

Liciaga v New York City Tr. Auth.
2019 NY Slip Op 33331(U)
October 25, 2019
Supreme Court, Kings County
Docket Number: 513495/2016
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 513495/2016
Motion Date: 8-6-19

-----X
ROBERT LICIAGA,
Plaintiff,

-against-

DECISION/ORDER

NEW YORK CITY TRANSIT AUTHORITY d/b/a NEW
YORK CITY TRANSIT,

Defendant.
-----X

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion	
Affirmations/Affidavits/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

2019 NOV - 8 AM 10:30
KINGS COUNTY CLERK
FILED

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, defendant, the NEW YORK CITY TRANSIT AUTHORITY, moves pursuant to CPLR 4404(a) for an order setting aside the jury verdict and dismissing plaintiff's complaint on the ground that the plaintiff did not make out a prima facie case, or in the alterative, setting aside the jury verdict and granting a new trial on the ground that the jury's failure to find that the plaintiff was not negligent and was against the weight of the evidence, that the jury's awards for past and future pain and suffering were excessive and for other alleged evidentiary and trial errors. In the alternative, the defendant seeks a reduction in the awards for past and future pain and suffering. The defendant also moves for an

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order directing that a collateral source hearing be held.

On April 10, 2016, at approximately 2:50 p.m., the plaintiff, Robert Liciaga, was severely injured when a railroad tie fell from a girder supporting an elevated subway line and struck his back while he was riding a bicycle along Broadway in the Bushwick section of Brooklyn, New York. At the time of the accident, the defendant was performing track replacement work on the elevated subway tracks for the J and M lines which run above Broadway. The track replacement work required the defendant to lift up the old sections of track with a crane and lower them to the ground. Each section of track that was removed from the elevated subway line was over 20 feet in length and consisted of two rails attached to which were a series of wooden railroad ties. Each of the railroad ties were several feet long and substantial in weight.

The trial evidence established that when the old sections of track were lifted off the existing track bed and lowered to the ground, the railroad ties would often come loose from the rails and fall to the ground. Accordingly, to safeguard the area where the old track was being removed, the defendant created what was referred to as a "drop zone." The drop zone was the area directly below where the old sections of track were being lifted from the track bed and lowered to the ground and was supposed to be completely barricaded off during operations to prevent debris from striking anyone in the area.

At the time of the accident, the 23 year old plaintiff was riding a bicycle along Broadway in the area where the track replacement work was being performed. He testified at trial that after someone controlling traffic on Broadway in the area of the work told him that it was safe to proceed, he continued riding his bicycle along Broadway. Plaintiff was struck with the railroad tie after he rode his bicycle directly into the drop zone.

As a result of the accident, the plaintiff suffered severe and life changing injuries, including a crush injury between his T9-T10 vertebrae which completely severed his spinal cord and left him without motor activity and sensation below the T7 level. The trial evidence demonstrated that plaintiff will suffer from paraplegia for the remainder of his life and never walk again. It was also shown that plaintiff has no bladder or bowel function, that he cannot engage in sexual relations and that for the rest of his life, he will need to be institutionalized and confined to a wheelchair. Additionally, it was demonstrated that plaintiff suffers from severe and constant neurogenic pain which will likely be a lifelong condition.

Following a liability trial, the jury returned a verdict finding the defendant 100% at fault. The jury awarded the plaintiff \$9 million dollars for past pain and suffering, covering a period of approximately three years and \$60 million dollars for future pain and suffering covering 48 years. The jury also made a substantial award for future economic losses. The parties stipulated to the judgment amount for past economic losses.

Defendant's contention that the verdict should be set aside on the ground that the plaintiff failed to make out a prima facie case is without merit. "A motion on this ground may be granted only where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Caliendo v. Ellington*, 104 AD3d 635, 636 [2d Dept 2013], quoting *Szczerbiak v. Pilat*, 90 NY2d 553, 556 [1997]). "In considering such a motion, 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant'" (*Hamilton v. Rouse*, 46 AD3d 514, 516 [2d Dept 2007], quoting *Szczerbiak v. Pilat*, 90 NY2d at 556). Here, affording the plaintiff every

inference that may properly be drawn from the evidence presented and considering the evidence in a light most favorable to him, the jury could have rationally found that the defendant was negligent for any number of reasons, including but not limited to, the failure to exercise reasonable care to ensure that the drop zone was completely blocked while old sections of track were being removed and lowered to the ground. Sufficient evidence was introduced from which the jury could have concluded that there was a 12 foot opening in the barricading at the time of the accident and that it was through this opening that the plaintiff gained entry into the drop zone. Contrary to defendant's contention, there was no evidence that the plaintiff intentionally biked through existing barricades in order to enter the drop zone.

Defendant's contention that the jury's verdict that the plaintiff was not negligent is against the weight of the evidence is also without merit. A jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached the verdict on any fair interpretation of the evidence (see *Lolik v. Big V Supermarkets*, 86 NY2d 744 [1995]; *Cassuto v. City of New York*, 23 AD3d 423 [2nd Dept 2005]; *Harris v. Marlow*, 18 AD3d 608 [2d Dept 2005]). It is for the trier of fact to determine the credibility of the witnesses and great deference is accorded to the fact-finder, who had the opportunity to see and hear the witnesses (see *Cassuto v. City of New York*, *supra* at 424). On this record, the jury could have reasonably concluded that the plaintiff was free from fault since he was told just prior to the accident that it was okay to continue biking along Broadway and that he entered the drop zone unintentionally through an opening that was not barricaded.

Contrary to the defendant's contention, the admission into evidence of the statements by the non-testifying witness who told the plaintiff that it was safe to proceed ahead did not

constitute hearsay. The statement was not offered for the truth of the matter asserted and was properly admitted for the limited purpose of establishing the reasons behind plaintiff's actions just prior to the accident (*see People v. Martinez*, 167 AD3d 941, 942 [2d Dept 2018]; *People v. Lopez-Miralles*, 153 AD3d 936, 936 [2d Dept 2017]; *People v. Prince*, 128 AD3d 987, 987 [2d Dept 2015]).

The court is not persuaded that it was error to preclude the defendant from introducing evidence that plaintiff was suffering from bipolar disorder at the time of the accident, especially since defendant's counsel admitted that he was not going to call an expert to testify that plaintiff's bipolar disorder was relevant to any of the issues pertaining to liability.

The court adheres to its ruling that a charge on implied assumption of the risk was not appropriate since no evidence was presented that the plaintiff was aware of the specific risk which caused his injuries, i.e. - the risk of falling objects (*see Grassi v. Carolina Barbeque, Inc.*, 254 AD2d 38, 38 [1st Dept 1998]). While sufficient evidence was presented from which a jury could have inferred that plaintiff was aware that he was riding his bicycle in a construction zone and that construction zones are generally dangerous, only when a plaintiff fails to appreciate a known danger is an implied assumption of risk charge warranted (*see Arbogast v. Board of Education*, 65 NY2d 161 [1985]; *Shire v. Mazzilli*, 203 AD2d 275, 275 [2d Dept 1964]; *Pisciotta v. Parisi*, 155 AD2d 422 [2d Dept 1989]).

Allowing plaintiff's counsel to comment on defendant's failure to call any physician during the damages phase of the trial was proper. "The rule is well established that counsel may comment on the failure of the adverse party to call a witness who is under his control and whose testimony he could be expected to produce if it were favorable to him" (*Seligson, Morris &*

Neuburger v. Fairbanks Whitney Corp., 22 AD2d 625, 630 [1st Dept 1965]) and that such comments are allowed even though a missing witness charge is not given (*Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, *supra* at 630). While plaintiff's counsel stipulated that he would not request a missing witness charge if the defendant did not call an examining physician to testify, plaintiff's counsel did not stipulate that he would refrain from commenting on defendant's failure to call an examining physician during his summation.

The court is not persuaded that the liability charge misstated the law. The jury was instructed, in sum and substance, that a defendant in possession and control of a work area has a duty to exercise reasonable care in safeguarding the area. It is well settled that liability for dangerous conditions on real property can be predicated upon possession and control of property (*see Guzman v. Jamaica Hosp. Med. Ctr.*, 163 AD3d 636, 637 [2d Dept 2018]; *Ellers v. Horwitz Family Ltd. Partnership*, 36 AD3d 849 [2d Dept 2007]; *Nappi v. Incorporated Vil. of Lynbrook*, 19 AD3d 565 [2d Dept 2005]), and there is no question that the defendant was in control of the area of the accident. Further, since the defendant did not request a charge on inherently dangerous conditions, defendant's right to such a charge was waived even if such a charge was warranted, as defendant contends.

The court agrees that the awards for past and future pain and suffering were excessive. While the amount of damages to be awarded for personal injuries is primarily a question for the jury (*see Walsh v. Kings Plaza Replacement Serv.*, 239 AD2d 408, 409 [2d Dept 1997]; *Schare v. Welsbach Elec. Corp.*, 138 AD2d 477, 478 [2d Dept 1988]), an award may be set aside, as here, when it deviates materially from what would be reasonable compensation (*see CPLR 5501(c)*; *Walsh v. Kings Plaza Replacement Serv.*, *supra* at 409). Despite plaintiff's devastating injuries, a

review of the prevailing case law addressing awards for pain and suffering in similar cases show that the awards granted here cannot stand (*see e.g., Barnhard v. Cybex Int'l, Inc.*, 89 AD3d 1554 [4th Dept 2011]; *Miraglia v. H & L Holding Corp.*, 36 AD3d 456 [1st Dept 2007]; *Ruby v. Budget Rent A Car Corp.*, 23 AD3d 257, 257 [1st Dept 2005]; *Cruz v. Long Island Rail Rd. Co.*, 22 AD3d 451 [2d Dept 2005]; *Harvey v. Mazal Am. Partners*, 179 AD2d 1 [1st Dept 1992]; *Saladino v. Am. Airlines, Inc.*, 500 Fed Appx 69, 74 [2d Cir 2012]). Defendant's motion for a new trial on the issue of past and future damages is therefore granted unless, the plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to reduce the awards for past and future pain and suffering to \$4 million dollars and \$12 million dollars respectively.

Contrary to defendant's contention, the comments made by plaintiff's counsel during his summation to the effect that defendant never took responsibility for the accident constituted fair comment and were within the bounds of the wide latitude allowed to counsel in summation (*see Cerasuoli v. Brevetti*, 166 AD2d 403, 404 [2d Dept 1990]; *Braun v. Ahmed*, 127 AD2d 418, 421-422 [2d Dept 1987]). Similarly, since counsel for a plaintiff is entitled to suggest to the jury specific dollar amounts to award for past and future pain and suffering (*see* CPLR 4016(b), PJI 2:277A), the amounts plaintiff's counsel suggested in his summation were not outside the bounds of fair comment given the nature of plaintiff's injuries.

Turning to that branch of defendant's motion for a collateral source hearing, "to be entitled to a collateral source hearing, the defendant must tender some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral sources" (*Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 36-37 [2d Dept 2008]; *see also Nunez v. City of New*

York, 85 AD3d 885, 887-88 [2d Dept 2011]). Here, defendant argues that it met this burden by demonstrating that the plaintiff is eligible to procure healthcare coverage under the Patient Protection and Affordable Care Act (“ACA”), and that if plaintiff procured such coverage, he would be indemnified for a substantial portion of his future medical care. Parenthetically, defendant is not claiming that the plaintiff was covered under the ACA at the time of the accident or that he received benefits under the ACA anytime thereafter. The court rejects defendant’s argument and holds that even though defendant sufficiently demonstrated that the plaintiff may be eligible to procure healthcare coverage under the ACA, such coverage is not a collateral source within the meaning of CPLR 4545.

First, to construe healthcare coverage that does not presently exist as a collateral source within the meaning of CPLR 4545 is inconsistent with a strict construction of the statute. Since CPLR 4545 was enacted in derogation of the common law, it must be strictly construed (*Oden v. Chemung County Indus. Dev. Agency*, 87 NY2d 81, 83-86 [1995]), citing McKinney’s Cons Laws of NY, Book 1, Statutes § 301(a); *see also Matter of Bayswater Health Related Facility v. Karagheuzoff*, 37 NY2d 408, 414 [1975]) which means that it must be “construed in the narrowest sense that its words and underlying purposes permit, since the rules of the common law¹ must be held no further abrogated than the clear import of the language used in the statute absolutely requires” (*Oden, supra* at 86 [internal quotations omitted]). Clearly, construing the statute in the manner urged by the defendant would not be appropriate.

Second, at least one Appellate Court in this State has held that any benefits a plaintiff may

¹Under the common law, the collateral source rule precluded any reduction of a personal injury award by the amount of any compensation received from a source other than the tortfeasor (*Bryant v. New York City Health & Hosps. Corp.*, 93 NY2d 592, 605 [1999]).

receive in the future, if he so chooses, that would reimburse him for portions of his future economic damages, is not a collateral source under CPLR 4545 (*Malmberg v. United States*, 816 F3d 185 [2d Cir 2016]). In *Malmberg*, the defendant argued that since the plaintiff was entitled to receive free medical services from the Veteran's Administration (VA) in the future, such benefits should be treated as a collateral source under CPLR 4545. In rejecting this argument, the court stated:

The plain language of Section 4545, however, suggests that a tortfeasor's offer to provide a plaintiff with free medical services at the tortfeasor's facility does not warrant an offset against the damages award. Section 4545 provides for a reduction of the damages award with respect to costs of medical care "[i]f the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source." If the plaintiff seeks medical care from a non-VA provider—which, as discussed, is his prerogative—the costs of that medical care cannot be regarded as "replaced or indemnified" merely because the plaintiff elected not to accept the opportunity to receive free medical care from the VA. Indeed, the government has not demonstrated that, under these circumstances, plaintiff's future medical care costs "will, with reasonable certainty, be replaced or indemnified from any collateral source."

(*Id.* at 194).

Here, as in *Malmberg*, it is plaintiff's prerogative whether or not to obtain coverage under the ACA and CPLR 4545 simply cannot be interpreted as requiring him to do so.

Finally, while plaintiff may receive a double recovery if he procures healthcare coverage under the ACA in the future, an outcome CPLR 4545 was enacted to prevent (*Kihl v. Pfeffer*, 47 AD3d 154, 162-63 [2d Dept 2007]), this is not a basis to find that such potential coverage is a collateral source within the meaning of CPLR 4545. The *Malmberg* Court fully recognized the possibility that the plaintiff in that case could potentially receive a double recovery if he opted to

receive medical treatment at a VA authorized facility in the future and held that any such concern was for Congress and not the court (*Malmberg* 816 F3d at 194); *see also Ulrich v. Veterans Admin. Hosp.*, 853 F2d 1078, 1084 [2d Cir 1988]; *Feeley v. United States*, 337 F2d 924, 935 [3d Cir 1964]).

For all of the above reasons, defendant's motion for a collateral source hearing is denied.

The court has considered the remaining arguments advanced by the defendant in favor of a new trial and finds that they were either waived due to defendant's failure to make a timely objection, without merit or both.

For all of the above reasons, it is hereby

ORDERED that defendant's motion is decided as set forth above.

This constitutes the decision and order of the Court.

Dated: October 25, 2019



PETER P. SWEENEY, J.S.C.
HON. PETER P. SWEENEY, J.S.C.

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