

Malayev v Boulevard Leasing Ltd. Partnership

2022 NY Slip Op 34484(U)

September 14, 2022

Supreme Court, Queens County

Docket Number: Index No. 708959/2017

Judge: Sally E. Unger

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: IAS Part 24**

-----X
ROMAN MALAYEV,

Plaintiff,

-against-

**BOULEVARD LEASING LIMITED PARTNERSHIP
ESTATES NY REAL ESTATE SERVICES, LLC,**

Defendants.

-----X
**BOULEVARD LEASING LIMITED PARTNERSHIP,
ESTATES NY REAL ESTATE SERVICES, LLC.,**

Third-Party Plaintiff,

-against-

VAIBHAV MAHAJAN,

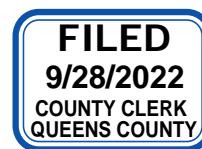
Third-Party Defendant.
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Index No. 708959/2017

Motion Date: 8/11/2022

Motion Seq. 6, 8 and 9

DECISION/ORDER



The following papers were read on these motions, submitted as motion sequence 6, 8 and 9.

Motion Sequence No.:	<u>NYSCEF Doc. Nos</u>
Motion Sequence No.: 6	
Notice of Motion – Exhibits, Affirmation and Affidavit Annexed.....	EF115-EF140
Affirmation in Opposition	EF141-EF142, EF170, EF171-EF172
Reply Affirmation	EF219
Motion Sequence No.: 8	
Notice of Motion – Exhibits, Affirmation and Affidavit Annexed.....	EF157-EF169
Affirmation in Opposition	EF204-EF205
Reply Affirmation	EF221
Motion Sequence No.: 9	
Notice of Motion – Exhibits, Affirmation and Affidavit Annexed.....	EF173-EF202

Affirmation in Opposition	EF206-EF218
Reply Affirmation	EF220

In the initial caption, there is a third party action. Although the case was dismissed as to the Third-Party Defendant, the Third-Party Plaintiffs are attempting to resurrect the action against the Third-Party Defendant yet again by their motion to vacate the jury verdict.

For purposes of this decision and order, the motions brought as Motion Sequence No. 6,8 and 9 are hereby consolidated. Motion Sequence No. 6 is a motion brought by Defendants pursuant to CPLR 4401 and 4404 to set aside the liability verdict; Motion Sequence No. 8 is a motion in limine brought by Plaintiff to preclude the expert testimony that chronic and permanent cognitive, behavioral or other brain deficits cannot be caused by concussion or mild traumatic brain injury. Motion Sequence No. 9 is brought by Defendants pursuant to CPLR 3126 to preclude all claims and evidence identified in the new and amended disclosures served by Plaintiff on and after June 23, 2022.

Motion Sequence No. 6

Defendants have already had two bites at this proverbial apple and did not prevail. First, Defendants made a motion for summary judgment before Justice Weiss asserting the Defendants did not owe a duty to Plaintiff and that the placing of the rocks on the ground of the rooftop terrace was not the proximate cause of the Plaintiff's injuries. Justice Weiss gave a very detailed decision which, in essence, held there were material issues of fact in dispute; these issues raised were not within the Court's purview and were better addressed by a jury. Therefore, the Defendants' motion was denied at that time.

At trial, the Defendants raised the identical issues and cited virtually the same case law pursuant to CPLR 4401, in their attempt to keep the matter away from the jury and obtain dismissal of this action. This Court rendered a decision from the bench adhering to Justice Weiss's earlier decision and sending the issues to the jury for determination.

Now, post-trial, the Defendants have chosen to waste judicial resources to make this redundant motion under CPLR 4404. For the same reasons stated on the record on April 14, 2022, (NYSCEF Document 122, pages 125 through 131), the branch of Defendants' motion which seeks to set aside the jury verdict is denied. An additional reason for denial of this motion is that the appeal of Justice Weiss's order was dismissed on or about June 10, 2020, thereby making that order the law of the case. *Stephanie Rubeo vs. National Grange Mutual Insurance, Co.*, 93 NY2d 750, 697 NYS2d 866 (1999); and *Silvestre v. Shelley*, 30 AD3d 401, 816 NYS2d 195 (2nd Dept 2006).

With respect to the branch of Defendants' motion which seeks to set aside the jury verdict based upon what Defendants have asserted was an improper jury verdict sheet, that argument is utterly without merit. By placing his initials on the verdict sheet after assisting in its drafting and reviewing the final version, defense counsel specifically approved the wording of the verdict sheet before it was submitted verbatim to the jury.

Finally, with respect to the branch of the Defendants' motion to set aside the verdict pursuant to CPLR 4404, a verdict should only be set aside as against the weight of the

evidence when the verdict could not be reached on any fair interpretation of the evidence. *Kiley v. Almar Inc* 1 AD3d 570, 767 NYS2d 651 (2nd Dept 2003); *Jun Suk Seo v. Walsh*, 82 AD3d 710, 918 NYS2d 146 (2nd Dept 2011).

In the case at bar, this Court finds the jury verdict was not against the weight of the evidence. The verdict was rationally based on sufficient evidence. The Court has considered all other arguments of Defendants and finds them to be without merit.

Motion Sequence No. 8

By this motion in limine, Plaintiff is attempting to preclude the expert testimony that chronic and permanent cognitive behavioral or other brain deficits cannot be caused by concussion or mild traumatic brain injury (hereinafter "TBI"). This potential testimony contradicts the initial testimony of Plaintiff's witnesses, particularly the testimony of Dr. Carciente, but this is not a basis for preclusion.

The Court views this dispute over causes for TBI as merely a battle of experts. The issue is not whether the testimony was admissible, but rather what weight should be accorded to it. *La Rose v. Corrao*, 105 AD3d 1009, 1010, 963 NYS2d 712 (2nd Dept 2013). The remedy is not preclusion, but rather cross-examination. Therefore, the Court will permit the jury to resolve this question as well. The Plaintiff's motion in limine is denied.

Motion Sequence No. 9

Defendants' new counsel has moved to preclude all claims and evidence identified in all new and amended/supplemental disclosures served by Plaintiff's new counsel on and after June 23, 2022. While Defendants characterized the claimed injury of future dementia as a new claim, this is not entirely accurate. The claim was raised approximately two years earlier but was not developed by Plaintiff's prior counsel. Current defense counsel was involved in the trial and thereafter in an "Of Counsel" role. Therefore, this should not come as any surprise to him. While it may seem somewhat unorthodox to allow the damages for future dementia to be explored at this juncture, the issue was raised, discussed and determined without objection by former counsel at the June 8, 2022, conference. Therefore, the Court will permit the claim to be pursued.

Moreover, at the June 8th conference, this Court granted leave to the Plaintiff to add the damages that were the natural consequences of future dementia and imposed a 30-day deadline to Plaintiff to submit his B/P; and while the order did not explicitly state the Plaintiff was being given the opportunity to identify new witnesses, it seems obvious this would be a necessary implicit consequence.

Similarly, the Defendants were to have a reciprocal right to depose those witnesses and retain their own experts. Rather than use their time effectively, Defendants chose to waste the resources of this Court yet again by making the instant motion pursuant to CPLR 3126.

Furthermore, the claim of lost wages due to future impairment is appropriate as the subject of a supplemental B/P as continuing special damages and disabilities, which was disclosed in the initial B/P, as well as through trial testimony about the prospect of future

dementia. See *Pines v. Muss Development, Co., Inc.*, 172 AD2d 600, 568 NYS2d 422 (2nd Dept 1991); *Rahman v. Domber*, 45 AD3d 497, 846 NYS2d 167 (1st Dept 2007).

Finally, Drs. Brian Greenwald, Michael Lipton and Harch are all treating physicians of the Plaintiff. Therefore, the disclosure as to those doctors as experts as articulated by Plaintiff, was more a courtesy, than a requirement.

With regard to the remaining expert disclosures, Defendants have sufficient time to depose them as well as locate, designate and disclose those that they intend to utilize to counter Plaintiff's experts and offer to have them deposed by Plaintiff. Based on the foregoing, Defendants' 3126 motion is denied.

Accordingly, Motion Sequence No. 6 pursuant to CPLR 4401 and 4404 of the Defendants is denied; Plaintiff's motion in limine, which is Motion Sequence No. 8, is denied; and Defendants' motion to preclude, which is Motion Sequence No. 9, is also denied.

The parties shall adhere to the following schedule for discovery as determined subsequent to oral argument on these motions:

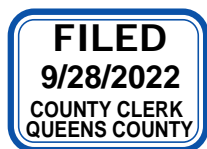
Depositions of all non-party fact witnesses shall be complete on or before October 1, 2022.

Expert disclosure, including depositions, shall be complete by November 1, 2022.

Any other discovery shall be completed within 30 days prior to the commencement of jury selection on December 1, 2022.

This constitutes the decision and order of the Court.

Dated: September 14, 2022




SALLY E. UNGER, A.J.S.C.