

Renko v Faragon

2021 NY Slip Op 33782(U)

October 13, 2021

Supreme Court, Albany County

Docket Number: Index No. 904228-20

Judge: James H. Ferreira

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ANGELO RENKO and MARJORIE
RENKO,

Plaintiffs,

**DECISION, ORDER
AND JUDGMENT**
Index No.: 904228-20
RJI No.: 01-20-136094

-against-

SAMUEL FARAGON, S.G.F. PROPERTIES,
LLC, FARAGON PROPERTIES, LLC and
SEFCU,

Defendants.

(Supreme Court, Albany County, Motion Term)

APPEARANCE: Andrew M. Gelbman, Esq.
Sandford Rosenblum, Esq.,
Gelbman Legal Group, P.C.
Attorneys for Plaintiffs
113 Great Oaks Blvd.
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HON. JAMES H. FERREIRA, Acting Justice:

In this action, plaintiffs seek damages arising from injuries sustained by plaintiff Angelo Renko (hereinafter plaintiff) on December 2, 2019 when he slipped and fell on property located at 2 Braintree Street in Albany, New York. Plaintiffs allege that the property was owned controlled, operated, maintained and/or managed by defendants Samuel Faragon, S.G.F. Properties, LLC and Faragon Properties, LLC (hereinafter defendants) and that defendants negligently failed to maintain the property in a safe condition.¹ The claim of plaintiff Marjorie Renko (hereinafter Ms. Renko) is derivative.

¹ By Order dated January 25, 2021, the Court granted the unopposed motion of defendant SEFCU for summary judgment dismissing the complaint as against it.

Defendants failed to appear or answer and, by Decision and Order dated April 28, 2021, the Court granted plaintiffs' motion for a default judgment on the issue of liability and scheduled an Inquest on the issue of damages. The Inquest was held on June 3, 2021, via Microsoft Teams teleconferencing technology. Plaintiffs appeared with their counsel and defendants failed to appear.² Plaintiffs testified and also submitted a Memorandum of Law in support of damages, along with plaintiff's medical records and a typed document identified as "Statement of Marjorie Renko," which is unsworn, undated and unsigned.³

Inquest Evidence

At the Inquest, plaintiff testified, in relevant part, that, on December 2, 2019, he tripped in a pothole in the driveway of 2 Braintree Street while snow blowing. He fell onto his right shoulder. He "was down" for about "five, ten, 15 seconds because it really hurt" (Tr. 7).⁴ He slowly got up and put the snow blower away. After the pain did not get better and "actually got worse" after a few days, he called his primary care physician (Tr. 7). He saw his primary care physician on December 10, 2019 and she recommended that he see an orthopedist. He was thereafter examined by an orthopedist, who ordered an MRI. After the MRI, the doctor informed him that "the only solution" was rotator cuff surgery and that he had torn "three of the four" (Tr. 7). He had the surgery on March

² Plaintiffs filed proof that, on May 14, 2021, defendants were served with the Court's Decision and Order scheduling the Inquest by certified mail, return receipt requested, and that the mailings were signed for on May 18, 2021.

³ Following the inquest, the Court directed that plaintiffs submit an affirmation or affidavit from a treating physician supporting their damages claim. To date, the Court has not received an affidavit or affirmation from a treating physician as requested, although plaintiffs submitted, in response to the Court's directive, a second copy of plaintiff's medical records (this copy is certified), a second copy of the typed statement and a letter from counsel providing additional arguments in support of damages. As the Court did not authorize or direct this post-Inquest submission, the Court has not considered it. The Court also has not considered the unsworn and unsigned statement, as it is not authenticated in any way.

⁴ References preceded by "Tr." are to the one-volume written transcript of the Inquest.

7, 2020, followed by physical therapy and follow-up appointments. However, “it wasn’t getting really any better” and the doctor suggested a shoulder replacement (Tr. 7). Plaintiff did not want to undergo another surgery, so he opted for more physical therapy. He testified that the physical therapy “still really wasn’t making much difference. I was very limited in what I could do with my right arm. From my elbow down, I could [do] anything, but moving my elbow up forwards it was difficult” (Tr. 8). Plaintiff testified that, in June 2020, his doctor ordered a second MRI since plaintiff was not making progress. At the follow-up appointment, in December 2020, the doctor told him that the rotator cuff was still damaged and that he could have another surgery to repair it or could have a total shoulder replacement. The doctor advised that, with a shoulder replacement, he would not be able to reach behind his back and would not be able to lift anything above his ear over 12 pounds. He testified that this was not an option for him because he would not be able to do remodeling work. He stated that he had not seen the doctor since that appointment and that he is not doing any physical therapy aside from what he does at home.

When asked to describe his current pain level, plaintiff testified:

“If I don’t move my arm, if I don’t move my shoulder there’s zero, no pain at all. But if I’m driving a car, if I try to reach over to the passenger seat for something, that hurts, then it becomes maybe a five from one to ten. It’s hard to shampoo my hair, reach the top of my head. I have to lean my head over. And I try to do things at home with weights, I got a pulley thing on the wall. I try to do that” (Tr. 10).

He testified that he had become accustomed to the limitations and he “knows what [he] can do and what [he] can’t do,” although he hopes that maybe it will get better (Tr. 11). Plaintiff testified that, at the time of the accident, he was earning income remodeling apartments. He affirmed that he is now unable to perform that work, which entailed sheetrocking, wiring, tile work, kitchen cabinets, light plumbing, plastering and painting. He testified that he recently had a grandchild but is only able to hold her for a “short while” (Tr. 14). He further testified that his injury has impacted his

relationship with his six children, as he “spend[s] most of the time in [his] bedroom” and does not “stay around too much” because he feels badly about his limitations (Tr. 15). He stated that the only time he feels comfortable is when he is “in [his] bedroom or just laying down, watch TV or go on the computer” (Tr. 15).

Ms. Renko testified that, prior to the accident, plaintiff was “always very active” and would work 12 or 14 hour days “probably doing his remodeling or whatever with the apartments and he was always, always working, always very busy” (Tr. 18). She testified that plaintiff had “a great attitude,” “took care of stuff and everything was good” (Tr. 18). She testified that they would see their kids, go places, and “things were good” (Tr. 18). She testified:

“And now because he’s so uncomfortable and he doesn’t sleep at night, so sometimes he’s like, sleeps during the day or he’s in his room all the time . . . And I might see him for, like, an hour maybe, two hours out of the day. Yes, and when I do see him we don’t have any conversation much because he’s been laying in his room or sitting at the computer while I’ve been out either visiting with the children or right now caring for our granddaughter. It’s just like I’m living by myself. I try to talk to him about things and he seems to be, like, detached from a lot of the family life and everything else that’s going on . . . I just think he’s kind of just discouraged . . .” (Tr. 18-19).

She testified that, after the accident, she was still working and would have to be at work by 4:30 A.M., so she had to wake up early, shovel and clean off the car and then get ready for work. She testified that, when she got home from work, plaintiff would still be in bed. She stated: “[E]ven now when in the morning I’ll see him – maybe he’ll come down and get his coffee and we just pass each other hey, hey. It’s sad” (Tr. 19). She affirmed that this is a marked difference compared with what things were like before the accident. Ms. Renko testified that, before the accident, she and plaintiff “had things to talk about” and had job interests but now, he “doesn’t ever ask [her] how [she is] doing or if everything is ok” (Tr. 19). He also used to spend a lot of time with their daughter who has intellectual disabilities and severe anxiety; now, he “doesn’t ever go hardly to her house and visit

anymore” (Tr. 19). A lot of the responsibility with respect to that daughter has now fallen on her, which is “a lot” (Tr. 20). She testified that, after the accident, plaintiff moved into the spare room and has not returned to their bedroom. Prior to the accident, he took care of most of the outside work and did all of the snowblowing; now, she does all of the outside winter chores. Ms. Renko testified that she believes that plaintiff should “take a chance” and have the shoulder replacement surgery (Tr. 21).

The medical records submitted by plaintiffs can be summarized as follows. On January 15, 2020, plaintiff saw Lee A. Kaback, MD, at OrthoNY. He complained of right shoulder pain due to a slip and fall. Dr. Kaback examined plaintiff, diagnosed him with a “likely” rotator tendon tear and ordered a MRI (Memorandum for Damages Inquest, Exhibit A at Jan. 15, 2020 note). The MRI of plaintiff’s right shoulder was performed on January 31, 2020. The MRI report found:

“mild-moderate multifocal rotator cuff tendinosis and supraspinatus complete rupture at and slightly proximal to the footprint. Tear propagates posteriorly into the infraspinatus anterior fibers at the footprint. Variable retraction of tendon slips between the level the mid humeral head and glenohumeral joint. Subscapularis full width, low-grade concealed interstitial tear at and slightly proximal to the footprint, facilitating medial subluxation of a mildly degenerated and longitudinally split biceps long head into its substance” (*id.*, Jan. 31, 2020 MRI report).

Dr. Kaback saw plaintiff again on February 6, 2020. He reported pain intensity of 3 out of 10. He also reported soreness, stiffness and weakness in the shoulder which worsened with activity. Dr. Kaback noted that the MRI showed “right shoulder full-thickness 2 cm supraspinatus rotator tendon tear with upper border subscapularis tendon tear with medially subluxed long head biceps tendon” (*id.*, at Feb. 6, 2020 note). He recommended surgery.

Plaintiff had rotator cuff repair surgery on March 10, 2020. At a follow-up visit with Dr. Kaback on March 11, 2020, plaintiff reported pain intensity of 10 out of 10. At another follow-up visit on March 18, 2020, plaintiff reported pain intensity of 5 out of 10, and plaintiff was noted to

be “doing well” and would be starting therapy (Memorandum for Damages Inquest, Exhibit A at Mar. 18, 2020 note). Plaintiff saw Dr. Kaback on April 23, 2020; plaintiff reported pain intensity of 3 out of 10 and stated that he had “aching” and “radiating” pain with activity (id., at April 23, 2020 note). He also stated that his pain had improved with treatment. Dr. Kaback stated that plaintiff was “doing well” and renewed his physical therapy prescription (id.). Plaintiff saw Dr. Kaback again on June 3, 2020. Plaintiff reported pain intensity of 5 out of 10 and advised that he had soreness and weakness with activity and motion that was better with therapy. Dr. Kaback noted that plaintiff “has recently taken a step backwards in terms of his motion” and that he was concerned about plaintiff’s rotator cuff (id., at June 3, 2020 note). Plaintiff next saw Dr. Kaback on July 15, 2020. At that visit, plaintiff reported pain intensity of 7 out of 10 and reported aching, stiffness and weakness that was unchanged with therapy. Dr. Kaback’s impression was that plaintiff was doing poorly and that he was “concern[ed] about a rotator cuff tear verses re-tear verses poor healing” (id., at July 15, 2020 note). He recommended a MR arthrogram on his right shoulder. Plaintiff saw Dr. Kaback on August 19, 2020. He reported pain intensity of 7 out of 10 and reported stiffness and weakness and sharp and aching pain which worsens with activity. Dr. Kaback stated that he was concerned about plaintiff’s tendon healing and that he had offered to “evaluate this with an MR arthrogram” but plaintiff “does not want to pursue this” (id., at August 19, 2020 note). Dr. Kaback noted that plaintiff would like more physical therapy and “understands that function may not return without further intervention” (id.). Plaintiff had another MRI on October 21, 2020⁵ and saw Dr. Kaback for a follow-up appointment on December 23, 2020. He reported pain intensity of 7 out of 10. Dr. Kaback noted that plaintiff’s shoulder pain “is his baseline” and, at that point, he was “not

⁵ The results of that MRI are not reflected or discussed in the medical records submitted by plaintiffs.

willing to proceed with a reverse shoulder arthroplasty due to restrictions placed upon and postoperatively” (id., at December 23, 2020 note).

Analysis

“[A]n award of damages to a person injured by the negligence of another is to compensate the victim, not to punish the wrongdoer[, and t]he goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred” (McDougald v Garber, 73 NY2d 246, 253-254 [1989]). Here, plaintiffs seek to recover damages for plaintiff’s past and future pain and suffering and for Ms. Renko’s loss of consortium.

Pain and Suffering

“[D]amage awards for pain and suffering are inherently subjective and not subject to precise quantification or formulas” (Garrison v Lapine, 72 AD3d 1441, 1443 [3d Dept 2010]; see DeMarco v DeMarco, 154 AD3d 1226, 1229 [3d Dept 2017]). The amount awarded as damages is an issue that is “left to a [fact finder’s] common sense and judgment in light of its common knowledge and experience and with due regard to the evidence presented” (Murphy v Lewry, 235 AD2d 968, 969 [3d Dept 1997] [internal citation omitted]). “[F]actors to be considered in evaluating such awards include the nature, extent and permanency of the injuries, the extent of past, present and future pain and the long-term effects of the injury” (Nolan v Union Coll. Trust of Schenectady, N.Y., 51 AD3d 1253, 1256 [3d Dept 2008], lv denied 11 NY3d 705 [2008]; Ciuffo v Mowery Constr., Inc., 107 AD3d 1195, 1197 [3d Dept 2013]; Garrison v Lapine, 72 AD3d at 1443). In assessing the amount of a damage award, a court should also examine comparable cases to determine what would be a reasonable award (see Albanese v Przybylowicz, 116 AD3d 1216, 1217 [3d Dept 2014]; Edwards v Stamford Healthcare Socy., 267 AD2d 825, 827 [3d Dept 1999]).

Here, the evidence presented at the Inquest establishes that plaintiff suffered a right shoulder injury as a result of the slip and fall which required him to undergo surgery and physical therapy. The evidence establishes that the physical pain and suffering that plaintiff experienced and continues to experience as a result of the fall has been, at times, severe, although plaintiff, during his testimony, did not quantify the severity of the pain during the time between the accident and the Inquest. According to plaintiff, he presently experiences pain, on a scale of 5 out of 10, when he moves his shoulder but does not have any pain when he is not moving his shoulder. As of the time of the Inquest, he was still having pain in the shoulder despite the surgery and physical therapy. Although plaintiff claims that the injury is permanent, he did not submit any medical evidence or expert proof on that point, and the evidence reflects that plaintiff's physician recommended additional intervention but plaintiff declined such. Therefore, the Court finds that the record does not demonstrate that the injury is permanent, even though plaintiff still has pain.

The Court has reviewed comparable cases for guidance in formulating its award for pain and suffering (see Morales v Manhattan & Bronx Surface Tr. Operating Auth., 106 AD3d 459, 459 [1st Dept 2013] [reducing a jury's award to \$300,000 for past pain and suffering and \$250,000 for future pain and suffering over 48.6 years for a partial thickness rotator cuff tear requiring surgery and physical therapy and an injury to the plaintiff's lower back]; Shifrel v Singh, 61 AD3d 401, 402 [1st Dept 2009] [increasing the jury's award for past pain and suffering to \$50,000 for a torn rotator cuff requiring surgery and physical therapy]; DeSimone v Royal GM, Inc., 49 AD3d 490, 490 [2d Dept 2008], lv dismissed and lv denied 11 NY3d 862 [2008] [finding that a jury award of \$100,000 for past pain and suffering and \$250,000 for future pain and suffering for the plaintiff's rotator cuff injury and herniated cervical disc did not deviate from what would be reasonable compensation]; Leonard v Irwin, 280 AD2d 935, 935 [4th Dept 2001] [increasing jury's award for past pain and

suffering to \$50,000 for a torn rotator cuff that caused severe pain and limited mobility and two invasive surgeries]; Beckwith v Rute, 235 AD2d 892, 892 [3d Dept 1997] [jury award of \$75,000 for past pain and suffering arising from a torn rotator cuff]; May v European Health Spas, 103 AD2d 1032, 1032 [4th Dept 1984] [reducing award for pain and suffering from \$300,000 to \$200,000 for a rotator cuff tear that resulted in a substantial loss of use]).

Upon due consideration, the Court finds that plaintiff has established causally related damages and that he endured pain and suffering from November 2, 2019 until the date of the Inquest (a period of approximately 1.5 years). Upon consideration of comparable cases and all of the evidence and the circumstances in this case, the Court finds that fair and reasonable compensation is had by an award of \$100,000.00 for past pain and suffering. As for future pain and suffering, the Court is cognizant of “the fact that future damages cannot be computed with exactitude” (Adams v Georgian Motel Corp., 291 AD2d 760, 762 [3d Dept 2002] [internal citation and quotation marks omitted]). Based upon the evidence presented, including plaintiff’s testimony as to his current pain and limitations, it is reasonable to assume that plaintiff will continue to experience pain and suffering arising from the accident in the future. However, as noted above, there is insufficient evidence before the Court that plaintiff’s shoulder injury is permanent. Moreover, it appears that a physician has recommended an additional surgery or procedure on plaintiff’s shoulder; the Court received no evidence as to plaintiff’s prognosis should he elect to receive the surgery, or any evidence as to his prognosis if he does not. In addition, the Court did not receive any evidence as to plaintiff’s life expectancy for it to assess the duration of any future pain and suffering; the Court notes that the record reflects that plaintiff was almost 68 years old at the time of the Inquest. Under these circumstances and based upon this limited record, the Court finds that fair and reasonable compensation is had by an award of \$50,000.00 for future pain and suffering.

Loss of Consortium

As for Ms. Renko's claim of loss of consortium, the record establishes that, as a result of plaintiff's accident, she has suffered an injury inasmuch as she had to assume many household duties that plaintiff used to take care of but now cannot do, such as snowblowing. She has also had to assume most of the responsibility with respect to the needs of one of their children, who has anxiety and intellectual disabilities. In addition, her relationship with plaintiff has suffered inasmuch as his shoulder pain has caused him to become withdrawn and detached and they do not do activities or spend time together like they did before the accident. He has also moved out of the marital bedroom. Based upon the slim record before the Court, the Court finds that fair and reasonable compensation for Ms. Renko's claim is had by an award of \$10,000.00 for loss of consortium.

Conclusion

Based upon the foregoing, the Court finds that plaintiffs' damages in this action total \$160,000.00, together with interest from April 28, 2021, the date of the Court's Decision and Order establishing liability. The award consists of:

- (1) \$100,000.00 for past pain and suffering
- (2) \$50,000.00 for future pain and suffering and
- (3) \$10,000.00 for loss of consortium.

Based upon the foregoing, it is

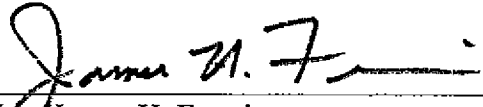
ORDERED AND ADJUDGED that plaintiffs are entitled to a judgment against defendants in the amount of \$160,000.00, together with interest from April 28, 2021.

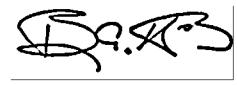
The foregoing constitutes the Decision and Order of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
October 13, 2021


Hon James H. Ferreira
Acting Justice of the Supreme Court



10/14/2021

Papers Considered:

1. Memorandum for Damages Inquest by Andrew M. Gelbman, Esq. and Sanford Rosenblum, Esq., dated June 2, 2021, with attached exhibits; and
2. Inquest Transcript.