

M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
SUPREME COURT IAS PART 5

-----x Hon. **JAMES P. DOLLARD**
MICHAEL LAURO,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE
NEW YORK CITY POLICE DEPARTMENT

Defendants.

-----x

Index No.: 6246/04

Motion Date: Aug. 14, 2007

Calendar No.: 17

Seq. No. 4

This is a post trial motion by the defendant pursuant to CPLR 4404 to set aside the verdict in favor of the plaintiff (on liability) and for judgment in favor of the defendant or in the alternative for a new trial and to set aside the damages assessed to the plaintiff.

The action was brought by the plaintiff, a former Sergeant in the New York City Police Department for injuries allegedly sustained as a result of slip and fall on a puddle of water in the locker room of the 114th Precinct Station House on April 13, 2003. The trial was bifurcated. On the first part of the trial the jury rendered a unanimous verdict in favor of the plaintiff on liability. On the damages portion of the trial the plaintiff claimed to have suffered severe injuries to his back as a result of the 2003 fall. The defendant offered evidence that the plaintiff had suffered injury to his back in a 1989 accident.

The jury found that the 2003 accident was a substantial factor in causing plaintiff's injuries. It also found that the percentage of his injuries attributable to the 1989 accident was 2% and to the 2003 accident 98%.

The jury awarded \$160,000.00 for pain and suffering up to the date of the trial, \$650,000.00 for future pain and suffering, \$1,200,000.00 for future loss of earnings and \$1,170,000.00 for future medical expenses. The period of years over which the damages were intended to provide compensation were 28 years for pain and suffering, fourteen years for future earnings and fourteen years for future medical expenses.

The Verdict on Liability

_____The branch of the motion to set aside the verdict on liability is denied. Viewing the plaintiff's evidence in the most favorable light, plaintiff made out a prima facie case. Moreover the verdict was not against the weight of the credible evidence and was supported by a fair interpretation of the evidence.

Damages for Pain and Suffering

The plaintiff sustained a fractured rib and submitted evidence of herniated discs at the L4-5 and L5-6 level. There was also testimony that he suffered severe pain on a daily basis and took vicodin daily. Affording the plaintiff's evidence in the most favorable light the court find that the awards for past and future damages for pain and suffering do not deviate materially from what would be reasonable compensation. Accordingly the branches of the motion to set aside the damages verdict for pain and suffering is denied.

Damages for Future Loss of Earnings

The plaintiff testified that he was forced to retire from the Police Department due to his lumbar spine condition. The parties stipulated that a Sergeant in the NYPD earns \$85,000.00 a year. Plaintiff offered the testimony of an economist that if plaintiff worked for another ten years his future lost earnings would equal \$850,000 in a flat projection and \$981,451.00 when adjusted for inflation. The jury awarded \$1,200,000.00 based on a work-life expectancy of fourteen years.

The defendant pled in its answer the defense of collateral estoppel to the claim of future lost earnings based upon an administrative finding by the Medical Board of the City of New York that plaintiff was not disabled as a result of the accident of April 13, 2003. The defendant raised that issue at the trial. Two communications from the Medical Board Police Pension Fund Article II to the Board of Trustees Police Pension Fund, one dated December 8, 2004 and the other November 29, 2006 were marked collectively as Court's Exhibit 11. The subject of the former was "Examination of Member of the Service" and applied to an application by plaintiff

for Accident Disability Retirement based on "a serious LOD injury to my lower back, resulting in two herniated discs and a broken rib, while performing my duties as a desk officer at the 114th Precinct. I am in constant pain and have trouble either standing or sitting for any period of time, and am, therefore unable to perform my police duties at 100 percent. It is due to this, that I am requesting an Accident Disability Retirement". The communication also states that an application for Ordinary Disability Retirement was submitted at the direction of the Police Commissioner. The communication notes (in Paragraph 3) that the plaintiff "sustained a line of duty injury in his back in arm (sic) RMP accident on November 17, 1989, for which there are no long term follow-up records. On April 13, 2003, he slipped on a puddle of water in the precinct, fell to the ground and injured his back and ribs". It also notes an (in paragraph 7) "[o]n interview today, the sergeant states his back has "gone out three times since the original injury". After reviewing the medical history and reports and conducting a physical examination the "Medical Board finds that the clinical and documentary evidence do not demonstrate that this officer is disabled from performing the full duties of a New York City Police Officer and recommends disapproval of the officer's own application for Accident Disability Retirement and the Police Commissioner's application for Ordinary Disability Retirement." The communication is endorsed by Nicholas DePalma, M.D. Chairman, Pension Board Article II, Theodore Cohen, M.D. Department of Citywide Administrative Services and Harold Bernanke, M.D. Department of Health.

The November 29, 2006 communication recites that it is in response to a communication dated April 12, 2005, from the Executive Director, Police Pension Fund, in which the application for Disability Retirement is remanded to the Article II Medical Board in light of "new evidence".

Paragraph 12 of the communication states:

Based on the review of the history, the medical records, the clinical findings, the symptomatology and the physical examination, it was the unanimous opinion of the Article II Medical Board that there were significant orthopedic findings precluding the sergeant from performing the full duties of a New York City Police Officer. In light of this, the Article II Medical Board rescinds its previous decision and recommends approval of the sergeant's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement. The final diagnosis is Spondylolisthesis of the level of L4-5

Resulting in Spinal Instability. The competent causal factor is the line of duty injury of November 17, 1989".

The communication is endorsed by Doctors DePalma and Bernanke and by Marylou Scheba, M.D, Department of Citywide Administrative Services.

Marked collectively as Court's Exhibit 4 are copies of four letters to the plaintiff from the New York City Police Pension Fund. The first, dated February 22, 2007 notified plaintiff that the application for his disability retirement will be reviewed by the Board of Trustees of the Police Pension Fund on March 14, 2007. The second, dated March 14, 2007 notified plaintiff that at a Board of Trustees' meeting that date he was approved for Accidental Disability Retirement. The letter stated that it was the formal notification of the decision of the Board of Trustees and "(T)he time limit for court proceedings (Article 78 CPLR) will commence upon receipt of this notice".

The trial of the action commenced on May 7, 2007 and concluded on May 18, 2007 which was prior to the expiration of the four month period to commence an Article 78 Proceeding (CPLR 217 subdivision 1). There was no claim at the trial that an Article 78 proceeding had been brought prior to that time or that plaintiff intended to bring such a proceeding. Moreover there is no claim in the opposition papers to this motion dated August 9, 2007 that such an application had been made during the four month period beginning March 14, 2007 or within five days thereafter allowing for mailing of the notice. There is nothing to indicate that the plaintiff requested an adjournment or stay of the personal injury action in order to bring an Article 78 proceeding. Accordingly it would appear that the decision of the Board of Trustees which was based on the Medical Boards' November 29, 2006 decision on remand which approved plaintiff's application but granted it on the basis of the line of duty injury of November 17, 1989 is final.

The legal question is whether, by reason of the foregoing, plaintiff is collaterally estopped from claiming that the competent causal factor of the injuries to his back with the consequent loss of future income was the fall of April 13, 2003 rather than the motor vehicle accident of November 17, 1989.

Collateral Estoppel

Collateral estoppel is a doctrine of issue preclusion based on

the premise that a person having a full and fair opportunity to litigate an issue identical to the one presented in the present proceeding and which was necessarily decided in a prior proceeding is precluded from raising the issue in a subsequent proceeding. The doctrine applies to administrative as well as judicial proceedings (Brugman v. City of New York, 102 AD2d 413, 417, affirmed 64 NY2d 1011) See Pisano v. New York City Board of Education, 303 AD2d 735). The Appellate Division in Brugman set forth a three prong test to determine whether collateral estoppel applies to a particular issue. First, the issue in the former proceeding must be identical to the issue in the present proceeding. Second the issue had to have been necessarily decided in the former proceeding and that the litigator had a full and fair opportunity to litigate the issues in the former proceeding. The burden of proving the first two prongs is on the proponent of the doctrine. The burden of disproving the third is on the opponent. (Brugman v. City of New York, supra, 417, 418).

The issue in this case is whether by reason of the fall on April 23, 2003 the plaintiff received an injury that disabled him from performing his duties as a police officer. In the 2003 proceeding before the Board plaintiff clearly made such a claim. The Police Commissioner requested an ordinary disability retirement. Had the Board in that proceeding granted the Police Commissioner's request it would necessarily have had to have decided that plaintiff's 2003 accident (or any other accident) was not the cause of the injury. It was not necessary however for the Board to decide causation since in its December 8, 2004 communication it found plaintiff was not disabled from performing the full duties of a New York City Police Officer and recommended disapproval of both the plaintiff's own application and the Police Commissioner's.

On April 13, 2005 the Executive Director of the Police Pension Fund remanded the application for Disability Retirement to the Medical Board in light of "new evidence". It would appear that the new evidence was a consultation letter dated April 8, 2005 from Dr. Michael Shapiro who felt that the plaintiff would be a good candidate for total disc replacement with anterior decompression at the L4-5 and L5-S1 levels.

On remand in addition to the April 8, 2005 letter from Dr. Shapiro the Board had before it subsequent letters from Dr. Vallo Benjamin dated May 9, 2005 who felt that plaintiff may need spinal fusion at L4-5, a letter from Dr. Benjamin Nachamine dated August 10, 2005 whose diagnosis was cervical spine sprain/strain, resolved and lumbar sprain/strain with disc herniations resolving, a letter

dated January 16, 2006 from Dr. John Galeno who recommended surgical intervention and a second letter, dated September 9, 2006 from Dr. Galeno whose findings were similar and his recommendation remained the same.

The Medical Board on the basis of this evidence, the minutes of the December 8, 2004 meeting, a new interview with the plaintiff and a new physical examination came to the unanimous opinion that there was significant orthopedic findings precluding the sergeant from performing the full duties of a New York City Police Officer, rescinded its previous decision of December 8, 2004, recommended approval of the sergeant's own application for Accident Disability Retirement and disapproval of the Police Commissioner's Application for Ordinary Disability Retirement (although it would appear that the latter application had not been remanded to the Board).

Having reached the opinion that there were significant orthopedic findings precluding the plaintiff from performing the full duties of a New York City Police Officer, the Medical Board had to decide whether plaintiff's condition was or was not caused by a line of duty accident and if so which accident. As noted, the Board referred to the December 8, 2004 meeting for documentation as to the incidents involved. The reported incidents were a back injury in an RMP accident on November 17, 1989 and the April 13, 2003 slip and fall. The issue of whether and which accident caused his disability is the identical issue in the case at bar. The Board determined that the competent causal factor is the line of duty injury of November 17, 1989. This determination necessarily precludes a finding that the 2003 fall could be responsible for the plaintiff's loss of future earnings. If, as determined by the Board, the 1989 accident was the competent causal factor in precluding the plaintiff from performing the full duties of a New York City Police Officer, the subsequent 2003 accident could not have contributed to the loss of future earnings as a New York City Police Officer. The court finds that the first two prongs necessary for the collateral estoppel doctrine are established. The burden then shifts to the plaintiff to disprove the third prong, viz, that he had a full and fair opportunity to litigate the issue.

Plaintiff did claim in a Trial Memorandum that he lacked such an opportunity when he was before the Medical Board. The Board's determination was not final, however. The Medical Board recommendation that he be approved for Accident Disability Retirement based on injuries caused by the November 17, 1989 accident was approved by the Board of Trustees of the Pension Fund on March 14, 2007 and plaintiff was afforded an opportunity to

challenge the determination in an Article 78 proceeding. There is no claim that he did so.

Accordingly, the court finds as a matter of law that the plaintiff is collaterally estopped from claiming that he lost future earnings by reason of the April 13, 2003 fall. The verdict of the jury awarding damages for loss of future earnings is set aside.

Future Medical Expenses

The plaintiff concedes that the only evidence of future medical expenses was \$20,000.00. Accordingly the verdict of \$1,170,000.00 for future medical expenses is set aside and the plaintiff may have judgment for \$20,000.00 for such damages.

The Judgment

Since the verdict for future damages for pain and suffering exceed two hundred and fifty thousand dollars the terms of the judgment must comply with CPLR 5041. The parties are directed to arrange with the Part Clerk at 718 298-1126 for a date for a hearing to hear evidence and argument as to the matters placed in issue by CPLR 5041.

Short Form Order signed.

Dated: December 11, 2007

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J. S. C.