

<b>Lofaro v Vincent W. NG</b>
2011 NY Slip Op 33512(U)
December 20, 2011
Supreme Court, New York County
Docket Number: 105572/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

LOFARO, MICHAEL

INDEX NO. 105572/09

MOTION DATE 9/13/11

- v -  
VINCENT W. NG., M.D.,  
ETAL

MOTION SEQ. NO. 04

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 18 were read on this motion to/for partial summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-12  
13  
14-15

sur-reply 16-18  
**FILED**

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

JAN 05 2012

NEW YORK  
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 1/3/12

Joan B. Lobis  
JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
MICHAEL LOFARO, As Administrator of the  
Estate of FRANCIS J. LOFARO, Deceased,

Plaintiff,

Index No. 105572/09

-against-

**Decision and Order**

VINCENT W. NG, M.D., NEW YORK  
DOWNTOWN MEDICAL ASSOCIATES, INC.,  
and QUEST DIAGNOSTICS INCORPORATED,

Defendants.

**FILED**

JAN 05 2012

-----X  
JOAN B. LOBIS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 004, 005, and 006 are hereby consolidated for disposition.

Defendants New York Downtown Medical Associates, Inc. ("NYDMA") (Sequence 004), Quest Diagnostics Incorporated ("Quest") (Sequence 005), and Vincent W. Ng, M.D. (Sequence 006) move, pursuant to C.P.L.R. § 3212(a), for partial summary judgment in their favor, dismissing certain claims against them for damages in this wrongful death action. Plaintiff is the administrator of the estate of his deceased son, Francis J. Lofaro, who died on September 10, 2007 at the age of thirty-two (32).

This case sounds in medical malpractice and wrongful death. On September 5, 2007, decedent presented to Dr. Ng at NYDMA with complaints of thirst, a swollen tongue, and a fever. Dr. Ng thought that decedent was having a problem in his salivary glands. Dr. Ng drew blood and recommended that decedent see an ear, nose, and throat doctor. Mr. Lofaro was found dead in his apartment five days later. The results of decedent's blood test revealed that his glucose level was 553 mg/dL, a level requiring urgent medical care. The autopsy listed the cause of death as hyperglycemic hyperosmolar nonketotic syndrome due to diabetes mellitus.

Defendants seek an order dismissing plaintiff's claim for wrongful death damages predicated on future lost earnings, on the grounds that future lost earnings cannot be established with reasonable certainty because there is no competent evidence that decedent would have provided financial support to his parents, or precluding plaintiff from offering proof at trial of future lost earnings. Alternatively, defendants seek an order precluding plaintiff from offering proof as to the projected earnings of an attorney or paralegal as a basis for establishing decedent's future lost earnings, and precluding plaintiff from offering proof as to decedent's ostensible plans to attend law school. Additionally, defendants seek an order precluding plaintiff from offering proof as to grief or loss of companionship under the guise of a claim for loss of household services. Plaintiff opposes all the motions on the merits and also argues that Dr. Ng's and Quest's motions are untimely.

As to the issue of the timeliness of Quest's and Dr. Ng's motions, this court's part rules set forth that summary judgment motions must be made no later than sixty (60) days after the filing of the note of issue. Quest filed its motion one (1) day late, and Dr. Ng filed his motion six (6) days late. Both Quest and Dr. Ng maintain that plaintiff was neither surprised nor prejudiced by the delay and that the delay was minimal. In addition, Quest argues that the delay was due, in part, to plaintiff's failure to respond to NYDMA's correspondence regarding the details of plaintiff's claim for special damages. The latter argument is not persuasive, since NYDMA, the entity requesting the information on special damages, was able to timely file its summary judgment motion. However, Quest and Dr. Ng correctly argue that there is no prejudice to plaintiff as a result of the late filing. Moreover, the relief they seek is not dispositive of plaintiff's liability claim. Though styled as motions for partial summary judgment, the motions address evidentiary issues and are akin

to in limine motions. The case on which plaintiffs rely, Brill v. City of New York, 2 N.Y.3d 648 (2004), is distinguishable on this basis. Accordingly, the court will consider the merits of Quest's and Dr. Ng's motions, together with NYDMA's motion.

As to the first claim regarding lost earnings resulting in pecuniary loss to decedent's parents, defendants argue that plaintiff cannot establish that decedent provided his parents with financial support during his lifetime, therefore any award to the parents would be based on speculation. They also argue that decedent had an unimpressive academic career, having started college at one institution, Franklin & Marshall College, in 1993, but not having graduated until 2003 from another institution, New York University. They cite to his employment history, first in computer science and then as a clerk in a law office where his earnings were under \$10,000 per year, as a further basis to preclude evidence of his future earnings. They acknowledge that he completed a paralegal course just prior to his death, but argue that he had no track record of earnings in the field. They also raise the fact that decedent had a history of treatment for depression as a further basis to restrict evidence on future earnings. They argue that any comments he may have made about his intentions to attend law school cannot serve as a basis for assessing his future earnings as a lawyer. They argue that there is little evidence of decedent providing his parents with any financial contributions or services. For these reasons, defendants ask this court to preclude plaintiff from offering testimony at trial of the pecuniary injury to decedent's distributees, his parents, by reason of his death. In the alternative, they ask that plaintiff be precluded from offering any evidence of future lost earnings.

As a separate basis for relief, defendants argue that decedent's history is insufficient to establish with reasonable certainty a level of future earnings as a paralegal. They argue that the lack of a work history would mean any award by a jury would be speculation. Therefore, they ask that plaintiff be precluded from presenting any evidence of decedent's future earning capacity as a paralegal at trial.

Finally, defendants seek to preclude plaintiff from presenting any evidence of grief, loss of companionship, or loss of consortium under the guise of a claim for loss of household services. It is axiomatic that wrongful death actions are for pecuniary losses only. Defendants argue that, as the economic losses in this case are minimal, plaintiff's claim for damages of \$1,500,000 for each parent must be impermissively adding compensation for their grief over losing their son. Accordingly, defendants maintain that the court should issue an order precluding plaintiff from offering at trial any evidence of grief or loss of companionship.

Plaintiff counters by asserting that defendants are urging an impermissively restrictive view of what can be offered at trial. He further argues that the jury may hear evidence of probable earnings and that his proof is not limited to decedent's actual work history. Plaintiff does not seek to offer proof of decedent's future earnings as a lawyer, but does seek to have the jury consider the likelihood of decedent's employment as a paralegal. Plaintiff cites to decedent's completion of paralegal education as an accomplishment, not merely an aspiration, so that evidence of earnings as a paralegal should be allowed at trial. Plaintiff states that the courts have consistently allowed expert testimony on future earning capacity for very young children with far lesser attainments.

Plaintiff argues that the record supports his claim that decedent had economic value to his parents. He points to deposition testimony of services performed by decedent and the assistance he provided to his parents. Plaintiff disputes that he will be seeking compensation for grief or loss of companionship. For these reasons, he asks the court to deny defendants' motions.

It is well established that wrongful death actions must be limited to "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought." E.P.T.L. § 5-4.3(a); Johnson v. Manhattan & Bronx Surface Tr. Operating Auth., 71 N.Y.2d 198, 203 (1988). It is also well established that any award cannot be based on uncertainty, contingency, or speculation. See Fiederlein v. New York City Health & Hosps. Corp., 56 N.Y.2d 573, 574 (1982). But, courts have repeatedly allowed juries to consider the issues of future support and future earnings as long as there is some evidence upon which the jury can infer future pecuniary loss. See Zelizo v. Ullah, 2 A.D.3d 273 (1st Dep't 2003); Grayson v. Irvmar Realty Corp. et al., 7 A.D.2d 436 (1st Dep't 1959); Horan v. Dormitory Authority, 43 A.D.2d 65 (3d Dep't 1973). Defendants argue that the amount sought can only be justified as compensation for emotional loss. Clearly, plaintiff cannot recover for such loss. However, it would be heartless to expect a parent to testify about their son devoid of emotion. There is no basis for preclusion at this time based alone on this argument. After reviewing all the arguments for preclusion, all limitations on how the evidence is to be presented and which claims for damages go to the jury is best left to the trial judge. Accordingly, it is hereby

ORDERED that defendants' respective motions (Motion Sequence Numbers 004,

005, and 006) are denied in their entirety; and it is further

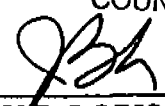
ORDERED that the parties shall appear for a pretrial conference on January 31, 2012,  
at 9:30 a.m., at 60 Centre Street, Room 345, New York, New York.

**FILED**

JAN 05 2012

Dated: Dec. 20, 2011

ENTER: NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.