

Daly v Wyndham W. at Garden City Condominiums
2017 NY Slip Op 32229(U)
October 23, 2017
Supreme Court, New York County
Docket Number: 154207/2013
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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JAMES M. DALY,

Plaintiff,

Index No. 154207/2013
Motion Seq: 002

-against-

THE WYNDHAM WEST AT GARDEN CITY CONDOMINIUMS,
THE BOARD OF MANAGERS OF THE WYNDHAM WEST
CONDOMINIUM and CHARLES H. GREENTHAL
MANAGEMENT CORP.,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendant.

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The motion to preclude any reference at trial, including expert testimony, of plaintiff's future earnings is granted in part and denied in part.

Background

This personal injury action arises out of plaintiff's slip and fall on August 16, 2012 while he was walking on the first floor of a building located at 111 Cherry Valley Avenue, Garden City, New York. Plaintiff claims he injured his left shoulder. At the time of the accident, plaintiff was working for the Department of Homeland Security with the Transportation and Security Administration ("TSA"). Plaintiff claims lost wages of over \$2 million due to his inability to gain law enforcement employment with the MTA, the U.S. Customs and Border Protection and Nassau County. Plaintiff ultimately had surgery on his shoulder in December 2012, after which he missed about four to six weeks of work before returning to his job with the TSA. Plaintiff later left the TSA in June 2015 to work as a federal

investigator for the U.S. Department of Labor. Plaintiff underwent a second shoulder surgery in February 2016.

Defendants move to preclude evidence pertaining to plaintiff's claims for future lost wages because plaintiff's alleged earnings are too speculative. Defendants contend that plaintiff never obtained employment with the three agencies mentioned above and, therefore, cannot claim lost wages for jobs he never had. Defendants argue that plaintiff cannot assume he would have obtained employment with these agencies had he not been injured.

In opposition, plaintiff contends that he passed the written exam to be an MTA police officer but that he failed the physical fitness test (specifically, the push-up portion) because of the injuries he suffered as a result of the slip and fall. Plaintiff insists that he passed the written test to be a police officer for the U.S. Customs and Border Protection, but that his application was denied because he could not lift the required weight or perform push-ups and pull-ups. Plaintiff further insists that he did not perform the physical fitness test for the Nassau County police because his medical provider did not clear him to perform the test (plaintiff insists he passed the written test).

Discussion

In order to receive compensation for lost earnings, plaintiff must establish these damages with "a reasonable degree of certainty" (*Matter of East 91st St. Crane Collapse Litig.*, 117 AD3d 404, 405, 985 NYS2d 37 [1st Dept 2014] [precluding plaintiff from introducing evidence pertaining to future lost earnings because the purported evidence was too speculative]).

The question for this Court is whether plaintiff provided evidence to establish these future lost earnings with a reasonable degree of certainty. The Court finds that plaintiff's claims are too

speculative and may not be presented to the jury because plaintiff did not have a firm offer to work for the MTA, for Nassau County or for U.S. Custom and Border Protection.

Although plaintiff may have passed written tests, that does not mean he would have been a police offer for the MTA if his injury did not occur. In fact, MTA's letter to plaintiff informing him about his successful written examination notes that "the Physical Fitness Screening Test is only one element in the hiring process for the MTA Police Officer position. Passing this test does not guarantee that you will be invited to take any other steps in the process or that you will receive a job offer" (NYSCEF Doc. No. 54). Similarly, there is no suggestion that plaintiff would have automatically received a firm employment offer if he had passed the physical tests or met the physical requirements for the other agencies (*see* NYSCEF Doc. No. 56, 61). Plaintiff cannot establish future earnings with a reasonable certainty where he never obtained a firm offer of employment (*see e.g., DeVirgilio v Feller Precision Stage Lifts, Inc.*, 47 AD3d 522, 523, 851 NYS2d 33 [1st Dept 2008]; *Dell v Port Auth. of N.Y. & N.J.*, 24 AD3d 155, 156, 805 NYS2d 65 [1st Dept 2005]).

The Court cannot assume that plaintiff would have passed the other components of the physical examination or that plaintiff would have passed other required tests, such as a psychological examination. Nor can the Court assume that plaintiff would have been afforded a job offer even had he passed every exam— the documents do not indicate that a job offer is automatically extended to candidates who pass all the required tests (*see e.g.,* NYSCEF Doc. No. 61 [referencing an "eligible list" for Nassau County police]). There is no evidence that plaintiff would have received an offer had he not injured his shoulder. Although his shoulder injury may have prevented him from progressing in the

hiring process, the counterfactual scenario advanced by plaintiff– that he would have had job offers– is too speculative.

Future Costs of Medical Care

Defendants claim that because plaintiff returned to work after his injury and he has health insurance, he should be prohibited from seeking future medical costs. Defendants further insist that plaintiff has proffered no evidence that his health insurance will fail to cover these future medical costs.

In opposition, plaintiff claims that CPLR 4545 provides a process by which defendants can seek, after trial, to reduce an award based on reimbursement to plaintiff from collateral sources.

Defendant failed to specifically address this point in reply.

“CPLR 4545 provides, in general, for a reduction in an award of damages based on reimbursement to the plaintiffs from collateral sources. Specifically, section 4545 is titled ‘Admissibility of collateral source of payment,’ and it is therefore an evidentiary rule governing when such evidence may be presented: The provision is clear that evidence of collateral source payments shall be admissible for consideration by the court and that any collateral source deduction shall be made by the trial court *after* the rendering of the jury’s verdict (*Schaefer v New York City Tr. Auth.*, 96 AD3d 485, 488, 946 NYS2d 154 [1st Dept 2012] [internal quotations and citations omitted). “[T]he jury should determine the [plaintiff’s] losses without reference to any reimbursement that the [plaintiff] may have received” (*id.*).

Here, plaintiff can present his claim for future medical costs. Obviously, he must meet his burden at trial to demonstrate entitlement to these damages despite his continued employment. After the trial, the amount may be reduced in accordance with CPLR 4545. There is no reason to prohibit

employment. After the trial, the amount may be reduced in accordance with CPLR 4545. There is no reason to prohibit plaintiff's presentation of this evidence because he is working or his health insurance will cover future costs. Therefore, defendants' motion is denied with regard to the branch of the motion seeking to preclude at trial any reference to the costs of plaintiff's future medical care.

Summary

Here, plaintiff applied for three law enforcement positions and did not receive a single, firm offer of employment from any of these agencies. Public service positions, such as the ones to which plaintiff applied, often have multiple steps in the hiring process and plaintiff had only passed the written examinations for each position. Plaintiff's attempt to seek wages based on future employment he could not yet accept is entirely too speculative.

Accordingly, it is hereby

ORDERED that defendants' motion is granted only to the extent that plaintiff is precluded from referencing at trial any future earnings and is precluded from offering expert testimony in support of his future earnings' claim; and it is further

ORDERED that the motion is denied to the extent that defendants sought to preclude plaintiff from referencing future medical costs at trial.

This is the Decision and Order of the Court.

Dated: October , 2017
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH