

Rodriguez v Wyldwood Owners Assn. Corp.
2022 NY Slip Op 32618(U)
April 27, 2022
Supreme Court, Westchester County
Docket Number: Index No. 68572/2016
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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CESAR RODRIGUEZ,

Plaintiff,

Index No. 68572/2016

– against –

Motion Seq. 7

WYLDWOOD OWNERS ASSOCIATION CORP.,
Defendant.

DECISION & ORDER

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WYKWOOD OWNERS ASSOCIATION CORP.,

Third Party Plaintiff,

– against –

HUDSON VALLEY RESTORATION D/B/A T.O.D.
DEVELOPMENT CORP.,

Third Party Defendant.

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In this action for personal injuries sustained by plaintiff, Cesar Rodriguez, defendant moves *in limine* for an order (1) dismissing plaintiff's claim for past and/or future lost earnings and/or precluding plaintiff from offering evidence at the trial regarding past and/or future lost earnings; (2) precluding plaintiff's expert economist from testifying at trial on the issue of past and future lost wages; (3) precluding plaintiff's life care planner from testifying as to any claim for future medical expenses as such testimony is based on speculation and furthermore on the basis that the life care planner is not medically qualified to testify as to medical care needed by this plaintiff; and (4) striking the portion of the plaintiff's life care plan which details and claims future expenses associated with home health care assistance and dismissing any claims for future home health care costs on the basis that such care is speculative.

This action arises from an alleged work-related injury sustained by plaintiff, Cesar Rodriguez, on September 7, 2016 when he fell from an unsecured ladder which he had climbed to paint the exterior of a condominium complex named Wyldwood Condominiums located at 27 Glen Hill Lane, Tarrytown, New York, and broke his knee. Plaintiff was employed as a painter or painter's assistant by Hudson Valley Restoration Corp., the painting contractor hired by defendant Wyldwood Owners Association Corp.

("Wylldwood"), which is the owner of the common areas and exteriors of the subject condominium complex. Plaintiff commenced this action asserting causes of action under Labor Law §240(1)¹ and 241(6), 200 and common law negligence.

Defendant argues that the plaintiff's economist should be precluded from testifying and the court should strike any and all claims for lost earnings and future lost earnings as any such figures can only be based on speculation. Defendant argues that plaintiff was employed by the third-party defendant for approximately ten days prior to sustaining the subject injuries and the IRS advised it had no records for plaintiff. Defendant further argues that plaintiff has no documentary evidence upon which to base a claim for past or future lost earnings as the plaintiff's economist disclosure indicates that the information with respect to lost earnings will be plaintiff's date of birth, work life expectancy, the wages he earned and the prevailing interest rate.

In opposition, plaintiff argues that the period of time the plaintiff was employed on the job should not preclude its admissibility but should go to the weight to be accorded to such evidence. Plaintiff argues that the plaintiff's date of birth, work life expectancy as stated in the PJI based on his current age, and his earned wages of \$800 per week as alleged in the Verified Bill of Particulars and confirmed by the plaintiff's employer, third-party defendant TOD Development Corp. in its C-11 report to the Workers Compensation Board and in the C2 Employer's Report of Accident, as well as prevailing interest rates for wages which are public record. Plaintiff also claims that he has filed tax returns, and in "2105"², the last full year before the accident at issue, he earned over \$32,000, and that his wages at the time of the accident are an increase over his prior year's wages. As such, there is no speculation.

A claim for lost earnings must be established with reasonable certainty (*Dmytryszyn v Herschman*, 98 A.D.3d 715, 716 [2d Dept 2012]; see *Gomez v City of New York*, 260 AD2d 598, 599 [2d Dept 1999]). A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty, by means of tax returns or other documentation (*Schleger v Jurcsak*, 186 A.D.3d 771, 773 [2d Dept 2020]). Unsubstantiated testimony, without documentation, is insufficient to establish lost earnings (*Lodato v. Greyhawk N. Am., LLC*, 39 A.D.3d 494, 496 [2d Dept 2007]; see also *Gomez v City of New York*, 260 AD2d 598, 599 [2d Dept 1999]). Future earning ability must be established with reasonable certainty, based on evidence of the injured plaintiff's earning capacity both before and after the injury (*Johnson v Rapisarda*, 286 A.D.2d 709, 710 [2d Dept 2001]).

Here, plaintiff has provided a State of New York Workers' Compensation Board record including one record which appears to show plaintiff's weekly earnings for weeks ending on August 26, September 2, and September 13, 2016, and an IRS Form W-4 for 2016. As a result, plaintiff can attempt to introduce into evidence documents to support

¹ Plaintiff's motion for summary judgment as to liability on his Labor Law 240(1) claim was granted by Decision and Order of this Court (Loehr, J.) dated May 24, 2019.

² Presumably 2015.

his claim for lost earnings to be considered by the jury. While plaintiff's economist expert disclosure does not reference any documentary evidence upon which the economist expert relied for his/her opinion, he/she may testify to any documents regarding plaintiff's income which are admitted into evidence at trial. However, to the extent that records and/or documents regarding the plaintiff's claim for lost earnings and/or lost future earnings is deemed inadmissible at trial, plaintiff's expert economist will be precluded from testifying about said records and/or documents. If at trial plaintiff is unable to substantiate his claim for past and future lost earnings with documentation, his claim of lost earnings will be dismissed as a matter of law (*Schleger v Jurcsak*, 186 AD3d 771, 774 [2d Dept 2020]).

Defendant argues that plaintiff's life care planner, Valerie V. Parisi, RN, CRRN, CLCP ("Parisi"), should be precluded from testifying to any claim for future medical expenses as any such testimony is based on speculation, as she cites no specific medical provider or records which support any of the claimed categories of future medical care, and on the basis that the life care planner is not medically qualified to testify as to medical care needed by the plaintiff. Defendant argues further proof that plaintiff's life care planner's opinion regarding future medical expenses is speculative is the submission of two life care plans based on the same information but with drastically different results.

Additionally, defendant argues that plaintiff's claim for future medical costs related to home health care assistance should be dismissed as it is based on speculation. Defendant argues that the life care plan submitted states that plaintiff is dependent on his wife and family members for all household chores, laundry and shopping. Defendant argues that the life care plan which includes 10 hours per week of home care assistance for plaintiff at \$25 per hour, resulting in \$13,000 per year is speculative, not supported by competent evidence as he has not received home care assistance to date. Defendant further claims there is surveillance that was exchanged which reveals that plaintiff can drive and do laundry.

In opposition, plaintiff argues that life care planning expert Parisi details all the medical treatment that plaintiff has undergone throughout the case, with specific reference to date, provider and summary of visit, and based on her review, coupled with her interview of the plaintiff and her experience with medical care as a nurse and training in life care management and case management, she has a sound basis to determine what medical care will be needed in the future. Plaintiff argues that he will call one or more of his treating physicians to testify at trial who will testify concerning future medical treatment which will support a claim for future medical expenses. With regard to plaintiff's claim for future home care services, plaintiff argues that it is premature to dismiss the claim as his need for home care services can be supported by treating physician testimony "and other means." Plaintiff argues that defendant's claims go to the weight to be accorded the evidence and not to its admissibility.

As a general rule, in order for an expert's opinion to qualify as evidence supplying a necessary element of proof on a sufficiency review, it must rest on facts in evidence or

on those personally known and testified to by the expert (*People v. Jones*, 73 NY2d 427, 430 [1989]). It is well established that an expert witness may not guess or speculate (*Kracker v Spartan Chemical Co.*, 183 A.D.2d 810, 812 [2d Dept 1992]). In addition, an expert's opinion testimony must be based upon facts personally known and testified to by the witness or disclosed by the evidence in the record (*id.*). An expert's opinion not based on facts is worthless because an expert's opinion is only as sound as the facts upon which it is based (*id.*, citing *People v. Jones*, 73 NY2d at 430).

Upon review, plaintiff's life care planner, Parisi, has submitted only one Life Care Plan, dated January 13, 2020. The first "life care plan" referred to by defendant is not a life care plan, but Plaintiff's Expert Exchange, dated August 19, 2019. In her January 13, 2020 Life Care Plan, Parisi documents the plaintiff's medical treatment by date and provider. Parisi bases her opinion for her life care plan projection on "review of medical records, a nursing assessment interview, evidence based clinical practice guidelines, and knowledge and experience as a certified rehabilitation nurse and certified life care planner" (see Parisi Life Care Plan, dated August 19, 2019, p 9). To the extent the documents she references are admitted into evidence, as well as any testimony by plaintiff's treating physicians regarding future care and treatment, she will be permitted to testify and rely on them for her opinion. Plaintiff will be able to lay foundation to attempt to establish that Parisi is an expert in nursing and life care planning to permit her to testify as to her opinion regarding the plaintiff's future medical care. However, without medical evidence as to plaintiff's need for future medical treatment, Parisi will be unable to testify as to same. Defendant will have the opportunity at trial to cross examine Parisi on her credentials and opinion.

At this juncture, it is premature to dismiss plaintiff's claim for future home health care assistance as plaintiff will have an opportunity at trial for expert testimony regarding same.

Accordingly, it is hereby

ORDERED that plaintiff's motion *in limine* is denied as outlined above.

The above constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 27, 2022


HON. WILLIAM J. GIACOMO, J.S.C.