

Velez v Metropolitan Transp. Auth.

2015 NY Slip Op 31211(U)

June 30, 2015

Supreme Court, New York County

Docket Number: 400280/04

Judge: Lottie E. Wilkins

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOTTIE E. WILKINS
Justice

PART 18

JANNET VELEZ,

Plaintiff,

METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY and
SEAN CORBIN,

Defendants.

INDEX NO. 400280/04

MOTION DATE:

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for: Collateral Hearing

PAPERS NUMBERED

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

1, 2,

Answering Affidavits — Exhibits _____

3, 4

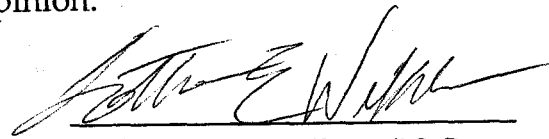
Replying Affidavits _____

Cross-Motion: Yes No

~~Upon the foregoing papers, it is ordered that this motion~~

Order to show cause brought by plaintiff's counsel seeking to preclude a collateral source hearing is dismissed as moot, inasmuch as a collateral source hearing has already occurred. See attached opinion.

Dated: July 7, 2015



Lottie E. Wilkins, J.S.C.

Check one:..... CASE DISPOSED NON-FINAL DISPOSITION
Check as appropriate...Motion is: GRANTED DENIED GRANTED IN PART OTHER
Check if appropriate: SETTLE ORDER SUBMIT ORDER REFERENCE
 DO NOT POST FIDUCIARY APPOINTMENT

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

S/O

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Upon remand from the Appellate Division for further proceedings pursuant to CPLR Article 50B, the primary issue before this Court is whether the awards by the jury for loss of future earnings, loss of future pension benefits and loss of future social security disability payments constitute collateral sources and thus subject to a reduction of the damages awarded by the jury. For the foregoing reason, defendants are not entitled to a collateral source offset for future loss. Accordingly, the jury judgement should be entered in accordance with CPLR Article 50-B and the report of the plaintiff's economist Kristina Kucsman, as modified by the parties on the record during the collateral source hearing.

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

This is a personal injury action in which plaintiff, Jannet Velez ("Plaintiff") a Sergeant in the New York City Police Department, sustained injury while trying to apprehend a suspect in a subway station. A jury rendered verdict in favor of plaintiff, awarding various monetary damages. At issue here is the jury's award for the following items of loss: (1) Future loss of earnings in the amount of \$1,451,901; (2) Future loss of pension income in the amount of \$3,177,878; and (3) Future loss of social security income in the amount of \$469,650.

Defendants New York City Transit Authority and Sean Corbin (collectively "NYCTA" or "Defendants") contend entitlement to off sets prior to any calculations being made pursuant to Article 50-B. Specifically, Defendants contend that before a verdict can be calculated and then reduced to its present value under Article 50-B, any applicable off sets pursuant to CPLR 4545 must be considered. After making the required adjustments the Court is then to enter judgment following reduction to the present value that will provide for the payment of the remaining amounts of the future damages in periodic installments. Defendants maintain that the applicable provision which governs the applicable availability of collateral source reductions in this action is CPLR 4545(c).

Plaintiff contends that NYCTA is not entitled to any reductions of the damages awarded by the jury, arguing that NYCTA failed to assert the collateral source offset as an affirmative defense in its answer. Moreover, Plaintiff claims that the applicable statute at issue here is CPLR 4545(b), which precludes offsets for future damages.

Plaintiff further contends NYCTA is collaterally estopped from using the New York City Police Department Disability Retirement Pension as a collateral source to offset past and future earnings, having raised and lost the same argument in Johnson v NYCTA, 88 AD3d 321 (1st Dept. 2011). Finally Plaintiff contends that NYCTA did not sustain its burden of establishing a direct correspondence between Plaintiff's pension and the awards of future economic losses made by the jury.

As an initial matter, NYCTA's request to amend the answer to include a request for a collateral source setoff is granted. The determination whether to grant such leave is within the court's discretion, and absent significant prejudice or surprise caused by delay, leave to amend a pleading pursuant to CPLR 3025 should be freely permitted, even after judgment is rendered (see Bryant v

Broadcast Music, Inc., 60 AD3d 799, 800 [2d Dep't 2009]; see also Wooten v State, 302 AD2d 70 [4th Dep't 2002]).

Permitting NYCTA to amend however is of limited avail here because the applicable subsection of CPLR 4545, as enacted during the relevant time period, clearly precludes a collateral source offset with respect to Plaintiff's future awards. Former CPLR 4545 (b), which was repealed in 2009, is applicable to actions commenced before November 2009, and concerned, *inter alia*, personal injury actions brought by a public employee against a public employer. There is no requirement that an employee-employer relationship exist between the parties (see Hothan v Metropolitan Suburban Bus Auth., 289 AD2d 448, 449 [2d Dep't 2001] appeal denied, 98 NY2d 671 [2002]). Prior to the revision of CPLR 4545(b), subdivision (b), stated in relevant part as follows:

(b) * * * In any action against a public employer* * * for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, where the plaintiff seeks to recover for the cost of medical care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such cost or expense was replaced or indemnified, in whole or in part, from a collateral source provided or paid for, in whole or in part, by the

public employer, including but not limited to paid sick leave, medical benefits, death benefits, dependent benefits, a disability retirement allowance and social security * * * but shall not include those collateral sources entitled by law to liens against any recovery of the plaintiff. If the court finds that any such cost or expense was replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the contributions of the injured public employee for such benefit.

CPLR 4545(b) (prior to the November 2009 amendment)

It is settled law that subdivision (b) does not include a collateral-source offset for future costs or expenses in actions by public employees against public employers (See Ryan v City of New York, 79 NY2d 792, 579 NYS2d 634 [1991] [clear legislative intent of subdivision (b) is to permit offsets “only for collateral-source reimbursements for pre-verdict losses”]). In Iazzetti v. The City of New York, 94 NY2d 183 (1999), the Court of Appeals determined that CPLR 4545(b) governed collateral source reductions in personal injury and wrongful death actions brought by public employees against employers. The Iazzetti Court also reiterated its prior ruling that there should be no reduction for an award for future losses.

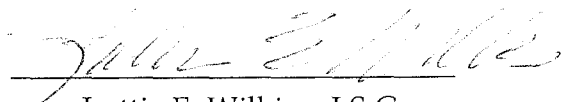
Defendants’ conclusory reliance upon CPLR 4545(c) without any explanation is both curious and misplaced. There is no dispute that this is a

personal injury action involving a public employer and public employee, and that Defendants are exclusively seeking a collateral source offset for future loss which is not permissible under CPLR 4545(b) (see Iazzetti, 94 NY2d at 188; Cutrone v New York City Transit Authority, 73 AD3d 462, 463 [1st Dep't 2010]).

Accordingly, Defendants' are not entitled to a collateral source reduction of the jury judgement, which should be entered in accordance with CPLR Article 50-B, as set forth by Plaintiff's economist Kristina Kucsman and modified by the parties. Plaintiff is directed to settle judgement on notice within 45 days of the date of this order.

This constitutes the decision and order of the Court.

Dated: June 30, 2015


 Lottie E. Wilkins, J.S.C.

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