SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

----------X **INDEX NO.** 153558/2018

DOMINGO A. HERNANDEZ,

Plaintiff,

- v -

DECISION + ORDER AFTER INQUEST

MOSHE SAMOUHA,

Defendant.

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I. INTRODUCTION

This is an action to recover damages for personal injuries arising from a slip-and-fall accident. The plaintiff alleged that he was caused to fall on the sidewalk located in front of a building owned by the defendant, Moshe Samouha, at 1985 Amsterdam Avenue, New York, New York (the premises). The plaintiff asserted that Samouha allowed the sidewalk to remain in a defective condition by failing to shovel and clean snow and ice from sidewalk, and failed to place signs and barricades around the condition, or otherwise warn the public. The plaintiff contended that Samouha's negligence caused him fall and thereupon to sustain multiple injuries including, inter alia, injuries to his back, neck, right shoulder, right knee, right hand, and right finger, with concomitant pain, shock, and mental anguish. On March 1, 2021, the plaintiff filed the note of issue and certificate of readiness for trial. On March 21, 2023, the matter was called for trial before Justice James d'Auguste, but Samouha failed to appear. On March 23, 2023, pursuant to 22 NYCRR 202.27, Justice d'Auguste, in effect, struck Samouha's answer and directed the entry of a default judgment against him on the issue of liability. On March 24, 2023, the matter was heard before this court at an inquest on the issue of damages. The court now finds that the plaintiff is entitled to recover the total sum of $450,000 from the defendant, plus statutory prejudgment interest at the rate of 9% per annum, from March 24, 2023.

II. FINDINGS OF FACT

Having defaulted in this matter, Samouha is deemed to have admitted all factual allegations against him and the reasonable inferences that flow therefrom (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]; *HSBC Bank USA, N.A. v Simms*, 163 AD3d 930, 932-933 [1st Dept 2018]; *Nationstar Mtge., LLC v Hilpertshauser*, 156 AD3d 1052, 1053 [3d Dept 2017]). At the March 24, 2023 inquest on the issue of damages, the plaintiff testified on his own behalf and adduced the testimony of Howard Altschule, a certified consulting meteorologist. At the time of the inquest, the plaintiff was 75 years of age, and was not employed, as he had by then retired from his position as a maintenance worker at Boricua College. The court finds that the credible testimony, photographs, and documentation submitted to and considered by the court established the following facts.

On January 6, 2018, the plaintiff worked on the maintenance staff at Boricua College in Manhattan. On that date, as the plaintiff was walking to a nearby bus stop to head home from work, he slipped on a patch of ice on the sidewalk in front of the premises, and fell backwards. striking his neck, back, and right knee on the ground. A friend of the plaintiff passed by shortly after the fall and helped the plaintiff to his feet. Thereafter, the plaintiff went to the emergency department of New York Presbyterian Hospital, where he was treated for a bent finger and wound on his right hand.

Days later, the plaintiff began physical therapy for pain in his lower back, neck, right shoulder, and right knee. After more than one month of therapy, with no relief from his pain, the plaintiff was referred for a magnetic resonance imaging (MRI) scan of the problem areas. The MRI revealed that the plaintiff had cervical radiculopathy. He ultimately needed neck surgery. On May 23, 2018, the plaintiff underwent surgery, wherein he had lateral mass screws placed at the C4, C5, C6, and C7 vertebrae, with rods placed over the screws. Additionally, a complete laminectomy, that is, the removal of the vertebral bone, was performed at C4, C5, and C6, while

a hemilaminectomy, that is, a partial removal of the vertebral bone, was performed at C7. Finally, a decompression of the C3-4 junction was performed. After surgery, the plaintiff wore a neck collar for two months, and continued physical therapy for another five months.

The plaintiff continues, on his own and while at home, to perform the exercises that he learned at his physical therapy sessions. The plaintiff continues to have pain in his body, primarily in his right knee and neck. As a result of the accident, the plaintiff is no longer able to partake in his normal activities such as working, bending down, lifting pails, and cleaning. The cold weather numbs his neck and causes him greater pain.

Altschule conducted a forensic investigation of the weather and ground conditions at the premises for the period beginning on January 1, 2018, and ending on January 6, 2018. He used data from various sources such as nearby official weather stations, the National Weather Service, the Community Collaborative Rain, Hail and Snow Network, the Citizen Weather Observer Program, and Doppler radar, to name a few. Altschule found that, in the days leading up to the date of the accident, that is, from January 1 to January 4, temperatures ranged anywhere from a low of 7 to 19 degrees Fahrenheit, and a high of 19 to 30 degrees Fahrenheit. He found that, while the first three days of that period experienced no rain or snowfall, and only trace amounts of snow and ice were present on the ground, the fourth day experienced a winter storm that accumulated approximately 7 inches of new snow. In addition to the storm, that day saw the development of freezing fog, which Altschule described as “fog, the droplets of which freeze upon contact with exposed objects and form a coating of rime and/or glaze,” causing new ice and slippery conditions to develop. Moreover, from January 4, 2018 through January 6, 2018, winds had gusted in excess of 25 miles per hour (MPH), and as high as 35 to 45 MPH, causing some blowing and drifting of snow.

Altschule found that, on the day of the accident, the air temperature in Upper Manhattan was well below freezing, with a low of 6 degrees Fahrenheit and a high of 14 degrees Fahrenheit. He also found that approximately 6.5 inches of pre-existing snow and ice, as well

as areas of melted and refrozen ice, were present on exposed, untreated, and undisturbed surfaces such as the sidewalk on which the plaintiff fell. Altschule concluded, within a reasonable degree of meteorological certainty, that his findings were true and accurate, and the circumstances leading up and on the day of the accident caused even more dangerous and slippery conditions to be present at the time of the accident. The court finds Althschule's testimony to be credible and he thus established that a snow-and-ice covered sidewalk, as described by the plaintiff, was the proximate cause of the plaintiff's injuries.

III. CONCLUSIONS OF LAW

A defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718, 720 [2d Dept 2015]; *Gonzalez v Wu*, 131 AD3d 1205, 1206 [2d Dept 2015]). A defaulting defendant is, however, "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages" (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2d Dept 2003] [internal quotation marks omitted]; *see Rudra v Friedman*, 123 AD3d 1104, 1105 [2d Dept 2014]; *Toure v Harrison*, 6 AD3d 270, 272 [1st Dept 2004]). Here, the defendant did not appear at the inquest.

"The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" *(Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; *see Garcia v CPS 1 Realty, L.P.*, 164 AD3d 656, 659 [2d Dept 2018]; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7). What constitutes

"reasonable compensation" must be assessed with due regard to the "circumstances presented" (*Luna v New York City Tr. Auth.*, 116 AD3d 438, 438 [1st Dept 2014]).

The court concludes that the plaintiff is entitled to an award of $300,000 for past pain and suffering, from January 6, 2018 until the date of this decision, a period of approximately five years and eight months (*see Ortiz v NY City Tr. Auth.*, 107 AD3d 465 [1st Dept 2013] [affirming jury award of $300,000 for past pain and suffering over 12 year period, where plaintiff slipped and fell down stairway, resulting in lumbar radiculopathy, injury to her coccyx, severe pain, restrictions in ability to engage in bending, walking, lifting, and sitting, and possible need for surgery to remove coccyx]; *Sanabia v 718 W. 178th St., LLC*, 49 AD3d 426 [1st Dept 2008] [affirming award of $200,000 for past pain and suffering where plaintiff had neck and back pain due to herniated discs of the cervical spine, and nerve root impingement, but was not hospitalized nor expected to have surgery]; *Valentin v City of NY*, 293 AD2d 313 [1st Dept 2002] [increasing award for pain and suffering to $350,000 where plaintiff slipped and fell down a flight of stairs, resulting in two spinal surgeries, inability to perform manual labor or sit for prolonged periods of time, and continuous use of pain medication]; *Priester v City of NY*, 276 AD2d 766 [2d Dept 2000] [affirming a $263,000 award for past pain and suffering, where plaintiff slipped and fell on a sidewalk near her home that was covered with ice from snow storms that occurred over three weeks prior]).

The court concludes that the plaintiff is entitled to an award of $150,000 for future pain and suffering, from the date of decision until 9.9 years thereafter (*see Kane v Coundorous*, 11 AD3d 304 [1st Dept 2004] [additur of $250,000 for future pain and suffering, after jury awarded no damages for that item, was warranted where plaintiff suffered a herniated disc, and underwent a failed laminectomy and a subsequent spinal fusion resulting in permanent partial disability, accompanied by pain and limitation in movement]; *see also Ortiz v NY City Tr. Auth.*, 107 AD3d at 465 [affirming jury award of $100,000 for future pain and suffering over 10 years]; *Rutledge v NY City Tr. Auth.*, 103 AD3d 423 [1st Dept 2013] [affirming jury award of $400,000

for future pain and suffering over 20 years where plaintiff suffered a herniation to her lumbar spine, and two bulging discs in her cervical spine, resulting in radiculopathy, which required surgery]; *Spetter v Alliance Towing Corp.*, 58 AD3d 424 [1st Dept 2009] [affirming jury award of $200,000 for future pain and suffering over five years where plaintiff suffered a herniated disc in his neck after subject accident, resulting in significant and permanent loss of range of motion]). Here, the 75-year-old plaintiff has a life expectancy of 9.9 years (*see* 1B NY PJI 3d at Appendix A [2023] [life expectancy tables]). Thus, in considering these examples of awards for future pain and suffering, the court concludes that an award of $150,000 for future pain and suffering over a period of 9.9 years is warranted (*see Jordonne v Ole Bar & Grill, Inc.*, 2016 US Dist LEXIS 56943, *30 [SD NY Apr. 26, 2016]).

Inasmuch as the plaintiff did not adduce evidence of the specific cost of past and future medical, surgical, and therapeutic expenses, or past and future lost earnings, he did not establish a basis for the court to make an award for those items of damage.

"[P]rejudgment interest must be calculated from the date that liability is established" (*Love v State of New York*, 78 NY2d 540, 544 [1991]; *see Gyabaah v Rivlab Transp. Corp.*, 170 AD3d 616, 616 [1st Dept 2019]; *Bermeo by Bermeo v Atakent,* 241 AD2d 235, 247 [1st Dept 1998]), which here is March 23, 2023, the date on which the court directed the entry of a default judgment against Samouha on the issue of liability.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Domingo A. Hernandez, and against the defendant Moshe Samouha, 50 Allenwood Road, Great Neck, NY 11023, and/or 1985 Amsterdam Avenue, New York, NY 10185, in the sum of $450,000, plus prejudgment statutory interest at the rate of 9% per annum from March 23, 2023.

This constitutes the Decision and Order After Inquest of the court.

9/25/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE