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| Buckham v 322 Equity LLC |
| 2022 NY Slip Op 33109(U) |
| August 25, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 505356/2016 |
| Judge: Peter P. Sweeney |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 505356/2016

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AUDREY BUCKHAM,

Plaintiff,

-against-

DECISION/ORDER

322 EQUITY LLC,

Defendant.
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In connection with defendant's motion to reduce the verdict pursuant to CPLR § 4545(a), a partial collateral source hearing was held on July 6, 2022. On July 8, 2022, following the hearing, the parties submitted a Stipulation, which was so ordered, which partially settled some of the issues raised at the hearing. Pursuant to the Stipulation, the parties agreed:

- That the verdict for past lost earnings shall be reduced to \$171,080.00; and
- That the verdict for future lost earnings shall be reduced to \$312,054.58 unless the court allows a further reduction reflecting post-verdict earnings.

The parties further agreed that they would submit further briefing on the issue of whether the award for future loss of earnings can be offset pursuant to CPLR § 4545 by plaintiff's post-verdict earnings. It is undisputed that plaintiff went back to work following the accident. Indeed, plaintiff submitted an affidavit in which she admitted that following the accident, she secured employment as an at will employee and works as a home health aide for an 87-year-old woman. She stated that she is not employed pursuant to any contract and that it would be very difficult for her to find subsequent employment as a home health aide because of her disabilities concerning lifting and carrying. At the time of trial, the plaintiff was not working and claimed to be permanently disabled.

The parties also stipulated that if the Court finds that such post-verdict earnings are subject to a CPLR 4545 reduction, the Court, within its discretion, could order post-verdict discovery and reopen the collateral source hearing.

The parties have submitted their briefs and other papers (NYSCEF Item Numbers 218-223) pursuant to the stipulation. The Court will now address the issues raised.

Discussion:

CPLR § 4545(a), in relevant part, provides:

In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for... loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense **was** or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding....**In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement.** Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.

Here, defendant made a timely request for a collateral source hearing and judgment has yet to be entered. The court has found no authority, nor has plaintiff cited any, that post-verdict earnings are not considered collateral sources within the meaning of CPLR § 4545 if a judgment has not been entered. By the clear wording of CPLR § 4545(a), in an action to recover personal injuries, a defendant is entitled to a collateral source reduction for “any such cost or expense” that “was or will, with reasonable certainty, be replaced or indemnified from any ... collateral source.” Clearly, plaintiff has been partially indemnified for the award of future loss of earnings by her post-verdict earnings.

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature” (*Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York*, 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338 [1976]) and generally, courts should “look first to the statutory text, which is the clearest indicator of legislative intent” (*Matter of*

New York County Lawyers' Assn. v Bloomberg, 19 N.Y.3d 712, 721, 955 N.Y.S.2d 835, 979 N.E.2d 1162 [2012] [internal quotation marks omitted]). Since there is no language in CPLR § 4545 limiting the statute's application to collateral sources that existed pre-verdict, and considering that the ultimate purpose of CPLR § 4545 is to prevent plaintiffs from receiving double recoveries for economic loss (see *Bryant v. New York City Health and Hosps. Corp.*, 93 N.Y.2d at 607, 695 N.Y.S.2d 39, 716 N.E.2d 1084; *Oden v. Chemung County Indus. Dev. Agency*, 87 N.Y.2d at 88, 637 N.Y.S.2d 670, 661 N.E.2d 142; *Ryan v. City of New York*, 79 N.Y.2d at 794, 579 N.Y.S.2d 634, 587 N.E.2d 272; *Humbach v. Goldstein*, 229 A.D.2d at 67–68, 653 N.Y.S.2d 950; Mem. of Assembly Rules Comm., 1984 N.Y. Legis. Ann. at 251–252), the Court finds the defendant is entitled to a collateral source offset of the award for future loss of earnings in a sum representing all of plaintiff's earnings since the date of verdict to the time that the further collateral source hearing which is being ordered herein is held.

Plaintiff is not, however, entitled to an additional offset for earnings that she may earn past the date of the further collateral source hearing unless it is established that she is entitled to such future earnings “pursuant to a contract or otherwise enforceable agreement” and that monies will be earned “with reasonable certainty.” CPLR § 4545(a), in relevant part, provides: “[i]n order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, **pursuant to a contract or otherwise enforceable agreement**, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement.” The Court notes that plaintiff maintains that she is presently employed as an “at will” employee” and is not working pursuant to a contract.

With respect to post-verdict discovery, as a general rule, discovery of collateral sources is generally conducted prior to the filing of a note of issue, and posttrial discovery is disallowed (see *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 37–38, 852 N.Y.S.2d 148, 163). However, a court may, in the exercise of its discretion, permit post trial collateral source discovery if the defendant can demonstrate prejudice not of its own making, such as where benefits became payable after the filing of a note of issue (see *Hoffman v. S.J. Hawk, Inc.*, 177 Misc.2d at 308–309, 676 N.Y.S.2d 448). Clearly, since it would have been impossible for the defendant to obtain discovery concerning plaintiff's post-verdict earnings prior to the filing of

the Note of Issue, the defendant would be severely prejudiced if it were unable to conduct post-verdict discovery.

For the above reasons, it is hereby

ORDERED that within 45 days of entry of this order, the plaintiff shall appear for a deposition limited to her post-verdict earnings and allowing defendant to explore whether there are any contracts or agreements in existence entitling her to future earnings, if is further

ORDERED that within 15 days of entry of this order, the plaintiff shall provide the attorneys for the defendant with: (1) all records in her possession concerning her post-verdict earnings, including paystubs and W-2s, and (2) authorizations permitting the release of all post-verdict employment records; and it is further

ORDERED that the parties shall appear for a further collateral source hearing on November 9, 2022, at 10 a.m. in Room 761, 360 Adams street, Brooklyn New York.

This constitutes the decision and order of the Court.

Dated: August 25, 2022



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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