COUNTY

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

ALICE CRESPI

Index Number: 700971/2014

Plaintiff,

-against-

ORDER GRANTING  
DAMAGES AFTER INQUEST

RITA O'MALLEY,

Defendants.  
\_\_\_\_\_ X

The plaintiff, Alice Crespi, commenced this lawsuit against the defendant, Rita O'Malley, to recover for injuries that she allegedly suffered in February 13, 2013, as a result of the negligence of the defendant. The plaintiff contends that she has sustained injuries of a permanent nature. The defendant, Rita O'Malley, failed to appear in this case and the plaintiff, in turn, moved for a default judgment. See CPLR 3215(a).<sup>1</sup>

On April 18, 2016, this case was administratively referred to this Court for an inquest, which was then conducted on the record. Klevis Peshtani, Esq., appeared for the plaintiff. The defendant appeared without counsel at the inquest and was permitted an opportunity to participate. The plaintiff, Alice Crespi testified on her own behalf. At the inquest, a certified copy of the plaintiff's medical records from New York

<sup>1</sup> The City of New York was also sued by the plaintiff in this case and moved for summary judgment, dismissing the complaint against it. Concluding that the City of New York had neither actual nor constructive notice of the alleged condition, which was a patch of black ice, another Judge of this Court granted the motion for summary judgment. Because, however, the defendant, Rita O'Malley, failed to appear in this case, that Court granted the plaintiff's motion for a default judgment against this defendant. By not appearing in this case, O'Malley squandered a potential opportunity to have the case dismissed against her.

Presbyterian Hospital in Queens County, was admitted into evidence as Plaintiff's Exhibit 1; a certified copy of the plaintiff's medical bill in the amount of \$3,961.00 from New York Presbyterian Hospital in Queens County, for services rendered on February 13, 2013, was admitted into evidence as Plaintiff's Exhibit 2. This bill established that the plaintiff's insurance company covered all but \$50.00 of her medical expenses for treatment she received at New York Presbyterian Hospital on February 13, 2013. Because Plaintiff's Exhibit 3, which were the medical records of David Capiola, a physician associated with the Orthopaedic Specialists of Greater New York, were not certified, it was deemed marked for identification only. In addition, Plaintiff's Exhibit 4, which were the treatment records of Steven Berman, a Registered Physical Therapist, were deemed marked for identification only for that same reason. On May 19, 2016, this Court received a certified copy of Steven Berman's treatment records relating to the plaintiff. Accordingly, such records will be admitted into evidence as Plaintiff's Exhibit 3. On that same date, this Court also received the records of the Orthopaedic Specialists of Greater New York. Such records, however, were not accompanied by any certification. Accordingly, the Court cannot consider them for purposes of deciding this matter. After receiving these records, this case was adjourned for decision.

The evidence presented at the inquest revealed that, on February 13, 2013, at about 8:10 am, the plaintiff, who was born on June 18, 1955, stepped out of a car and slipped on a patch of ice "outside" of a driveway abutting the property located at 66-19 70<sup>th</sup> Road, Millage Village, Queens County. This property belonged to the defendant in this case. As a result of slipping on this ice, the plaintiff fell to the ground, breaking her left humerus and leaving her in what she testified was excruciating pain. An ambulance was called to the scene, whereupon the plaintiff was taken to New York Presbyterian Hospital for treatment. The medical records from this hospital reveal that, as a result of this fall, the plaintiff sustained a closed fracture of the upper end of her left humerus bone. At the hospital, the plaintiff was given opiates for her pain, which she stopped taking in the hospital because it made her nauseous. Her arm was immobilized in a sling, which according to the medical records, rendered her "free of pain." The Court notes that the hospital records further reveal that the plaintiff experienced pain "only when moving the extremity."

The plaintiff testified that she saw Dr. Capiola, who prescribed an MRI scan and advised bed rest for three weeks, that she continue to keep her arm immobilized in the sling, and that she keep her arm still. After a period of three weeks, she returned to Dr. Capiola, who informed her that she did not require surgery. Instead, this doctor prescribed a course of treatment in physical therapy. The plaintiff then went to Richard Berman for the physical therapy. Such therapy commenced on March 19, 2013 and ended on December, 2013. In all, the plaintiff was treated by Berman thirty-six times. Plaintiff, who is right-handed, testified that, as a result of the fall, her left arm is not as strong as her other arm, and that she continues to feel pain on rainy days. She also testified that the injury forced her to leave her job, which consists of caring for special needs children ranging in ages from 5 to 11 years old, as she is no longer capable of lifting or carrying them. The plaintiff, however, also testified that she had taught school

for 31 years and decided to retire early. Finally, the plaintiff testified that she spent \$1,000.00 for medical treatment, which represented co-payments to the treating medical personnel.

At the conclusion of the inquest, counsel for the plaintiff requested that she be awarded damages in the amount of \$175,000.00 for pain and suffering, both past and future. Based on the evidence presented at the inquest, this Court finds that an award of \$175,000.00 is excessive. See *Reynolds v. Merit Oil of New York, Inc.* 167 AD2d 521 (2<sup>nd</sup> 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 medical records established that the plaintiff experienced a great deal of pain as a result of the injury to her left arm. Nevertheless, the records from her physical therapist reveal that the plaintiff benefitted a great deal from physical therapy. Such records revealed that by December, 2013, she was no longer in constant pain and that her prognosis was “good.” The Court accepts the fact that she still experiences occasional pain in her arm when it rains. Surgery, however, was not necessary in this case; nor did the plaintiff have to undergo extensive rehabilitation. Compare *Zavurov v City of New York*, 241 AD2d 491 (2<sup>nd</sup> Dept. 1997). In short, a fair reading of the medical records reveals that the plaintiff’s wrist has healed quite well. Thus, the Court cannot grant the plaintiff’s request for damages in the amount of \$175,000.00. Instead, the Court awards the plaintiff \$45,000 for past pain and suffering. Taking into account that the defendant, who at the time of the hearing was 60 years old; and taking into account her life expectancy of 22.4 years, the Court awards the plaintiff \$15,000.00 for future pain and suffering. See *Vincent v Landi*, 123 AD3d 1183 (3<sup>rd</sup> Dept. 2014); see also *Vogel v Cichy*, 53 AD3d 877 (3<sup>rd</sup> Dept. 2008); compare *De Lany v. State*, 256 AD2d 1135 (4<sup>th</sup> Dept. 1998). Accordingly, based on the evidence presented at the inquest, this Court finds that an award of \$45,000.00 for past pain and suffering and \$15,000.00 for future pain and suffering is fair and reasonable. See *Albanese v Przybylowicz*, 116 AD3d 1216 (3<sup>rd</sup> Dept. 2014). See *Vogel v Cichy*, 53 AD3d 877 (3<sup>rd</sup> Dept. 2008).

Accordingly, the plaintiff is awarded \$45,000.00 for past pain and suffering in this case and \$15,000.00 for future pain and suffering. Finally, the plaintiff is awarded \$1,050.00, which represents her medical costs not covered by insurance. This award shall include interest at the rate of 9%, to be computed by the Clerk of the Court as of February 13, 2013, the date that the plaintiff’s cause of action arose. See CPLR 5001; see also CPLR 5004. The plaintiff is also awarded costs in this 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: June 21, 2016

  
Salvatore J. Modica

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COUNTY CLERK  
QUEENS COUNTY